IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	**APPELLEE'S BRIEF**
v.	)	
NIDAL M. HASAN Major (O-4), United States Army, Appellant	)	Crim. App. Dkt. No. 20130781
	)	USCA Dkt. No. 21-0193/AR

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTION

MANUAL FOR COURTS-MARTIAL

OTHER STATUTES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES / COURT OF MILITARY APPEALS

SERVICE COURTS OF CRIMINAL APPEALS

OTHER FEDERAL COURTS

STATE COURTS

BOOKS AND PERIODICALS

ARMY REGULATIONS

OTHER SOURCES

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

Issues Presented[1]

Part A: Section I

I.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF BECAUSE APPELLANT'S WAIVER OF COUNSEL WAS NOT VOLUNTARY OR KNOWING AND INTELLIGENT?

[1] The government reviewed the matters submitted by Appellant pursuant *to United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this Court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

II.

WHETHER THE TOTAL CLOSURE OF THE COURT OVER APPELLANT'S OBJECTION VIOLATED HIS RIGHT TO A PUBLIC TRIAL?

III.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISQUALIFY LIEUTENANT COLONEL GARWOLD AS A PANEL MEMBER?

IV.

WHETHER ARTICLE 45(b)'S PROHIBITION AGAINST GUILTY PLEAS TO CAPITAL OFFENSES IS CONSTITUTIONAL?

V.

ASSUMING ARGUENDO THAT ARTICLE 45(b) IS CONSTITUTIONAL, WHETHER ITS APPLICATION IN THIS CASE NONETHELESS CONSTITUTED REVERSIBLE ERROR?

Part A: Section II

VI.

WHETHER THE PROSECUTOR'S SENTENCING ARGUMENT IMPERMISSIBILY INVITED THE PANEL TO MAKE ITS DETERMINATION ON CAPRICE AND EMOTION?

VII.

WHETHER THE CONTINUED FORCIBLE SHAVING OF APPELLANT IS PUNISHMENT IN EXCESS OF THE SENTENCE HE RECEIVED AT HIS COURT-MARTIAL AND VIOLATED ARTICLE 55 AND THE EIGHTH AMENDMENT?

VIII.

WHETHER APPELLANT WAS DEPRIVED HIS RIGHT TO COUNSEL DURING POST-TRIAL PROCESSING?

Part A: Section III

IX.

WHETHER THEN-COLONEL STUART RISCH WAS DISQUALIFIED FROM PARTICIPATING ON THIS CASE AS THE STAFF JUDGE ADVOCATE?

X.

WHETHER THE JUDGES OF THE ARMY COURT OF CRIMINAL APPEALS SHOULD HAVE BEEN RECUSED BECAUSE THEY WERE SUPERVISED BY THEN-MAJOR GENERAL STUART RISCH WHILE HIS ERROR AS THE STAFF JUDGE ADVOCATE WAS PENDING LITIGATION BEFORE THEM?

XI.

WHETHER THE CONVENING AUTHORITY WAS DISQUALIFIED TO PERFORM THE POSTTRIAL REVIEW OF APPELLANT'S CASE AFTER AWARDING PURPLE HEART MEDALS TO THE VICTIMS OF APPELLANT'S OFFENSES?

Part A: Section IV

See below for issues previously raised at the Army Court.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) exercised jurisdiction over this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2018) [UCMJ]. This Court has jurisdiction pursuant to Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1) (2018).

Statement of the Case

On August 28, 2013, a panel of officers sitting as a general court-martial convicted Appellant of thirteen specifications of premeditated murder and thirty-two specifications of attempted murder in violation of Articles 118 and 80, UCMJ, 10 U.S.C.S. §§ 918, 880 (2008). (SJA 1769). The panel sentenced Appellant to forfeit all pay and allowances, to be dismissed from the service, and to be put to death. (SJA 1876). The convening authority approved the sentence as adjudged. (Action).

On December 11, 2020, the Army Court affirmed the findings and sentence. *United States v. Hasan*, 80 M.J. 682, 721 (A. Ct. Crim. App. 2020). On March 15, 2021, the Army Court denied Appellant's motion for reconsideration. *Hasan v. United States*, 2021 CCA LEXIS 114, at *2 (A. Ct. Crim. App. 2021). Appellant filed his brief with this Honorable Court on March 21, 2022.

Statement of Facts

On November 5, 2009, Appellant went on a shooting rampage at the Fort Hood Soldier Readiness Processing (SRP) center. He murdered thirteen people—twelve U.S. Army soldiers and one Department of the Army civilian employee—and attempted to murder thirty-two others. Appellant only stopped shooting when he was shot and seriously wounded by law enforcement officers responding to the scene.

A. Appellant purchased "the most technologically advanced handgun" and prepared to use it.

In the fall of 2009, Appellant expected to be deployed. (SJA 1640). Appellant did not want to deploy, however. As he explained during his opening statement, he believed the wars in Iraq and Afghanistan were part of "America's war on Islam." (JA 723). [redacted], (JA 1588) (sealed), and told a colleague words to the effect of: "If they deploy me . . . they will pay." (SJA 1794). His commentary on this subject made his work colleague "uncomfortable." (SJA 1794).

On August 1, 2009, Appellant purchased a Fabrique Nationale 5.7 handgun. (SJA 1619, 1628). After frequenting a large local firearm store Appellant requested "the most technologically advanced handgun on the market." (SJA 1615, 1624). Minimal recoil makes it "very easy to shoot." (SJA 1625). During his purchase, he videoed the clerk "going through the steps of disassembly and

assembly." (SJA 1621). He also had a clerk mount a laser on the weapon for him. (SJA 1620).

This handgun "comes with three high-capacity magazines—three 20-rounders." (SJA 1623). "The ammunition itself is basically a small rifle round" that is "5.7 x 28 millimeter," similar to the "5.56 we use in the M16." (SJA 1625). Appellant learned that these rounds would not only pierce the body but would "also cause a [larger] temporary wound cavity" and "liqu[ify] a good portion of the flesh and organ tissue in that area." (SJA 1626). In fact, after Appellant purchased the weapon, the "ATF came down with a decision that the ammunition was deemed too dangerous to be sold to civilians," but "existing stocks could still be sold." (SJA 1629). Appellant, who preferred this ammunition, bought additional ammunition at "almost every" visit to the gun store. (SJA 1622, 1629). Appellant converted the twenty-round magazine to a thirty-round magazine. (SJA 1627).

Appellant regularly practiced shooting his firearm with this particular ammunition on both a pistol and a rifle range. (SJA 1630, 1633). He also practiced firing a large number of shots in succession, instead of wasting time "loading magazines." (SJA 1630). Appellant requested instruction regarding speed loading—dropping the magazines and quickly replacing them. (SJA 1635). He frequented that gun dealer so often that the clerks could spot him on their surveillance cameras when Appellant arrived. (SJA 1632).

B. Appellant observed the SRP site and knew that the soldiers inside were preparing for a deployment.

On October 14, 2009, Appellant's supervisor notified him that he would be deploying to Afghanistan at the end of November 2009. (SJA 1640). As part of his deployment preparation, Appellant went through the required processing at the SRP site, checking in on October 26, 2009. (SJA 1642, 1648, 1683).

Without a legitimate basis to return to the SRP site, Appellant continued to frequent this site on multiple occasions after completing his SRP. (SJA 1652). In the ten days leading up to the shooting, Appellant visited the SRP site "between seven and nine times." (SJA 1684, 1758). "He would just keep returning to the building" even though "he didn't have a purpose to return." (SJA 1684). Visiting twice within one day, Appellant went to the SRP site Officer in Charge's (OIC) office where she "chastised" him for being on site without a legitimate purpose. (SJA 1650). Staff told him, "Sir, you're not supposed to be back in here," but he continued to return. (SJA 1684, 1757–58).

During these repeated visits to the SRP site, Appellant walked past the dry erase board listing all the "units coming in and how many soldiers to expect" within forty-eight hours. (SJA 1520, 1652–52, 1654, 1705–06). Appellant also had the opportunity to view the memorandum posted in the OIC's office showing that the SRP "anticipated processing three unit[s] of Reserve to mobilize to Iraq or Afghanistan" on November 5, 2009. (SJA 1760).

C. Appellant finalized his preparations to murder personnel at the SRP site.

In the days leading up to November 5, 2009, Appellant took several steps to close out his personal affairs. Appellant gave his neighbor food, clothes, and shelving. (SJA 1636–37). Appellant also paid his neighbor to clean his apartment "when he left on Friday," and asked him to turn in his apartment key to the manager. (SJA 1638). Appellant visited the same gun store where he bought his firearm on November 2 and 3, 2009, going through "200-300 rounds" each day on the shooting range. (SJA 1631).

On the morning of November 5, 2009, Appellant went to a local Islamic center for prayer between the hours of 0600 and 0630. (SJA 1644). Outside of the normal custom or protocols inside a mosque, Appellant "took the mic[rophone] over to call for prayer that morning." (SJA 1644). After completing the prayer, Appellant "bid goodbye and told the congregation he was going home." (SJA 1645). When Appellant was departing the mosque, he shook hands with the elder and told him "that he was going on a journey" and apologized for anything he had done wrong, because "he's just saying goodbye." (SJA 1646).

D. Appellant murdered thirteen people and attempted to murder thirty-two others.

November 5, 2009, was "a very busy day" at the SRP location. (SJA 1690). "[E]very clerk had about 10 people deep," with lines waiting for each station. (SJA 1690). Approximately "80 personnel" had arrived early to "get a head start

on the SRP." (SJA 1673–74). Station 13—where soldiers "would be seated prior to getting their final out" in the SRP process, (SJA 1649)—was at "full capacity." (SJA 1656).

At approximately 1315 on November 5, 2009, Appellant entered the SRP building and sat among the crowd of soldiers in Station 13. (SJA 1655–56, 1691, 1757–58). He wore his Army Combat Uniform [ACU], a medical badge, and medical "insignia on his sleeve." (SJA 1658, 1721). Appellant got up, walked between a "line of soldiers," and spoke with a civilian data entry clerk. (SJA 1657, 1686). He falsely told her that she was needed in the back of the building, and she departed the area. (SJA 1686–88).

Appellant turned around and shouted, "Allahu Akbar," reached under his ACU top, pulled out his firearm, and took a "firing stance." (SJA 1658, 1732). Appellant shot "everything that moved." (SJA 1719). Soldiers attempted to flee the building as he fired at them "running out" the doors. (SJA 1707). A "bottleneck" occurred where soldiers attempted to flee. (SJA 1766).

There was "no stopping" his gunfire. (SJA 1719). Appellant was "very efficiently dropping his magazine and coming up with another magazine." (SJA 1707). The rate of fire was "methodical," as though "somebody was pulling the trigger as fast as they could." (SJA 1731, 1736). He fired so many rounds that "the room was filled with gun smoke." (SJA 1719).

One civilian and several soldiers attempted to charge Appellant with a chair, but Appellant killed them at point-blank range. (SJA 1660). Appellant shot many victims in the back, (SJA 1680–81, 1722–1725, 1729, 1735)—several as they crawled on the floor. (SJA 1746–47). He shot others in the head. (SJA 1730, 1738, 1748). As soldiers were "trying to get out the door," Appellant continued to fire. (SJA 1664, 1708).

Appellant chased soldiers who fled out the back door. (SJA 1665, 1740). He shot soldiers as they were "being triaged" outside the building. (SJA 1666–67, 1753). When law enforcement arrived, Appellant "fire[d] rapidly" at them. (SJA 1772–72). Responding officers shot Appellant, who sustained significant injuries. (SJA 1772–73).

Appellant arrived at the SRP site on November 5, 2009 with approximately 400 rounds of ammunition and fired over 140 rounds in only minutes. (JA 3, 243–46, 800–01, 806–10; SJA 1521, 1758). By the end of his shooting spree, Appellant had murdered thirteen people and attempted to murder thirty-two more. (SJA 1769).

Additional facts necessary to resolve each issue presented are included below.

Part A: Section I

Issue Presented I

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF BECAUSE APPELLANT'S WAIVER OF COUNSEL WAS NOT VOLUNTARY OR KNOWING AND INTELLIGENT?

Summary of Argument

Appellant made a knowing, intelligent, and voluntary waiver of his right to counsel. Appellant did not desire to maintain his innocence. He instead desired to present the defense of others—a defense that both admitted the actus reus of the offense and, more importantly, was inapplicable to the facts of his case. Appellant has no constitutional right to present an inadmissible defense, nor to compel his counsel to present such a defense. Thus, his choice to proceed pro se was voluntary because he did not have good cause for new counsel when he desired to pursue an objective that neither he, nor any other counsel, could pursue. Notably, the military judge gave Appellant the opportunity to retain different counsel, despite making a request for new counsel only seven days before voir dire—the same day the military judge entered a plea for him—and he did not do so. His decision to remain pro se was therefore a voluntary invocation of his constitutional right to proceed without counsel at trial.

Standard of Review

The waiver of a constitutional right is reviewed de novo. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005) (per curiam) (citing *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002)). This Court applies "the Supreme Court's structural error analysis, requiring mandatory reversal, when the error affects 'the framework within which the trial proceeds, rather than simply an error in the process itself.'" *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008) (quoting *Arizona v. Fulminate*, 499 U.S. 279, 310, 111 (1991)).

Additional Facts

A. Appellant chose to represent himself when his defense counsel would not present a nonviable defense strategy.

As trial approached, an apparent strategic conflict between Appellant and his detailed defense counsel emerged. [redacted]

[redacted]

[redacted]

Rather than pursuing a [redacted] theory to contest premeditation as his detailed counsel had proposed, Appellant's desired strategy was to prove his actions were justified. Appellant concluded that, because the war in Afghanistan was illegal, he was acting in the defense of others—what Appellant would call the "defense of thirds." (JA 368, 435). Specifically, Appellant believed that by shooting soldiers at the SRP site on November 5, 2009, he would prevent them from deploying—thereby protecting Mullah Omar and members of the Taliban. (JA 369, 377–78, 435). [redacted] Nonetheless, Appellant persisted in his desire to represent himself and pursue the defense of others at trial.

[redacted] At the next Article 39(a) session, the military judge and Appellant had a colloquy to ensure that he understood his rights and his choice was knowing, intelligent, and

voluntary. (JA 312–15). The military judge next turned to Appellant's physical and mental state—with her primary concern being Appellant's physical ability to represent himself. (JA 1339–45). To assuage her concerns, the military judge ordered Appellant to undergo a physical evaluation before she would grant his request. (JA 321–323). The doctor that completed the evaluation testified at a later Article 39(a) session as to any physical limitations that the Accused would have. (JA 334–37). The military judge was satisfied with the medical evaluation and relied on that in conjunction with Appellant's Rule for Courts-Martial (R.C.M.) 706[2] sanity board determination to find Appellant's waiver of counsel knowing, intelligent, and voluntary and granted his request to proceed pro se. (JA 359). The military judge ordered Appellant's defense team to serve in a standby capacity. (JA 359).

Although Appellant initially stated that he would not need a continuance due to his decision to proceed pro se, (App. Ex. 314), Appellant filed a motion on June 3, 2013 requesting a three-month continuance to, *inter alia*, "help prepare for his new defense [and] transition into the role of sole counsel . . . ." (SJA 1561). At an Article 39(a) session the following day, the military judge asked questions to "try[] to find out whether the defense [of others] is a cognizable defense . . . ." (JA 377).

[2] Unless otherwise indicated, all references to the R.C.M. are those contained in the *Manual for Courts-Martial, United States* (2008 ed.).

The military judge then gave Appellant twenty-four hours "to find some legal authority for application of the [d]efense of [o]thers" to Appellant's case. (JA 378).

[redacted] (JA 1586 (sealed); SJA 1565–1571). The military judge reviewed the materials and ruled that the defense of others failed as a matter of law. (JA 399–404).

B. Appellant persisted in his desire to proceed pro se.

Throughout the trial, the military judge reengaged Appellant concerning his desire to continue representing himself. The first of these instances occurred on July 2, 2013, when Appellant indicated that he may have found an attorney that would represent him and pursue his preferred strategy at trial—the defense of others. (JA 435). [redacted] Appellant requested three days to communicate with the attorney and discuss his possible representation. (JA 435).

The military judge questioned Appellant on this request, informing him that she had already ruled that he would not be allowed to pursue a defense theory

based on the defense of others. (JA 438). When asked again if he wanted to proceed pro se, Appellant replied:

> I'll repeat what I said—maybe saying it in a different manner. *I want to proceed pro se*, however after talking to [the attorney]—*if after talking to him, something fruitful evolves, I'm not sure what that is*, then I'd have him as my attorney and not my standby counsel . . . .

(JA 438) (emphasis added).

The military judge again reminded Appellant that he would not be allowed to proceed with a theory based on the defense of others and informed him he would not be granted a continuance to seek civilian counsel. (JA 438–39). She informed Appellant that if civilian counsel was ready to proceed in seven days on July 9, that he could proceed with civilian counsel. (JA 439). If they were not present, Appellant could proceed pro se or allow his standby counsel to represent him. (JA 439–41).

On July 9, 2013, the military judge asked Appellant if, during the seven-day recess, he had retained civilian counsel. (JA 442). Appellant informed the military judge that he had not. (JA 442). When asked if he still wanted to proceed pro se, Appellant responded: "Yes, but I would like to add to the record—if the court changes its mind about [allowing me] to use the defense of others, [the civilian counsel] will be my attorney . . . ." (JA 442). The military judge emphasized that her ruling on the inapplicability of the defense of others was clear and wanted to

ensure that Appellant's desire to continue pro se given this was also clear. (JA 442–43). The military judge asked Appellant, "The court's ruling is that the defense of others fails as a matter of law. Understanding that, do you still wish to proceed pro se?" (JA 443). Appellant responded, "Yes, I do." (JA 443).

This would not be the last time that the military judge engaged Appellant about his desire to continue representing himself. The military judge engaged Appellant multiple times throughout the course of the trial, and each time Appellant stated he wished to proceed pro se. The military judge engaged Appellant during voir dire, (JA 566–67, 1711–12); when he seemingly waived confidentiality by placing his mitigation specialist on the witness list, (SJA 1774–75, 1781); as the government rested their case and Appellant had the opportunity to present evidence, (SJA 1791); during sentencing—which the military judge called "critical," (SJA 1797, 1804, 1810–11); and as Appellant decided to present no evidence in extenuation and mitigation, (SJA 1820). Each and every time Appellant reaffirmed his choice to represent himself.

Law

A. *McCoy v. Louisiana* and the right to autonomy.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. In exercising this right, the Supreme Court has recognized that an accused does not cede the

authority to make all decisions concerning their defense to his counsel—some decisions are reserved for the defendant to make. *See Jones v. Barnes,* 463 U.S. 745, 751 (1983) (reserving the decision to plead guilty, waive a jury, and testify on their own behalf). In *McCoy v. Louisiana,* the Supreme Court expanded the decisions left to an accused to include the autonomy to decide whether the objective of the defense is "to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence . . ." 138 S. Ct. 1500, 1505 (2018).

In *United States v. Read*, the Ninth Circuit found that the defendant's Sixth Amendment right to counsel was violated where, over his objection, his counsel presented an insanity defense instead of the defendant's preferred defense of demonic possession. 918 F.3d 712, 715 (9th Cir. 2019). In *Read,* the defendant attempted to proceed pro se when his counsel refused to put forward the defense that he was possessed by demons when he stabbed and killed his cellmate. *Id.* at 717. After standby counsel expressed concerns that Read did not properly understand the legal defense of insanity, the trial court vacated its order and reappointed standby counsel. *Id.* At trial, his re-appointed counsel unsuccessfully presented an insanity defense. *Id.*

In reviewing the conviction, the Ninth Circuit found that, considering *McCoy,* "Read's Sixth Amendment rights were violated when the trial judge permitted counsel to present an insanity defense against Read's clear objection."

Id. at 719. At the center of the court's holding was the fact that Read was subjected to standby counsel that he had previously dismissed when he attempted to proceed pro se and that his counsel presented a defense inconsistent with his own beliefs that he was sane. *Id.* at 721. The court reasoned:

> [T]he defendant's choice to avoid contradicting his own deeply personal belief that he is sane, as well as to avoid the risk of confinement in a mental institution . . . are still present. These considerations go beyond mere tactics and so must be left with the defendant.

Id. Accordingly, the court reversed Read's conviction. *Id.*

Other federal circuit courts have more narrowly interpreted *McCoy.* In *United States v. Rosemond*, the Second Circuit noted that *McCoy*'s holding regarding the accused's autonomy to control a concession of guilt "is explicitly limited to the charged crime." 958 F.3d 111, 122 (2nd Cir. 2020) (citing *McCoy,* 138 S. Ct. at 1505). In *Rosemond*, the court found no error when counsel presented a defense, over the defendant's clear objection, to the charge of murder-for-hire by arguing that the defendant had no intent that the decedent be killed but admitted the other elements of the charged crime. *Rosemond*, 958 F.3d at 123. The court recognized the defendant and attorney shared the same goal: an acquittal to the charged offense. *Id.* This was so, regardless of the attorney's strategy impliedly acknowledging that the defendant had perhaps committed another crime. *Id*. ("While it is true that [Rosemond's attorney] admitted that Rosemond committed a

crime—perhaps aiding and abetting an assault in the first-degree . . . or conspiring to commit a kidnapping . . . he vehemently denied that Rosemond committed the charged crime.").

Other circuits have agreed that *McCoy*'s holding is limited to concessions of guilt to the charged offenses. *See, e.g., United States v. Holloway*, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019) (defendant's right to autonomy was not violated when attorney and defendant had "strategic disputes" about how to achieve same goal); *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019) (defendant's right to autonomy was not violated because he disagreed with his attorney about "which arguments to advance"); *Thompson v. United States*, 791 F. App'x 20, 26–27 (11th Cir. 2019) (vacated on other grounds) (defendant's right to autonomy is not violated because attorney conceded some, but not all, elements of a charged crime).

The Army Court, in the only military court opinion to address the *McCoy* decision directly, stated, "Put simply, *McCoy* stands for the proposition that when an accused unequivocally states their desire to maintain their innocence, counsel may not 'steer the ship the other way.'" *United States v. Lancaster*, ARMY 20190852, 2021 CCA LEXIS 219, at *10 (Army Ct. Crim. App. May 6, 2021) (quoting *McCoy*, 138 S. Ct. at 1509). Of note, the court held that "as long as attorney and client share the same objective, an attorney may make strategic

concessions in pursuit of an acquittal—including conceding some elements of the crime—without running afoul of *McCoy*." *Lancaster*, 2021 CCA LEXIS at *12.

B. The right to self-representation and substitution of counsel.

The Constitution guarantees the independent right of self-representation when an accused voluntarily and intelligently elects to proceed in this manner. *Faretta v. California,* 422 U.S. 806, 807 (1975). "[T]he Constitution does not force a lawyer upon a defendant." *Id.* at 814–15 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that . . . he knows what he is doing and his choice is made with eyes open." *Id.* at 835 (internal quotation marks omitted).

The right to counsel is not absolute, however, and an accused cannot use the threat of proceeding pro se as a tactic to obtain new counsel. *United States v. Peister*, 631 F.2d 658, 661 (10th Cir. 1980). "Where a defendant's complaints of his counsel's inadequacy plainly lack merit, a court cannot allow itself to be manipulated into . . . appointing new counsel just to placate a defendant threatening to represent himself." *United States v. Cunningham*, 145 F.3d 1385, 1392 (D.C. Cir. 1998); *see also United States v. Irorere*, 228 F.3d 816, 828 (7th Cir. 2000); *United States v. Allen*, 789 F.2d 90, 93 (1st Cir. 1986); *United States v.*

Moore, 706 F.2d 538, 540 (5th Cir. 1983); *McKee v. Harris*, 649 F.2d 927, 932 (2d Cir. 1981). Rather, an accused must demonstrate good cause for substitution of counsel. Absent good cause, the court can insist that the accused choose between continuing representation by his existing counsel and appearing pro se. *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976). Thus, a refusal to proceed with competent and prepared counsel without good cause is a voluntary waiver of a defendant's right to counsel. *Id.*

Argument

A. Detailed counsel's strategy would not have violated Appellant's right to autonomy.

Appellant's argument is built upon on a faulty premise. Contrary to Appellant's assertions on appeal, he did not wish to maintain his innocence. (*See* Appellant's Br. 41). Appellant instead wanted to present a defense that he killed thirteen individuals and attempted to kill thirty-two others in defense of Taliban members located in Afghanistan. Pursuing such a strategy not only required Appellant to admit that he was the shooter on November 5, 2009, but, importantly, such a defense failed *as a matter of law*. (JA 399). In other words, even if Appellant had been allowed to present evidence in support of this defense theory, it would not have supported his innocence. Indeed, Appellant wanted to, and ultimately did admit to killing and injuring his victims. As Appellant stated in his opening statement:

> On November 5, 2009, 13 U.S. Soldiers were killed and many more injured. The evidence will clearly show that I am the shooter. And the dead bodies will testify that war is an ugly thing . . . The evidence will show also show [sic] that I was on the wrong side—America's war on Islam. But then I switched sides, and I made mistakes.

(JA 723).[3]

Appellant's misguided desire to present a defense of others simply does not implicate his constitutional right to autonomy. This case does not present an instance, as was present in *McCoy*, where the appellant desired to deny that he committed the charged acts. *See McCoy,* 138 S. Ct. at 1508. Unlike in *McCoy*, Appellant's desired defense does not support his innocence. [redacted] The defenses differed in strategy: [redacted]

[3] As discussed *infra* at p. 169, admitting to the actus reus, as Appellant did, did not amount to a plea of guilty in violation of Article 45(b), UCMJ. *Hasan*, 80 M.J. at 691 (finding that all of Appellant's assignments of error—including his argument that he effectively pleaded guilty at trial—were without merit).

[redacted].[4] Thus, Appellant's disagreements with his detailed counsel were not "intractable disagreements about the fundamental objective of the defendant's representation," but instead "strategic disputes about [redacted] . . . ." *McCoy*, 138 S. Ct. at 1510.

Nor are the circumstances of Appellant's case similar to *Read*, where the Ninth Circuit held that "a district court commits reversible error by permitting defense counsel to present a defense of insanity over a competent defendant's clear rejection of that defense." *Read,* 918 F.3d at 719. First, of course, Appellant chose to represent himself, unlike Read who was represented by counsel against his wishes. Additionally, Appellant's grievances with his counsel's planned defense are not comparable. Unlike in *Read*, Appellant's detailed defense counsel were not planning to present a defense of insanity against his explicit wishes, and so, there were no "grave, personal implications" with detailed counsel's planned defense, nor was there a risk of Appellant's confinement in a mental institution. *Id.* at 721.

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4 [redacted]

As the Ninth Circuit found, "An insanity defense is tantamount to a concession of guilt." *Id.* at 720. Appellant's detailed defense counsel did not want to pursue a strategy that was "tantamount to a concession of guilt;" to the contrary, they [redacted] If they were successful, Appellant would have been found not guilty of premeditated murder, which is decidedly different than a finding of not guilty only by reason of insanity. *See* 18 U.S.C. § 4243 (requiring commitment of a person found not guilty only by reason of insanity).[5]

Additionally—and critically—Appellant did not clearly and vociferously object to his detailed counsel's planned defense. In fact, Appellant did not object at all on the record. All the appellants in *McCoy, Read,* and *Rosemond* repeatedly, specifically, and unambiguously objected to their counsel's planned defenses. *McCoy,* 138 S. Ct. at 1510 (finding error for attorney to concede guilt to a charged crime "over the client's intransigent objection to that admission"); *Read*, 918 F.3d at 719 (finding "error by permitting defense counsel to present a defense of insanity against defendant's clear rejection of that defense"); *Rosemond*, 938 F.3d

[5] Even if this strategy may have exposed Appellant to criminal liability for a lesser included offense it would not have violated Appellant's right to control the objective of his defense. *See Rosemond,* 958 F.3d at 123 (finding an attorney's admission that Rosemond committed an uncharged crime, contrary to Rosemond's wishes, did not implicate Rosemond's right to choose the objective of his defense).

at 122 (the appellant alleged his right to control the objective of his defense "was violated because [his attorney] admitted guilt of criminal acts over [his] express objection"). There is simply nothing in the record that supports that Appellant's [redacted] fundamentally conflicted with his counsel's planned defense, as Appellant now argues on appeal. (Appellant's Br. 50). [redacted] *Gonzales v. United States*, 553 U.S. 242, 250 (2008). Appellant did not clearly, explicitly, and fundamentally disagree with his counsel's plan. Any disagreements in the record were merely tactical and do not raise any of the constitutional concerns the Supreme Court sought to protect in *McCoy*.

"*McCoy* stands for the proposition that when an accused unequivocally states their desire to maintain their innocence, counsel may not 'steer the ship the other way.'" *Lancaster*, ARMY 20190852 at *10. Those simply were not the facts in the present case. In truth, what Appellant wanted was a captain to steer his ship in an impossible direction—presenting a defense the court had ruled inadmissible. Any conflict between Appellant and his detailed counsel was a disagreement of strategy and not objective. His choice to proceed pro se was not a "Hobson's choice" at all. (Appellant's Br. 48). His desire for something

impossible did not justify good cause for new counsel or otherwise make his decision to proceed pro se involuntary.

B. Appellant did not have good cause to substitute counsel.

Because Appellant had no good cause to substitute counsel, his decision to represent himself was voluntary. *See Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984) (finding the appellant's decision to waive the right to counsel was voluntary because there was no good cause to substitute counsel when detailed counsel were qualified and capable). Appellant did not have good cause to substitute counsel because his detailed counsel were well-prepared and competent.

[redacted] Thus, there was no need to substitute counsel.

More importantly, however, substituting counsel would not have given Appellant what he wanted: to present a defense that the military judge already ruled could not be presented. Appellant argues on appeal that he only decided to proceed pro se to ensure his detailed defense counsel was not the "captain of his . . . ship." (Appellant's Br. 49). Appellant's own words defeat that argument, however. After the military judge gave Appellant seven days to explore retaining new counsel, Appellant once again told the military judge that he wanted to

proceed pro se. (JA 442). He then told the military judge, "I would like to add to the record -- *if the court changes their mind* about me allowing to use the defense of others, [a civilian attorney] will be my attorney representing me through that defense. Otherwise, I will proceed pro se." (JA 442) (emphasis added). Thus, it is clear that he only wanted an attorney—any attorney—if that person could present a defense that the military judge already determined failed as a matter of law. Because no attorney could, and not because of any alleged infirmities with his detailed counsel, Appellant decided to represent himself. Accordingly, his decision was voluntary.

[redacted] (JA 1503-16; JA 3119-25; JA 1586-89; JA 1590-98; JA 1717-23) (sealed). Appellant did not "clearly vacillate[] on his pro se status" on the eve of trial. (Appellant's Br. 51). Rather, Appellant indicated an apparent desire to retain new counsel *for the purpose of* presenting the defense of others at trial. (JA 442). Especially considering the late hour of Appellant's request for new counsel—only seven days before the start of voir dire—the court would have been justified to deny his request outright. In considering whether an accused should be permitted to substitute counsel, "the court is entitled to take into account the countervailing state interest in proceeding on schedule." *United States*

v. Gallop, 838 F.2d 105, 108 (4th Cir. 1988) (citing *Morris v. Slappy*, 461 U.S. 1, 13 (1983)). However, rather than denying his request, the military judge allowed Appellant seven days to pursue new representation—four more days than he requested. (JA 438). After seven days, it was Appellant who explained to the court that he did not hire an attorney because of the court's prior rulings on the defense of others. (JA 442) At that point, further investigation was simply unnecessary. The record makes clear that Appellant only wanted an attorney if that person would be able to present the defense of others. No attorney could have. No amount of time or further inquiry would have changed that fact. Thus, it was reasonable for the military judge to determine that Appellant's decision to proceed pro se was voluntary. Accordingly, there was no error.

Issue Presented II

WHETHER THE TOTAL CLOSURE OF THE COURT OVER APPELLANT'S OBJECTION VIOLATED HIS RIGHT TO A PUBLIC TRIAL?

Summary of Argument

The Sixth Amendment right to a public trial does not extend to a hearing on a motion to withdraw filed by a pro se accused's standby counsel. Even if it does apply, the military judge did not violate Appellant's rights when she briefly closed court to discuss the motion with Appellant and standby counsel when she had justified concerns that discussing the motion in open court would risk inadvertently

disclosing privileged information. The military judge determined that alternatives to closure were insufficient and narrowly tailored the closure both in scope and duration. Even if she did err somehow, the error did not violate Appellant's constitutional rights.

Additional Facts

[redacted] (JA 3102–25) (sealed). [redacted] (JA 3105) (sealed). Prior to discussing any of the substance of the motion, Appellant requested an *in camera* hearing, although from context it appears that he meant an *ex parte* hearing. (JA 728). The military judge told Appellant that she would "revisit that in just a moment." (JA 728).

There was concern from the trial counsel and the military judge that the body of the motion and some of its enclosures might contain privileged material, so the military judge ordered the motion and its enclosures sealed "in an abundance of caution." (JA 730). The military judge explained to Appellant that he owned the privilege and asked him if he waived it. (JA 733). Appellant responded, "No, ma'am." (JA 733). The military judge and standby counsel then had an exchange

discussing the motion where standby counsel attempted to talk around any privileged information, and the military judge repeatedly admonished counsel not to go into any details, at risk of inadvertently disclosing privileged materials in open court. (JA 734–49).

After hearing from standby counsel, the military judge asked Appellant if there was anything he wanted to submit in writing *ex parte*. (JA 739). Appellant declined to submit anything in writing and instead expressed a desire to discuss something in open court. (JA 740). The military judge explained that she had been very careful not to go into any specifics in open court and wanted to give Appellant the opportunity to submit something in writing *ex parte*, but Appellant again declined. (JA 740). The military judge appeared to begin a colloquy to determine whether Appellant was waiving his privilege but explained "I don't know what you're planning on going into here." (JA 740). Appellant began trying to explain in open court a couple of times, with the military judge cutting him off each time. (JA 740–41). The military judge then closed the court and removed everybody except Appellant and his standby counsel. (JA 741). The closed hearing lasted approximately thirty-four minutes and the portion of the transcript for that hearing covers fourteen pages. (JA 1503–1516).

The following day, the military judge opened court by explaining what had happened the day before and putting her reasoning for closing the court on the record. She explained:

> I closed the court yesterday to the public and had an *ex parte* 39(a) session. I do that on very rare occasions, and I do it pursuant to Rule for Court-Martial 806. In this particular instance, I believed that we needed to do that to address some issues that arose between standby counsel and Major Hasan, and issues relating to the release of privileged attorney work product, attorney/client, and other privileged communications. There was substantial probability that an overriding interest of retaining the confidentiality of those communications would be prejudiced if the proceedings remained open, and I believed that other means to address the issue were inadequate.

(JA 742).

The transcript from the closed hearing remained sealed after trial. On appeal at the Army Court, Appellant filed a motion to examine sealed materials that included the pages of the transcript from the closed hearing. (SJA 1600). At oral argument, the Army Court asked appellate defense counsel if Appellant consented to the disclosure of the sealed materials, and counsel were unwilling or unable to represent to the Army Court that he did. (SJA 1600). On May 4, 2022, Appellant filed a motion with this Court to unseal the transcript pages from the closed hearing. (SJA 1585–1589). As part of the motion, appellate defense counsel submitted an affidavit indicating that Appellant consented to disclosure of the

sealed transcript pages. (SJA 1603). On July 6, 2022, this Court granted the motion. (SJA 1605).

Standard of Review

This Court reviews a military judge's decision to close the courtroom for an abuse of discretion. *United States v. Ortiz*, 66 M.J. 334, 339 (C.A.A.F. 2008).

Law

"In all criminal prosecutions, the accused shall enjoy the right to . . . a public trial." U.S. Const. amend. VI. Like most rights, however, the right to a public trial is not absolute. As the Supreme Court has explained, "the right to an open trial may give way in certain cases to other rights or interests . . . ." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). *Waller* applied the standard first announced by the Court in *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984), in the context of a defendant's objection that his Sixth Amendment right to a public trial had been violated by a closure. 467 U.S. at 48. This Court has summarized the four-part *Waller* test as follows:

> [P]rior to closing a trial we require that: (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced; (2) the closure must be narrowly tailored to protect that interest; (3) the trial court must consider reasonable alternatives to closure; and (4) the trial court must make adequate findings supporting closure to aid in the review.

Ortiz, 66 M.J. at 338–39 (alterations in original omitted). The President codified a nearly identical requirement into a regulatory right to a public trial. R.C.M. 806(b)(2).[6]

Argument

The military judge did not abuse her discretion in conducting a closed Article 39(a) session during trial. The military judge correctly applied the four-part *Waller* test to the facts before her, and her decision to briefly close the court was well within the range of reasonable choices. Accordingly, there was no error. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

A. There was an overriding interest that was likely to be prejudiced absent closure.

The military judge decided to close the hearing because she had concerns that Appellant or his standby counsel might inadvertently disclose privileged information—either attorney–client communications or attorney work product—in open court without Appellant making an informed and voluntary waiver of his privilege. There can be no question that protecting these privileges is a legitimate

[6] By its plain language, R.C.M. 806(b)(2) simply codifies the test first announced in *Press-Enterprise I* and *Waller* and applied in the military cases cited herein. Satisfying the requirements of the Supreme Court's test necessarily satisfies R.C.M. 806(b)(2). *Compare* R.C.M. 806(b)(2) *with Ortiz*, 66 M.J. at 338–39. Accordingly, the discussion of both the constitutional and regulatory right to a public trial is consolidated below. (*See* Appellant's Br. 68).

and overriding interest.[7] *See, e.g.*, *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980); *see also United States v. Turley*, 8 U.S.C.M.A. 262, 265, 24 C.M.R. 72, 75 (1957) ("Once the attorney–client relationship has been shown to exist, no court—either Federal or state—has been more zealous in safeguarding and strengthening the privilege arising therefrom than has this Court."). Likewise, there can be no question that disclosure of attorney–client communications or attorney work product absent a knowing and voluntary waiver prejudices the values the privilege seeks to protect. *See United States v. Marrelli*, 4 U.S.C.M.A. 276, 281, 15 C.M.R. 276, 281 (1954) ("This privilege—one of the oldest and soundest known to the common law—exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his attorney safe from fear that his confidences will return to haunt him.").

The military judge was justified in fearing that privileged information might be disclosed—thus prejudicing the overriding interest—based on the information contained in the body of standby defense counsel's motion alone. Certainly, the trial counsel had the same concerns, (JA 729), and Appellant himself seems to concede that the standby counsel had disclosed privileged materials without his

[7] Appellant himself appears to argue that there were concerns that disclosure of privileged information could lead to a mistrial. (Appellant's Br. 64). Such concerns support the military judge's determination that preventing inadvertent disclosure was an overriding interest that was likely to be prejudiced.

consent. (Appellant's Br. 63) (arguing that Appellant's detailed defense counsel "were . . . publicly filing *his* privileged materials without his consent . . . .") (emphasis in original).

Appellant argues that protecting privileged information cannot be an overriding interest "because Appellant explicitly waived 'any privilege' and directly told the military judge that he did so." (Appellant's Br. 65). The military judge found otherwise, however, and her finding was reasonable considering the facts before her. It cannot be said that Appellant's waiver of "any privilege" was effective when the military judge stated that she didn't know what Appellant was "planning on going into" and Appellant himself suggested that the military judge's understanding of what he might say was misinformed. (JA 740) ("I don't think it is what you think it is, ma'am.").

Admittedly, during the closed hearing Appellant told the military judge more explicitly that he waived any privilege. (JA 1508). Importantly, however, when standby counsel started talking during the closed hearing about certain information they had gleaned from "hundreds and hundreds of hours in one-on-one conversations" with Appellant, Appellant interrupted him; and said, "That's enough. I object for any further – "; and then told the military judge, "That's not exactly what I had in mind, ma'am." (JA 1509). Under these facts, then, it was reasonable for the military judge to determine that Appellant had not, in fact,

waived "any privilege" because he did not do so knowingly and intelligently. It is likely that if the military judge relied on Appellant's statements to unseal standby defense counsel's motion and discuss it in open court, Appellant would now be arguing on appeal that was error. (*See* Appellant's Br. 67) (describing standby counsel's "disclosure of privileged defense materials without his consent" as "impropriety"). Additionally, the Army Court, after conducting its own review of the transcript and other materials sealed by the military judge, agreed with the military judge's conclusion that Appellant had not waived his privilege. *United States v. Hasan*, 80 M.J. 682, 720–21 (Army Ct. Crim. App. 2020).

B. The closure was narrowly tailored.

The military judge only closed the court-martial for thirty-four minutes to address a single issue—the potentially privileged materials contained in standby counsel's motion. When considered both qualitatively and temporally, the closure was narrowly tailored.

In *Ortiz*, this Court quoted with approval the factors that the Court of Appeals for the Second Circuit considers in determining the scope of a closure:

> [It] depends on a number of factors, including its duration, whether the public can learn (through transcripts, for example) what transpired while the trial was closed, whether the evidence presented during the courtroom closure was essential, or whether it was merely cumulative or ancillary, and whether selected members of the public were barred from the courtroom, or whether all spectators were precluded from observing the proceedings.

66 M.J. at 341 (quoting *Bowden v. Keane*, 237 F.3d 125, 129–30 (2d Cir. 2001)) (alterations in original). Considering those factors together, the closure in this case can fairly be characterized as "narrow" or "partial." *See United States v. Hershey*, 20 M.J. 433, 437 (C.M.A. 1985) (finding a partial closure where the military judge closed the court for less than an hour during the complaining witness's testimony).[8] Notably, the entire closed Article 39(a) hearing lasted only thirty-four minutes and covers only fourteen pages of the transcript. In total, Appellant's court-martial spanned over twenty-five months and the transcript consists of over 4,000 pages. Additionally, the military judge summarized on the record what transpired during the closed hearing, (JA 742), and the transcript was ultimately unsealed. (SJA 1605). Finally, the closure was to discuss evidence and argument related to standby counsel's motion to withdraw—an issue that must be considered ancillary given that Appellant represented himself throughout the duration of his trial and did not raise any complaints at trial about the role of his standby counsel.

[8] The *Hershey* court found it important that no spectators were present when the court was closed and that the only people that were removed from the courtroom were there "to perform a governmental function." 20 M.J. at 437. The military judge in that case, however, did order that nobody enter the courtroom during the testimony. *Id*. at 435.

C. The military judge considered reasonable alternatives to closure.

The military judge not only considered reasonable alternatives to closure, but she also suggested them to Appellant. The military judge repeatedly explained to Appellant that she would prefer that he submit anything he had to say to the court *ex parte* and in writing. (JA 739–40). Appellant, however, objected and indicated that he would not submit anything in writing. (JA 740). Thus, when Appellant—who began the morning by asking for a nonpublic hearing on the motion—began talking and indicated that he wanted to "clarify" his disagreement with standby counsel, it was reasonable for the military judge to determine that the only way to prevent Appellant from disclosing privileged information before first knowingly waiving the privilege was to conduct a closed hearing.

Appellant argues that "at least three reasonable alternatives" to closure existed and that the military judge erred by not adopting one of them. (Appellant's Br. 66–67). None of the three alternatives would have been effective in ensuring that she would be able to balance Appellant's interests, however.

The first proposed alternative—to "better define the privilege to narrowly tailor the interest," (Appellant's Br. 66)—was not necessary. The record is clear that, from the body of standby counsel's motion alone, the military judge had concerns that there was a risk of disclosing privileged communications or attorney work product. It is also clear from the military judge's discussion before the

closure and findings on the record after-the-fact that she closed the hearing to protect these two closely related interests. It is not clear how she could have more "narrowly tailor[ed] the interest." (Appellant's Br. 66).

Appellant's next proposed alternative is that the military judge could have had the parties litigate the motion in open court and only had a closed hearing on the issues that Appellant and standby counsel identified as requiring disclosure of privileged information. (Appellant's Br. 67). The military judge, however, attempted to do just that. She repeatedly admonished standby counsel—a trained lawyer familiar with privilege—to not go into any details, for fear of him divulging privileged information. It was reasonable for her to be concerned that Appellant—who has no legal training and had previously requested a nonpublic hearing—might unknowingly disclose privileged information. She only closed the hearing when she determined, based off Appellant's responses, that the risk of inadvertent disclosure was too high.

Finally, Appellant's proposed third alternative of "publish[ing] the transcript" (Appellant's Br. 67) was not something the military judge could have done because she determined that the transcript contained privileged communications. (JA 832–35). The Army Court agreed with her finding, so releasing the transcript was not a viable alternative absent Appellant's knowing and voluntary waiver. *Hasan*, 80 M.J. at 720–21.

Although the military judge and the Army Court determined that the closed hearing contained privileged communications and therefore should remain sealed, this Court has since granted Appellant's motion to unseal the transcript from the closed hearing. (SJA 1605). The fact that the transcript is now unsealed cuts against finding any deprivation of Appellant's Sixth Amendment right. *See Press-Enterprise I*, 464 U.S. at 512 ("[T]he constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time."). Though years have passed since Appellant's court-martial, the time was "reasonable" in this case because Appellant's appellate defense counsel were not able to represent that Appellant consented to disclosure of the sealed transcript pages until he filed a motion to unseal with this Court. (SJA 1600, 1603).

D. The military judge made adequate findings supporting closure to aid in appellate review.

Appellant's argument that the military judge erred by failing to make adequate findings before closure is unavailing. (Appellant's Br. 66). It fails for at least two reasons: (1) while the military judge did not use the word "findings," she put sufficient information on the record prior to closing the hearing to facilitate appellate review; and (2) the justification for requiring adequate findings is satisfied even when the findings are made immediately after the closed hearing, as they were in this case.

Prior to conducting the closed Article 39(a) session, the military judge had discussions with trial counsel, Appellant, and standby counsel on the record. Immediately in those discussions the military judge and the trial counsel discussed the possibility that there was privileged information contained in the motion. (JA 729–30). The military judge then, on the record, ordered the entirety of the motion to be sealed "in an abundance of caution." (JA 730). From her comments immediately before and immediately after her ordering the motion sealed, it is readily apparent that the caution that she was exercising was to prevent the disclosure of privileged information. The military judge then explained briefly to Appellant that he owned the attorney–client privilege and asked if he waived it, but he did not. (JA 733). After some discussion, she requested that Appellant submit written matters *ex parte*. (JA 739). Immediately before closing the courtroom, she asked Appellant if he objected to what standby counsel had said to her. (JA 741). Taken together, it is abundantly clear that she was concerned that Appellant's overriding interest in protecting his attorney–client privilege was likely to be prejudiced; that the scope of the closed hearing was to listen to Appellant's objections to what his standby counsel had discussed with the court in order to resolve the pending motion to modify the role of standby counsel; and that she had considered reasonable alternatives—namely Appellant submitting his matters in writing and *ex parte*. Thus, even though she didn't say "findings," she provided

the appellate courts with sufficient information to conduct their review—to hold otherwise would be to unjustifiably prioritize form over substance.

Perhaps more importantly, however, the purpose of putting adequate findings on the record is to facilitate appellate review. This goal is satisfied whether those findings are made prior to closure, after closure, orally, or later in some "written addendum to the record." *Ortiz*, 56 M.J. at 339. As this Court has observed:

> While we do not believe the Sixth Amendment dictates a formalistic approach as to the manner in which a military judge delivers her findings, this Court, following the lead of the United States Supreme Court, requires that a military judge make *some* findings from which an appellate court can assess whether the decision to close the courtroom was within the military judge's discretion.

Id. at 339–40 (citing *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13–14 (1986); *Waller*, 467 U.S. at 47; *Press-Enterprise I*, 464 U.S. at 510; *Hershey*, 20 M.J. at 436) (emphasis in original). Because the military judge did precisely that, she did not err.[9]

[9] Even if this Court found that the military judge made limited findings or even no findings, Appellant's claim of error still fails. As discussed *supra*, pp. 38–39, the closure in this case was "partial." This Court can and should adopt the approach, cited in *Ortiz*, of some circuit courts finding "no erroneous deprivation of the right to a public trial despite limited findings or the absence of findings in the context of a 'partial closure.'" 66 M.J. at 340 (citing *United States v. Sherlock*, 962 F.2d 1349, 1356–57 (9th Cir. 1992).

E. Even if the military judge erred, Appellant was not denied a public trial.

The Sixth Amendment right to a public trial does not include a motion to withdraw as standby counsel. In *United States v. Gottesfeld*, the First Circuit held that the right did not extend to pretrial hearings on motions to withdraw by counsel. 18 F.4th 1, 14 (2021). The court cited the fact that the hearings "involved only a dispute between the defendant and his counsel"; that "[p]ublic hearings on such motions would not encourage witnesses to come forward or discourage perjury"; that "government counsel was also barred from the hearing"; and "[t]he issue—should defense counsel be allowed to withdraw—was entirely collateral to the trial or to any issues of guilt or innocence." *Id.* at 14–15 (internal quotations and alterations in original omitted). All those factors similarly exist in the present case; however, the motion to withdraw is even more collateral as Appellant was already pro se and his detailed defense counsel were seeking to withdraw as *standby* counsel. The fact that the motion was filed and argued after the first day of trial as opposed to pretrial is not sufficient justification, without more, to find that it was part of the "public trial" that the Sixth Amendment guarantees.

Even if this Court finds that the Sixth Amendment right to a public trial extends to a hearing on a motion to withdraw as standby counsel, Appellant was not denied that right. As discussed above, the military judge did not err when she closed the hearing. But even if she did, not every error denies an accused of his

right to a public trial. *Hershey*, 20 M.J. at 437. The determination of whether Appellant was denied the right to a public trial must be made on the particular facts of the case. *Id.* Appellant undeniably received the safeguards of a public trial. The military judge only closed a very small portion of his trial to receive information to facilitate denial of an ancillary motion filed by individuals who were not active participants in the trial. Accordingly, there was no constitutional violation, and Appellant's argument must fail. *Hershey*, 20 M.J. at 438.

Issue Presented III

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISQUALIFY LIEUTENANT COLONEL GARWOLD AS A PANEL MEMBER?

Summary of Argument

Appellant waived any challenge to LTC KG on appeal through an express waiver, by failing to raise any grounds for challenge at trial, and by electing not to use his peremptory challenge. Even if this Court finds Appellant did not waive appellate review, the military judge had no duty to sua sponte excuse LTC KG. Finally, even assuming the military judge had some duty, she did not err by exercising her discretion not to excuse LTC KG because he was not actually or impliedly biased.

Additional Facts

A. Lieutenant Colonel KG's panel questionnaires.

[redacted]

[redacted] He never indicated, however, that he would be unable to remain objective. [redacted]

On April 26, 2013—nine months after he filled out his first questionnaire and five months after relinquishing command—LTC KG submitted an additional questionnaire. [redacted] The answers in his second questionnaire consistently reflect a more measured tone. [redacted]

[redacted]

B. Voir Dire.

Appellant played an active role in voir dire. After group voir dire, Appellant explicitly sought to join in the challenge for cause to LTC BR. (JA 492). During individual voir dire, he questioned all but two of the venire members that were called back for additional questioning. (JA 505–06, 513–15, 520–22, 531, 540–41, 550–55, 1691–92, 562–63, 576–78, 586–87, 661–64). He even requested that one of the members who had already been questioned on individual voir dire be called back for follow-up questioning. (JA 586). The questions to each of these members revolved around common themes, specifically their questionnaire responses to questions about religion, Islam, sharia law, jihad, the Taliban, and his relationship to other individuals he identified as mujahedeen. During the individual voir dire of LTC KG, Appellant asked him about his "Major League Infidel" sticker and the extent of his knowledge on Islam based off an answer that he gave in his questionnaire. (JA 560–62).

Other than joining the government challenge to LTC BR, Appellant did not challenge any other member for cause. At the end of the first round of voir dire, Appellant was given an opportunity to challenge the remaining panel members—

including LTC KG—for cause. (JA 589). Appellant did not make any challenges. (JA 589). The military judge then asked Appellant, "Are you *specifically waiving* any challenges for cause of the remaining members?" and Appellant responded, "Yes, ma'am." (JA 589) (emphasis added). Additionally, Appellant elected not to use his peremptory challenge. (JA 678).

Standard of Review

"Whether an accused has waived an issue is a question [this Court] reviews de novo." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). Forfeited issues are reviewed for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). This Court does "not review waived issues because a valid waiver leaves no error to correct on appeal." *Ahern*, 76 M.J. at 197.

Law and Argument

A. Appellant waived appellate review of any challenge to LTC KG.

1. Appellant waived appellate review by "expressly and unequivocally acquiescing" to LTC KG serving on the panel.

Appellant waived any challenge to LTC KG when he "expressly and unequivocally" acquiesced to LTC KG serving on his panel. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020); *United States v. Smith*, 2 U.S.C.M.A. 440, 442, 9 C.M.R. 70, 72 (1953). When Appellant told the military judge he was "specifically waiving any challenges for cause," it was more than a mere failure to object; Appellant "affirmatively declined to object." (JA 589); *Davis*, 79 M.J. at

331. Put differently, Appellant's decision not to challenge LTC KG for cause was an "intentional relinquishment or abandonment of a known right." *Gladue*, 67 M.J.at 313. The waiver was valid and leaves no error for this Court to correct on appeal. *Ahern*, 76 M.J. at 198.

2. Appellant waived appellate review by failing to challenge LTC KG for cause at trial.

In addition to his express waiver, Appellant waived any objection to LTC KG serving on his panel by not raising any grounds to challenge him at trial. R.C.M. 912(f)(4). Appellant argues that failure to raise a challenge to a panel member at the trial court is forfeiture and not waiver. (Appellant's Br. 69). Both the language of R.C.M. 912(f)(4) and the precedent that led to promulgation of the rule, however, call for waiver and not forfeiture.

First, R.C.M. 912(f)(4), titled "Waiver," states that a "ground for challenge is *waived* if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner." (emphasis added). The rule does not use the term "forfeiture," nor does it include the phrase "in the absence of plain error," as it does elsewhere in the R.C.M. *E.g.*, R.C.M. 920(f) (findings instructions), 1005(f) (sentencing instructions), 1106(f)(6) (post-trial matters); *but see United States v. Andrews,* 77 M.J. 393, 401 (C.A.A.F. 2018) (rejecting a government challenge to treating similar language in R.C.M. 919(c) as forfeiture).

In addition to its plain language, the rule is based on longstanding precedent and sound legal principles indicating that the rule intends waiver and not forfeiture. As the analysis to R.C.M. 912(f)(4) explains, the waiver rule is "based on" *United States v. Beer*, 6 U.S.C.M.A. 180, 19 C.M.R. 306 (1955), and supported by *United States v. Wolfe*, 8 U.S.C.M.A. 247, 24 C.M.R. 57 (1957) and *United States v. Dyche*, 8 U.S.C.M.A. 430, 24 C.M.R. 240 (1957). R.C.M. 912 analysis at A21–61. In *Beer*, the CMA held there was no error when a court-martial failed to excuse a member who was otherwise ineligible where the accused failed to challenge the member. 6 U.S.C.M.A. at 181–84, 19 C.M.R. 306–10. The court quoted favorably the following language from 31 Am. Jur. Jury § 119:

> The general rule is that objection to a juror because of his disqualification is waived by failure to object to such juror until after verdict, whether in a civil or criminal case, and even with respect to a statutory disqualification. Even in a capital case the disqualification of a juror is generally unavailable after verdict. The general rule stated is of special force when it appears that the party complaining was aware of the objection to the juror at the time of the impaneling of the jury, or where such objection could have been discovered by the exercise of ordinary diligence and it does not appear on the whole case that injustice resulted[.]

Id. at 183, 19 C.M.R. 309. The court reaffirmed its position in *Dyche*, where it collected cases and stated that it had "repeatedly held that a challenge to a court member which is based on facts known prior to the conclusion of a trial 'must be made at that time or it will be considered waived. . . .'" 8 U.S.C.M.A. at 433, 24

C.M.R. 243. The *Dyche* court supported its holding with a lengthy quote from *Wolfe*, a portion of which includes the following: "An accused . . . cannot withhold information of matters affecting the trial on the chance that they may have a favorable effect, and then, when disappointed, complain. Even rights guaranteed by the Constitution are considered surrendered when the accused knowingly declines at the trial to avail himself of them." *Id.* (quoting *Wolfe*, 8 U.S.C.M.A. at 250, 24 C.M.R. 60). It is clear, then, that in promulgating R.C.M. 912(f)(4), the President intended for unpreserved challenges to members to be waived and not merely forfeited. Accordingly, this Court should decline to review Appellant's argument on appeal.

Appellant cites four cases for support that this Court should conduct a plain error review of his challenge on appeal to LTC KG. (Appellant's Br. 69). The persuasive value of these cases is questionable, however, because none of them contain any discussion or analysis why plain error is the appropriate standard, especially considering the use of the term "waived" and the C.M.A. precedent to the contrary.

United States v. Bannwarth appears to be the first case in the court's jurisprudence that even suggests that the waiver provision in R.C.M. 912(f)(4) should be read as a forfeiture provision. 36 M.J. 265, 268 (C.M.A. 1993). In *Bannwarth*, the court found that a ground for challenge was "waived" and then

found there was "no 'plain error' to overcome the challenge," without any discussion as to the appropriate standard of review. *Id.* Certainly, if the court intended to announce a new standard of review it would have provided some analysis or justification for such a departure from its own precedent.

United States v. Ai, is equally bereft of analysis. In the opinion, the court simply announced that, because the appellant had not challenged the member on the basis it raised on appeal, it would review the "post-trial claim only for plain or obvious error." *Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998). The Court, however, cites to *United States v. Velez*, a case that is completely silent on the standard of review for unpreserved challenges other than a parenthetical citation referring to R.C.M. 912(f)(4) as a "general forfeiture of challenge rule." *Id.*; 48 M.J. 220, 225 (C.A.A.F. 1998).

United States v. Moran is inapposite, as it dealt with admission of evidence at trial and M.R.E. 103(d), a rule that expressly contemplates plain error review. 65 M.J. 178, 181 (C.A.A.F. 2007).

Finally, *United States v. Strand* should be given little deference for at least two reasons. As discussed *infra*, pp. 58–60, the Court should not have analyzed the military judge's decision not to sua sponte dismiss a panel member for an abuse of discretion, because the military judge has no duty to do so. The Court also appeared to apply both an abuse of discretion and a plain error standard to the

military judge's decision, which does little to clarify the appropriate standard of review. *United States v. Strand*, 59 M.J. 455, 460 (C.A.A.F. 2004) ("Since the judge did not abuse his discretion, there was no plain error.").

To the extent any of the cases cited by Appellant stand for the proposition that R.C.M. 912(f)(4) describes forfeiture and not waiver, this Court should overrule or at least clarify that holding. Those decisions are not well-reasoned for the very fact that they lack any analysis of the language of the R.C.M. The opinions were not focused on providing—and did not provide—an analysis demonstrating the propriety of regarding the rule as one that contemplated waiver rather than forfeiture. Additionally, intervening events—including this Court's more recent decision in *United States v. McFadden*, 74 M.J. 87 (C.A.A.F. 2015)[10]—support applying waiver.

Appellant knew or could have discovered the alleged grounds for challenge to LTC KG he now raises on appeal; however, he failed to raise them at trial. Indeed, Appellant had LTC KG's panel questionnaires available, asked him questions specifically about his responses in the questionnaire, and still did not object to LTC KG serving on the panel. (JA 362, 561–62). Accordingly, the challenge is waived under R.C.M. 912(f)(4). This conclusion is supported by the

[10] Discussed *infra* at pp. 58–60.

language of the rule itself and the precedent leading to promulgation of the rule. Accordingly, this Court should not—and indeed cannot—review his claim of error on appeal. *Ahern*, 76 M.J. at 197 ("[A] valid waiver leaves no error to correct on appeal.").

3. Appellant waived appellate review by failing to use his peremptory challenge.

Even assuming Appellant did not waive his challenge either expressly or by failing to make a timely challenge to LTC KG, his decision not to exercise a peremptory challenge did. R.C.M. 912(f)(4) states:

> When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review. Further, *failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review*.

(emphasis added). In other words, if a challenge for cause was denied at trial, the rule requires the challenging party to use its peremptory challenge to preserve the objection on appeal. Military courts have consistently refused to review denied for-cause challenges to panel members who could have been excluded by peremptory challenges. *See, e.g.*, *United States v. Marsh*, 21 M.J. 445, 450 (C.M.A. 1986) (finding waiver when, *inter alia*, the appellant failed to exercise a peremptory challenge); *Untied States v. Medina*, 68 M.J. 587, 592 (N.M. Ct. Crim.

App. 2009); *United States v. Jones*, No. ACM 38028, 2016 CCA LEXIS 71, at *5 (A.F. Ct. Crim. App. 4 Feb. 2016); *see also United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006) (finding waiver under a prior version of R.C.M. 912(f)(4) and deciding to "not address the merits of petitioner's claim that the military judge erred by not granting the challenge" to a panel member).

Although Appellant did not challenge LTC KG for cause at trial, his failure to exercise a peremptory challenge at all still must waive consideration of his challenge to LTC KG on appeal. It would make little sense for the rule to prohibit a party that made a timely challenge for cause from raising the challenge on appeal and at the same time allowing a party that never made a challenge for cause to raise it for the first time on appeal, when both parties had the ability to excuse the complained-of panel member through exercise of their peremptory challenge.

As the Supreme Court explained in *Frazier v. United States*:

> The right of peremptory challenge . . . is given in aid of the party's interest to secure a fair and impartial jury, not for creating ground to claim partiality which but for its exercise would not exist. It does not follow that by using the right as he pleases, he obtains the further one to repudiate the consequences of his own choice.

335 U.S. 497, 505–06 (1948) (footnote omitted). Here, Appellant exercised his right to not use his peremptory challenge at all. This decision, however, allowed LTC KG to serve on his panel. If there is ground to claim partiality in his panel because of LTC KG, it only exists because Appellant chose not to exercise his

right to remove him via a peremptory challenge. Appellant cannot now attempt to "repudiate the consequences of his own choice" on appeal. *Id.* Appellant waived his challenge to LTC KG. As a result, this Court should decline to review this argument.

B. The military judge had no duty to dismiss LTC KG sua sponte.

This Court has been unequivocal in explaining that "[a] military judge has the discretionary authority to sua sponte excuse [a] member but has *no duty to do so*." *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015) (emphasis added).[11] That holding is supported by the plain language of R.C.M. 912(f)(4) and lies on solid logical ground.

First, as the Court observed in *McFadden*, the rule clearly states that a military judge *may* excuse a member in the absence of a challenge from either party and not that she *must* excuse the member. *Id.* (citing *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005)); R.C.M. 912(f)(4). If the President intended to mandate that a military judge take action without exercising discretion, he could have done so through use of the term "must," as he did elsewhere in the R.C.M. *See, e.g.,* R.C.M. 703(f)(2) (requiring a judge to take

[11] Appellant argues that this Court should disregard its holding in *McFadden* because it was not a capital case. (Appellant's Br. 84). This argument is severely undercut, however, by the Court's reaffirmation of the *McFadden* holding in *United States v. Akbar*, a capital case. 74 M.J. 364, 395 (C.A.A.F. 2015).

certain actions upon a determination that evidence that is lost, destroyed, or not subject to compulsory process "is of such central importance to an issue that it is essential to a fair trial . . ."). Instead, the President granted the military judge the absolute discretion to excuse a member—or not—if she determined that it would be in the interest of justice.

Additionally, reading the military judge's authority as discretionary is consistent with the waiver provisions in R.C.M. 912(f)(4). If the military judge had a *duty* to sua sponte excuse members, then a challenge could never really be waived. An accused could sit silently at trial and then simply circumvent the waiver of his challenge by arguing that the military judge failed in her sua sponte duty—as Appellant attempts to do here. It would render the waiver provisions completely superfluous, which cannot have been the intent of the President in promulgating the rule.

Appellant cites to *Frazier v. United States* for support of the proposition that the military judge does indeed have a duty; however, his reading of the case is too expansive. (Appellant's Br. 83–84). The Court in *Frazier* is, at most, suggesting a *possibility* that a jury selected using proper procedures may result in some impartial jury that would allow or require the judge to intervene and cure the defect. 335 U.S. at 511. Immediately following the language cited by Appellant, however, the Court makes clear that "[s]uch a situation could arise, *if at all*, only in

the rarest and most extraordinary combination of circumstances." *Id.* (emphasis added). This dictum in *Frazier* simply cannot be read as a repudiation of the discretionary power granted to military judges by the President, as Appellant would have this Court do.

Nothing in the plain language of R.C.M. 912(f)(4) or in *Frazier* requires a military judge to excuse panel members in the absence of a challenge from either party. Military judges have the discretion to do so, but there is no duty. *McFadden*, 74 M.J. at 90. A military judge's decision *not* to take an action that she has *no duty to take* cannot be error. Accordingly, Appellant's argument fails.

C. Even if the military judge had a duty to dismiss LTC KG sua sponte, she did not err by exercising her discretion not to do so.

If the Court reviews the military judge's decision not to excuse LTC KG sua sponte, it should do so only for plain error and not for an abuse of discretion. If Appellant did not waive appellate review of a challenge to LTC KG, he at least forfeited it. Forfeited issues are reviewed for plain error. *Gladue*, 67 M.J. at 313. Properly preserved challenges for cause are reviewed for an abuse of discretion. *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015). It would make little sense to apply the more deferential abuse of discretion standard when there can be no question Appellant did nothing to preserve appellate review of his challenge to LTC KG. *But see Akbar*, 74 M.J. at 395 ("[E]ven if the military judge had such a

duty, he did not abuse his discretion in failing to sua sponte remove any of the members . . . ."). Under either standard, however, the military judge did not err.

1. The military judge was correct to defer to Appellant's panel selection strategy.

This is not a case where a pro se litigant or an ineffective counsel sat idly by and allowed biased members to be impaneled.[12] Instead, Appellant had a strategy in panel selection, focusing on panel members' views on topics that were important to him. He questioned multiple members, requested that one be recalled for additional questioning, and joined in a challenge for cause to one of the members. In cases like this—where the accused is executing a clear panel selection strategy—it is appropriate for the military judge to defer to that strategy and not intercede and excuse members with whom the accused has clearly demonstrated he is satisfied. "If deprivation there was . . . it was the result of his own choice." *Frazier*, 335 U.S. at 507. Indeed, if the military judge had excused LTC KG or any other unchallenged panel member, Appellant may very well complain on appeal that she interfered with his statutory right of peremptory challenge, which necessarily includes the right not to exercise any challenges. *See Velez*, 48 M.J. at

12 [redacted] This is yet another factor supporting the military judge's decision not to exercise her discretion to excuse unchallenged panel members.

225 (stating that a military judge's decision to sua sponte dismiss a member is a "drastic action").

2. Lieutenant Colonel KG was not actually biased.

This Court has given the "military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000)). Even assuming the military judge had some duty to excuse biased panel members in the absence of a challenge by either party, that duty would not have extended to LTC KG, as he was not actually biased. During voir dire, LTC KG told the military judge clearly and unequivocally that he had not formed an opinion as to guilt or innocence and that he could decide the case "based solely on the evidence admitted in court." (JA 564–55). His "protestation of impartiality [should] have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). In light of the "special deference" that is given to a military judge's resolution of the question of actual bias, it cannot be said that the military judge erred by not excusing him sua sponte. *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020).

Appellant's arguments that LTC KG was actually biased are without merit. First, LTC KG's knowledge of the case is unremarkable. As Appellant's defense counsel argued strenuously prior to trial, the media coverage was extensive.

(Appellant's Br. 21). It should be no surprise that an active duty servicemember would be aware of such a high profile event. With the exception of information on [redacted] the facts that LTC KG recounted would have been well known and included in the media coverage.[13] [redacted] Additionally, LTC KG's knowledge of the facts did not "far exceed[] every other sitting panel member." (Appellant's Br. 75). [redacted]

Despite this knowledge, LTC KG unequivocally stated that he could set aside the media coverage and his prior knowledge and decide the case solely on the evidence presented at trial. (JA 470, 564–65). Lieutenant Colonel KG also stated that he could follow the judge's instruction and not infer that Appellant was guilty because charges had been referred to a court-martial. (JA 472). Lieutenant Colonel KG answered that nothing about the fact that an officer was charged with

13 [redacted]

murdering and attempting to murder soldiers would cause him not to be fair or impartial. (JA 480).

Appellant's suggestion that LTC KG stating he [redacted] —somehow indicated he was "predisposed to 'stepping into the shoes' of the victims" is misplaced. (Appellant's Br. 76). As a preliminary matter, having emotions does not disqualify a panel member. "The jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions. Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions." *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009). [redacted] does not overcome the presumption that, years later, he could set aside that feeling and decide the case based solely on the evidence presented at trial. Additionally, the fact that twelve servicemembers were killed was never in dispute. Lieutenant Colonel KG commenting that he [redacted] no more disqualified him than any other eligible panel member, as the same is factually true of each of them. Additionally, "[t]hat time soothes and erases is a perfectly natural phenomenon,

familiar to all." *Yount*, 467 U.S. at 1034. While LTC KG may have been "angry" when he first learned of this horrific event, by the time he sat on the panel—nearly four years later—his initial feelings had undoubtedly softened.

Appellant's argument that LTC KG was deceptive ignores the overwhelming facts to the contrary contained in the record. (Appellant's Br. 77–78). [redacted] Appellant takes issue[14] with his answer during voir dire to the question about discussing publicity about the case, but in context it is clear that LTC KG was answering the question of whether he had discussed the media coverage after being notified that he was a panel member. (JA 564–65).

Finally, LTC KG's comment that he [redacted] first questionnaire should be given little weight, if any at all. In the supplemental comments to that same questionnaire, he identified Appellant as the individual who [redacted] (JA 2437) (emphasis added),

[14] Apart from ignoring the context of LTC KG's answer, Appellant's characterization that LTC KG stated he had never discussed the publicity "*with anyone in anyway*," (Appellant's Br. 77) (emphasis in original), is not consistent with LTC KG's answer that he discussed the media coverage "kinda explaining [his] whereabouts to the chain of command." (JA 565).

demonstrating he had not actually formed an opinion regarding Appellant's guilt. Furthermore, he implicitly repudiated his comment about [redacted] in his second questionnaire and during group and individual voir dire. For example, during individual voir dire, the military judge probed LTC KG on whether he had formed an opinion of guilt based on media exposure:

> Q. As a result of what you may have read, seen or heard in the media, have you formed an opinion as to the guilt or innocence of the accused?
> A. No, ma'am.
> Q. Can you disregard any publicity that you've read, seen or heard, and decide this case based solely on the evidence admitted in court, and the instructions that I will give you?
> A. Yes, ma'am.

(JA 564–65).

The Supreme Court has recognized that "[i]t is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed." *Yount*, 467 U.S. at 1035. A memory of a crime alone does not create "such fixed opinions that [a panel member] could not judge impartially the guilt of the defendant." *Id.* The military judge had access to LTC KG's questionnaires and was able to observe him during the conduct of voir dire. As such, she was in the best position to make the appropriate "determinations of demeanor and credibility" required for the actual bias inquiry. *Wainwright v. Witt*, 469 U.S. 412, 428 (1985). Nothing in the record

supports second guessing those determinations on appeal. *Id.* at 426 ("Deference must be paid to the trial judge who sees and hears the juror.").

3. Lieutenant Colonel KG was not impliedly biased.

Appellant's arguments that LTC KG was impliedly biased similarly fail. Nothing in the record should lead this Court to determine that "the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *United States v. Woods*, 74 M.J. 238, 243–44 (C.A.A.F. 2015). Although this Court, "give[s] the military judge less deference on questions of implied bias . . . when there is no actual bias, 'implied bias should be invoked rarely.'" *United States v. Warden*, 51 M.J. 78, 81–82 (C.A.A.F. 1999) (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)) (internal citations omitted).

In addition to relying on the alleged infirmities discussed above, Appellant points to other answers in his questionnaire to argue that LTC KG was impliedly biased because he indicated in his questionnaire that an accused with charges referred against him was [redacted] because of his answer [redacted] (Appellant's Br. 78–81). Each of these

arguments fall well short of creating a risk that members of the public would question the fairness of Appellant's trial when viewed in light of other facts in the record. Appellant's arguments rely on isolated statements provided with little to no context and ignore the "totality of the circumstances" that this Court has said must be considered in conducting an implied bias analysis. *Woods*, 74 M.J. at 244.

First, LTC KG repudiated his answer that [redacted] when he answered "no" in his second questionnaire to the same question and when, during voir dire, he answered that he would not infer guilt based on referral alone. (JA 472). In other words, LTC KG "dispel[led] the possibility of bias because he stated that his initial opinion was not definite and that he understood Appellant was presumed innocent." *Akbar*, 74 M.J. at 396 (quoting *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012)) (alterations in original).

Similarly, LTC KG's answer to the question about [redacted], should be given little weight, if any at all. This question—posed in the negative—is confusing. This is clear not only by reading the question itself, but by the fact another panel member explained during voir dire he misread that question and answered in the opposite manner than he intended. (JA 663–64). Of note, LTC KG answered [redacted] to the same question

on his first questionnaire. Given the marked shift[15] in tone and tenor of LTC KG's second questionnaire—that he filled out when he was no longer [redacted]—one can easily infer that LTC KG simply misread the question on the second time around. This is supported by the fact that, during group voir dire, LTC KG answered he could be fair and impartial despite the "nature of the charges," namely the murder and attempted murder of soldiers by an officer. (JA 480).

Likewise, LTC KG's answer that he thought [redacted] is easily explained by the fact that he was [redacted] Among other things, the answer is inconsistent with LTC KG's repeated assertions during general voir dire that he could follow the military judge's instructions, including applying the presumption of innocence to Appellant.

Finally, it is not clear how LTC KG's "Major League Infidel" bumper sticker and the fact that he was deployed at the time of Appellant's crime are even logically related, much less how they may be interpreted by a member of the public as evidence of bias. The sticker was on his truck for "about a year," and he

15 [redacted]

considered it a "morale decal" and a statement "[t]owards the enemy [he was] fighting" in Iraq. (JA 561). There is no indication that LTC KG imputed his views of "the enemy" in Iraq to all Muslims or to Appellant himself. In fact, LTC KG stated just the opposite. (JA 561–62); *Hasan*, 80 M.J. at 710 ("The record clearly demonstrates LTC KG's bumper sticker was a comment on the enemies of the United States, rather than on appellant or his religion."); *See Akbar*, 74 M.J. at 396 (finding a panel member was not disqualified when he made concerning comments about Islam but "because [the member] also expressed positive views of Muslims . . . and more importantly, because [he] stated openly that he would not be influenced in the course of the trial by any of his preconceptions about Muslims generally").

In conducting an implied bias analysis, the Court looks at the totality of the circumstances to determine what effect, if any, they might have on the public's perception of fairness knowing that a particular panel member served on the panel. *Woods*, 74 M.J. at 243–44. In the present case the risk is far from "too high" that the public would perceive that Appellant did not receive a fair trial. *Id.* Each of LTC KG's alleged biases are easily explained in context. Additionally, LTC KG repeatedly and unequivocally stated that he would follow all of the military judge's instructions, which included, *inter alia*, an instruction on the presumption of innocence and reminders that they were only to convict based on evidence

presented at trial. Finally, Appellant had the opportunity to explore any of these areas of inquiry with LTC KG during voir dire—and indeed did so with respect to his bumper sticker and his views on Islam. (JA 562–63). Even setting aside the question of waiver, the fact that Appellant questioned LTC KG and decided not to either challenge him for cause or use a peremptory challenge on him must be considered in the totality of the circumstances. In doing so, it is clear that a member of the public would not question the fairness of Appellant's trial. Accordingly, Appellant's argument that LTC KG was impliedly biased fails.

Issue Presented IV

WHETHER ARTICLE 45(b)'S PROHIBITION AGAINST GUILTY PLEAS TO CAPITAL OFFENSES IS CONSTITUTIONAL?

Summary of Argument

Article 45(b), as it existed at the time of Appellant's trial, clearly stated that an accused may not plead guilty to a capital offense. This Court has time and time again held that this statutory provision is constitutional. Since the Court last ruled on the issue, no changes in the law—including the Supreme Court decision in *McCoy*—require this Court to depart from its precedent.

Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. *United States v. Medina*, 69 M.J. 462, 464 (C.A.A.F. 2011).

Additional Facts[16]

As early as October 10, 2010, Appellant showed an inconsistent desire to plead guilty. Appellant submitted an offer to plead guilty on October 10, 2010 and withdrew the offer on October 21, 2010. (SJA 1503–04, 1507). After referral, on December 17, 2012, Appellant submitted a second offer to plead guilty. (JA 1020–26). Appellant's detailed defense counsel, still acting in this capacity, presented three options to the military judge. (JA 280). Two of the three options included Appellant submitting a plea of guilty to unpremeditated murder, attempted unpremeditated murder, or both. (JA 279–81).

The military judge rejected Appellant's offer. (JA 281). Regarding option one—pleading to the offenses as charged—the military judge found that accepting Appellant's plea would be "contrary to Article 45(b) and it is not legally permissible." (JA 280).

The military judge also rejected options two and three. In option two, Appellant would plead guilty to unpremeditated murder and attempted premeditated murder; in option three, Appellant would plead guilty to unpremeditated murder and attempted unpremeditated murder. (JA 281–82). The military judge reasoned that Article 45(b), read in conjunction with *United States*

[16] These facts are relevant to both this, and the next, issue presented.

v. Dock, 28 M.J. 117 (C.M.A. 1989), prohibited Appellant's offer to plead to lesser offenses. (JA 281– 82). Specifically, the military judge found:

> The offenses of attempted unpremeditated murder requires [sic] both the intent to kill, and an act that is more than mere preparation, and demonstrates the accused's resolve to commit the offense. The difference between that and the premeditated design to kill is very slight. You couple that with a number of acts that form the basis for the attempted murders and murders that happened in sequence, the four corners of the record will be that the accused is functionally admitting to a capital offense in violation of Article 45 . . . . Here, the accused is alleged to have murdered 13 people by shooting them with a firearm. In other words, you have a number of killings which are sequential over a period of time, rather than 13 murders all at once. The court believes that once the accused admits to intending to kill victims 1, 2 or 3, there comes a point of time when the panel could easily infer premeditation for the later murders, without anything more. . . . Therefore, the court believes that it would be the functional equivalent to admitting to a premeditated design to kill, which is barred by Article 45 . . .

(JA 281–82). The military judge also denied Appellant's request for reconsideration. (JA 302–03). The military judge offered to instruct the panel, during the sentencing phase, that Appellant desired to plead guilty but could not through operation of law. (JA 302). Appellant, however, declined the offer. (SJA 1802).

Appellant's desire to plead guilty disappeared as he thought more about his case. As stated *supra* pp. 12–18, Appellant motioned the court to proceed pro se, asked for a continuance to prepare his defense, and desired to present a theory that

on November 3, 2009 he was acting in defense of Mullah Omar and the Taliban. (JA 268–69, 369, 377–78, 435). Specifically, Appellant informed the military judge that his defense would be based on a theory that the soldiers at the SRP that day were preparing to deploy to an illegal war where they would commit illegal murders. (JA 369, 377–78, 435). After deciding to proceed pro se, Appellant never again expressed a desire to plead guilty.

Law

At the time of Appellant's crimes and subsequent trial,[17] Article 45(b) stated, "A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." *See also* R.C.M. 1004 (stating death may be adjudged only when an accused is convicted "by the concurrence of all the members of the court-martial . . . .").

In *United States v. Matthews*, the CMA considered the constitutionality of Article 45(b) and held:

> [W]e are unaware of any constitutional right to plead guilty in capital cases. Furthermore, in light of the special treatment given to capital cases by courts and legislatures and the irreversible effect of executing a capital sentence, we do not believe that Congress acted arbitrarily by providing in the Uniform Code that an accused cannot plead guilty to a capital charge."

[17] Article 45(b) was amended in 2016 to remove the prohibition on pleading guilty to a capital offense. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, §5227 (Dec. 2016)

16 M.J. 354, 362–63 (C.M.A. 1983). This Court has adopted and reaffirmed this position on multiple occasions since *Matthews* was decided. *See, e.g., United States v. Loving*, 41 M.J. 213, 292 (C.A.A.F. 1994); *United States v. Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995); *United States v. Gray*, 51 M.J. 1, 49 (C.A.A.F. 1999); *United States v. Akbar*, 74 M.J. 364, 400 (C.A.A.F. 2015).

In *United States v. McCrimmon*, this Court was even more explicit that there is no constitutional right to plead guilty in general:

> An accused does not have a constitutional right to plead guilty. *See Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). As the Constitution guarantees only a right to plead not guilty, an accused has generally only "a right to offer a plea of guilty," *United States v. Penister*, 25 M.J. 148, 151 (C.M.A. 1987), and may not even do that for "an offense for which the death penalty may be adjudged," Article 45(b), UCMJ, 10 U.S.C. § 845 (2000).

60 M.J. 145, 152 (C.A.A.F. 2004); *see also Straight*, 42 M.J. at 247 ("Although appellant asserts that he was deprived of the opportunity to negotiate a pretrial agreement in return for a plea of guilty, he had no constitutional right to plead guilty.").

Argument

An accused does not have a right to plead guilty. It follows, then, that an accused does not have a right to plead guilty to a capital offense. Thus, it was well within the authority of Congress to prohibit an accused from pleading guilty to any

charge or specification for which the death penalty may be adjudged. This Court has held as much every time it has considered the question, and nothing in *McCoy*—or any other case—requires this Court to reach a different result in the present case.

On its first occasion to consider question of whether Article 45(b) was constitutional, the CMA found that it was. The court relied on the fact that there is no constitutional right to plead guilty to an offense and that Congress had not "acted arbitrarily by providing in the Uniform Code that an accused cannot plead guilty to a capital charge." *Matthews*, 16 M.J. at 362–63. Since then, this Court has reaffirmed the constitutionality of the prohibition against pleading guilty to capital offenses multiple times, most recently in 2015. *Akbar*, 74 M.J. at 400 (finding the challenge to Article 45(b) "meritless based on our prior case law") (citing *Gray*, 51 M.J. at 49; *Loving*, 41 M.J. at 292; and *Matthews*, 16 M.J. at 362-63). Appellant urges this Court to depart from nearly forty years of precedent and now find that Article 45(b) is unconstitutional. Appellant, however, provides no justification for this Court to do so, and his reliance on *McCoy* for authority is misguided.

Appellant's reading of the holding in *McCoy* is simply far too expansive. As discussed *supra*, pp. 18–22, the Court in *McCoy* recognized that, while attorneys get to make certain decisions at trial, "[s]ome decisions . . . are reserved for the

client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." 138 S. Ct. at 1508. To this list, the Court added the "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* Appellant extrapolates from this that "an accused has a right to a guilty plea," (Appellant's Br. 99); however, that does not follow.

An accused's right to make certain decisions does not automatically confer upon him additional substantive rights. By analogy, while an accused has the right to decide whether to waive his right to a jury trial, he has no constitutional right to a trial by judge alone. *Singer v. United States*, 380 U.S. 24, 34–35 (1965); *United States v. Sherrod*, 26 M.J. 30, 32 (C.M.A. 1988); *United States v. Butler*, 14 M.J. 72, 73 (C.M.A. 1982); *see also* Rule for Courts-Martial [R.C.M.] 201(f)(1)(C)) (stating that trial by military judge alone is not permitted in capital cases). Similarly, an accused's "right to make his defense" is not unfettered. *Faretta*, 422 U.S. at 819. As Appellant learned during his trial, he could not present his desired "defense of others" because it was not raised by the evidence. The Military Rules of Evidence still apply and restrain an accused's right to present his defense. Likewise, an accused does not have a constitutional right to plead guilty just because he is empowered to make that choice. Article 45(b)'s prohibition of guilty pleas to capital offenses thus remained constitutional in the wake of *McCoy*.

Much of the state court dicta cited by Appellant provides policy reasoning in support of allowing an accused to plead guilty to a capital case. (Appellant's Br. 95) (E.g., "[a]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant[,]" and "the rights of citizens of a free society to make these types of choices concerning their own future are essential to the proper functioning of society as a whole, as well as our system of criminal justice.") (quoting *Chapman v. Commonwealth*, 265 S.W.3d 156, 175–76 (Ky. 2007)). To quote Chief Justice Rehnquist, "This is the sort of policy judgment that surely must be left to legislatures, rather than being announced from on high by the Federal Judiciary." *Chandler v. Miller*, 520 U.S. 305, 328 (1997) (Rehnquist, C.J., dissenting).

The question before this Court is not whether Congress *should* have prohibited guilty pleas to capital offenses, but rather whether it was permissible under the Constitution to do so. This Court has answered that very question on multiple occasions in the past and has reached the same result each time: that it was indeed permissible. Nothing in *McCoy* suggests that the Court should reach a different result in the present case. Because the prohibitions in Article 45(b) are constitutional, Appellant is entitled to no relief.

Issue Presented V

ASSUMING ARGUENDO THAT ARTICLE 45(b) IS CONSTITUTIONAL, WHETHER ITS APPLICATION IN THIS CASE NONETHELESS CONSTITUTED REVERSIBLE ERROR?

Summary of Argument

The CMA's decision in *United States v. Dock* is controlling in this case. The military judge correctly determined that allowing Appellant to plead guilty to the unpremeditated murder of thirteen people and the attempted premeditated or attempted unpremeditated murder of thirty-two other individuals, in the context of this case, would function as a de facto guilty plea to premeditated murder, in violation of Article 45(b). The reasoning in *Dock* prevented this course of conduct, remains good law, and should not be overruled.

Standard of Review

This Court reviews questions of statutory construction de novo. *United States v. Kohlbeck*, 78 M.J. 326, 330 (C.A.A.F. 2019).

Law

A. Article 45(b) and Dock—the "four corners" of the plea.

As discussed *supra*, pp. 72–78, at the time of Appellant's trial, Article 45(b) prohibited an accused from pleading guilty to an offense for which the death penalty could be adjudged. See Article 45(b), UCMJ (2012).

In *United States v. Dock*, the CMA, following its own precedent in *United States v. McFarlane*, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957), held that pleas in capital cases should be considered in light of the "four corners of the record to see if, for all practical purposes, the accused pled guilty to a capital offense." 28 M.J. 117, 119 (C.M.A. 1989) (internal quotations omitted). Pleas that, taken within the context of the particular case, constitute a plea of guilty to a capital offense are prohibited by Article 45(b). *Id.*

In *Dock*, the appellant was charged with premeditated murder while committing a robbery—effectively charging the appellant with both premeditated murder and felony murder. *Id.* at 118. The appellant pleaded guilty to the lesser included offense of unpremeditated murder and the robbery. *Id.* The issue in the case was "whether the Government could have rested its case and proved capital felony murder based solely on the accused's pleas to the two noncapital offenses, i.e., unpremeditated murder and robbery." *Id.* The CMA, in considering the appellant's actions at trial, answered in the affirmative and determined that the pleas, "taken within the context of [his] case, constituted a plea of guilty to felony murder, a capital offense." *Id.* at 119. Accordingly, the CMA found that the pleas violated Article 45(b) and the appellant's convictions were set aside.

In *McFarlane*, the defense counsel said to the law officer in open court, "I would like the court to understand [that] under the provisions of Article 45b of the

code, the accused is precluded from pleading guilty to Charge 1 and the specification." 8 U.S.C.M.A. at 98, 23 C.M.R. 322. The defense counsel then proceeded to allow the prosecution to put on its case without interruption. *Id.* As the court noted, "it became all too apparent that defense counsel had conceded guilt." *Id.* The statements and actions of defense counsel amounted to "[a] confession of guilt in open court" to a capital offense and were thus prohibited by Article 45(b) as a plea of guilty to "an offense for which the death penalty may be adjudged." Article 45(b), UCMJ (2012).

B. Statutory interpretation and the statutory scheme.

"Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "Unless the text of a statute is ambiguous, the plain language of the statute will control, [except where] it leads to an absurd result." *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (citations and quotations omitted). Where the plain language controls, and there is no absurd result, the "sole function" of the Court is to enforce it. *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (citation omitted) (internal quotation marks omitted)). As part of this analysis, courts presume Congress intended statutory terms to "have the meaning generally accepted in the legal community at the time of enactment."

Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 275 (1994) (citations omitted).

Courts must also look at statutory terms in their context, where each term's meaning necessarily informs the others. *United States Nat'l Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454–55 (1993). On this point, "identical words used in different parts of the same statute are . . . presumed to have the same meaning[,]" *Robers v. United States*, 572 U.S. 639, 643 (2014) (citations and quotations omitted) (second alteration in original), and no term is rendered void or insignificant. *Young v. UPS*, 575 U.S. 206, 226 (2015). Terms are ambiguous only if they are "reasonably susceptible of different interpretations." *Bd. of Trs. v. C&S Wholesale Grocers, Inc.*, 802 F.3d 534, 542 (3rd Cir. 2015) (citations and quotations omitted). If "the text [of a statute] creates some ambiguity, the context, structure, history, and purpose [may] resolve it." *Abramski v. United States*, 573 U.S. 169, 188 n.10 (2014).

C. Stare Decisis.

Courts analyze requests to overrule prior decisions under the doctrine of stare decisis. *United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015). As the Supreme Court has explained, "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and

perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "The doctrine is 'most compelling' where courts undertake statutory construction." *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003). Courts consider the following in determining whether they should overrule a prior decision: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Quick*, 74 M.J. at 336.

Argument

Dock is controlling in this case. As the military judge correctly held, if Appellant pleaded guilty to thirteen unpremeditated murders and thirty-two attempted premeditated or attempted unpremeditated murders, he could have been convicted of premeditated murder—a capital offense—without the government presenting any more evidence.[18] (JA 281). Appellant does not dispute the military judge's ruling. (Appellant's Br. 101) (stating "the military judge may

[18] As the military judge rightly noted, "[t]he difference between [intent to kill in unpremeditated murder] and the premeditated design to kill is very slight." (JA 281). "Premeditated design to kill means the formation of a specific intent to kill and consideration of the act intended to bring about death. The premeditated design to kill does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3–43–1 (1 Jan. 2010) (internal quotations omitted). Appellant's act of targeting his victims sequentially would undoubtedly show "the formation of a specific intent to kill and consideration of the act intended to bring about death."

have correctly determined that *Dock* dictated" that Article 45(b) prevented Appellant from pleading guilty to the noncapital offenses). To the contrary, Appellant argues that this Court should overrule the holding in *Dock*; however, Appellant has failed to provide sufficient justification for this Court to deviate from the "preferred course" of adhering to precedent.[19] *Payne*, 501 U.S. at 827.

A. *Dock* is not poorly reasoned or unworkable.

In *Dock*, the CMA held that, in capital cases, guilty pleas to noncapital offenses should be examined in conjunction with the "four corners of the record" to ensure they do not violate Article 45(b). Such a holding is supported by, and consistent with, the language of the statute itself and the CMA's own precedent in *McFarlane*.

Black's Law Dictionary defines a "plea of guilty" as "[a] confession of guilt in open court." (3d. ed. 1933).[20] The definition of a "plea of guilty" thus must include something more than just the formal entry of pleas. A "plea of guilty" is

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[19] In addition to arguing that this Court should overrule *Dock*, Appellant argues that the military judge erred by depriving Appellant of his regulatory right to plead guilty. (Appellant's Br. 115). Appellant's argument, however, ignores the fact that the "right" to plead guilty under R.C.M. 910(a) is not unlimited, and Article 45(b) is a valid limitation on an accused's ability to plead guilty. *Supra*, pp. 72–78. Accordingly, there is no error.

[20] The third edition of Black's Law Dictionary was the most recently published edition when Article 45(b) was enacted; therefore, this definition reflects "the meaning generally accepted in the legal community at the time of enactment." *Greenwich Collieries*, 512 U.S. at 275.

not "itself, a conviction" as Appellant alleges. (Appellant's Br. 106). This should be self-evident—once an accused enters a plea of guilty, he is not automatically convicted—a military judge must find him guilty after conducting the *Care* inquiry, and only after finding his plea to be provident. *See Chancelor*, 16 U.S.C.M.A. at 297, 36 C.M.R. 453; *see also Care*, 40 C.M.R. at 253.

Article 45, as a whole, is concerned with the greater guilty plea, including the underlying factual basis for the plea. Article 45(b)'s prohibition must be read in a way that is consistent with Article 45(a). The statutory scheme specifically cognizes treating the plea of guilty to include, at least, the providence inquiry required by the CMA in *Care*. The fact that this mechanism exists cannot be ignored. As stated *supra*, pp. 72–78, Article 45(b) is a constitutionally permissible prohibition on an accused's ability to plead guilty to a capital offense. Given the focus on the underlying factual basis of an accused's plea, it is a reasonable extension to interpret Article 45(b)'s prohibition to extend to situations where, because of the providence inquiry or the actions of the accused or his counsel at trial, the accused is de facto entering a plea of guilty.

The narrower definition of a "plea of guilty" proposed by Appellant would render Article 45(b) ineffective. As noted by this Court in *McFarlane*, "There would be no purpose served by the Code in its prohibition of a guilty plea if defense counsel could patently convey to courts-martial his belief that his client

was guilty and that a contrary plea was entered solely because a guilty person could not judicially admit his guilt." 8 U.S.C.M.A. at 99, 23 C.M.R. 323. Appellant's interpretation would violate the spirit of Article 45(b) by allowing the accused to circumvent its prohibition of admitting guilt to offenses punishable by death. This is exactly what McFarlane's attorney did: though his client pleaded not guilty, his attorney "figuratively . . . [shook] his head and [said], 'no it isn't so.'" *Id.* Thus, the narrow interpretation of a "plea of guilty" as the formal entry of pleas would eviscerate the purpose of Article 45(b) by allowing an accused to acknowledge his guilt to an offense punishable by death.

Appellant argues that the CMA's opinion in *Dock* is poorly reasoned because the court "failed[ed] to perform any statutory analysis . . . ." (Appellant's Br. 113). Appellee disagrees with that characterization of the opinion, as the entirety of the opinion analyzes the facts of the appellant's case as they applied to the statutory prohibition against pleading guilty to capital offenses. Additionally, it is notable that Appellant's argument as to the meaning of "plea of guilty" under Article 45(b) is consistent with the opinion of the lower court's dissenting judges in *Dock*. 26 M.J. 620, 629 (A.C.M.R. 1988) (Dejulio, C.J. and Carmichael, Robblee, JJ., dissenting). Importantly, however, both the majority and the CMA—at least implicitly—rejected this line of reasoning. Appellant's argument has no

more merit now than when the dissenting Army Court of Military Review judges made it when *Dock* was decided.

B. No intervening events justify overruling *Dock*.

Appellant's argument that *McCoy* "undercuts, if not decimates, *Dock*" fails on its face. (Appellant's Br. 114). Appellant's argument relies on the faulty premise that "*McCoy* announced that an accused has a constitutional right of autonomy to concede guilt at trial." (Appellant's Br. 114). As discussed *supra*, pp. 18–22, that is simply not the holding of *McCoy*. *McCoy* enshrines the choice of whether to concede guilt or to maintain innocence with the accused rather than his attorney. That is not the same as the right to plead guilty to a capital offense—or the functional equivalent thereof—as Appellant would suggest. In considering the underlying justification for the CMA's decisions in *Dock* and *McFarlane*, *McCoy* is inapposite and does nothing to disturb the validity of the prior precedent.

C. Upholding the reasoning in *Dock* is consistent with the reasonable expectations of servicemembers and instills public confidence.

The CMA decided *McFarlane* in 1957. 8 U.S.C.M.A. 96, 23 CMR 320. Thirty-two years later, the CMA reaffirmed the reasoning in *McFarlane* when it decided *Dock*. 28 M.J. at 120. This Court has cited *Dock* to varying degrees in three capital cases, and no decision has disturbed *Dock*'s treatment of Article 45(b). *Loving*, 41 M.J. at 292; *United States v. Curtis*, 44 M.J. 106, 141 (C.A.A.F. 1996); *Gray*, 51 M.J. at 49. Appellant has not provided sufficient justification to

abandon sixty-five years of precedent, especially when it provides a "predictable and consistent" standard to apply "for both litigants and the lower courts." *Quick*, 74 M.J. at 338. Appellant does not contest that the military judge's ruling was consistent with *Dock*, and even Appellant's detailed defense counsel admitted that pleading guilty to the lesser included offenses could run afoul of Article 45(b) under *Dock*. (*See* SJA 1547).

Appellant's argument that this Court should depart from the clear holding of *Dock* because it "is nearly a dead letter" is similarly unavailing. (Appellant's Br. 115). Appellant has provided no support or justification for this Court ignoring precedent merely because Congress amended the statute and there may not be any cases where the issues presented in *Dock* arise again. *Cf. Andrews*, 77 M.J. at 401 n.10 (finding that it would be "frivolous to overturn fifteen years of precedent for an eight-month period" when analyzing an R.C.M. that had been amended but the amendment had not yet taken effect). Among the myriad reasons not to accept Appellant's invitation to abandon precedent, there is no way for this Court—or any other court—to know whether Congress may enact a similar version of Article 45(b) in the future. This Court should apply *Dock* to the statute that was in effect at the time of Appellant's trial in the same manner that it has for the past sixty-five years. Such a consistent application will provide predictability for servicemembers

and lower courts alike and "contributes to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827.

The doctrine of stare decisis controls in this case. *Dock* is not poorly reasoned or unworkable, no intervening events mandate overruling *Dock*, and continuing to follow the holding and reasoning in *Dock* is consistent with servicemembers' expectations and instills confidence in the judicial system. Because the military judge correctly applied *Dock* in ruling that Appellant's proposed pleas would run afoul of Article 45(b), there is no error. Appellant is entitled to no relief.

Part A: Section II

Issue Presented VI

WHETHER THE PROSECUTOR'S SENTENCING ARGUMENT IMPERMISSIBLY INVITED THE PANEL TO MAKE ITS DETERMINATION ON CAPRICE AND EMOTION?

Summary of Argument

Trial counsel's sentencing argument was proper because it fairly commented on evidence adduced at trial. Even if this Court finds error, there was no prejudice given the overwhelming aggravating circumstances surrounding Appellant's criminal offenses. Without question, the members sentenced Appellant on the basis of the evidence alone; nothing improper impacted the integrity of Appellant's sentence.

Additional Facts

Private First Class (PFC) FV discovered she was pregnant and went through "a reverse SRP process" upon redeployment. (JA 745). On the day of the shooting, she was sitting in the last row of Station 13, near a set of doors, talking with several other soldiers. (SJA 1744). Once Appellant began shooting, PFC FV and two other soldiers began to "scramble" away from Appellant. (SJA 1745). Private FV made it to "the southernmost row of cubicles" where she was last observed "curled up in the fetal position," holding her stomach and yelling, "My baby! My baby!" (JA 755).

The noncommissioned officer-in-charge of the SRP site, Sergeant First Class MG, heard yelling from inside her office. She testified to the following order of events:

> Q: And as you're intently listening, Sergeant [MG], what do you hear?
> A: I hear the shots. I hear a lot of screaming. I hear yelling. I hear "Run, run." I hear "Move, move." I hear, "[h]e's coming, he's coming," and then I hear "Please don't, please don't, my baby, my baby." And then I hear shots.
> Q: Do you hear that voice again, Sergeant [MG]?
> A: No, sir.

(JA 750).

Other witnesses present at the SRP site that day could also hear a victim screaming, "My baby! My baby!" (JA 747, 751, 753, 755, 759, 760). One soldier

"tried to reach for [PFC VF]" because he could see she was hit and bleeding, saying "'My baby! My baby' over and over again." (JA 752). Once the first responders arrived, they rolled her over and she already appeared to be dead. (JA 756).

Appellant objected to admission of PFC VF's statements during the merits portion, on both Mil. R. Evid. 404(b) and Mil. R. Evid. 403(b) grounds. (JA 409). The military judge overruled the objection. (JA 409). As for Mil. R. Evid. 404(b), the government provided notice out of an "abundance of caution," but believed it to be "intertwined to such an extent with the crime that occurred that 404(b) notice [was] not required." (SJA 1611–12). The military judge noted this "seem[ed] to be part and parcel of the charges." (JA 283). Defense counsel took issue with the way the government wished to use the evidence, expecting to hear conflicting testimony about whether PFC FV screamed "My baby! My baby!" before, during, or after Appellant shot her. (JA 283). The government continued to offer the evidence to show "consideration," and "therefore, premeditation—if the accused heard that . . . and still decided to pull that trigger," it is "consideration of premeditation." (JA 284). The military judge held this evidence was "part of the res gestae of the offense," and denied the defense motion in limine. (JA 409).

The military judge also ruled:

> I have considered MRE 403 in my ruling, Major Hasan. I think the fact-finder can hear that evidence. I think that it

> is probative, and that the confusion of the issues – as I said, I think it is part of the res gestae of the offense – any confusion of the issues, and any danger of unfair prejudice, does not substantially outweigh the probative value of that particular evidence.

(JA 409).

At the end of trial, the military judge gave a limiting instruction to the panel on how to use this evidence in their deliberations: "This evidence was offered for the limited purpose of its relevance, if any, to premeditation and the intent to kill." (JA 771). "You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies, and that he therefore committed the offenses charged." (JA 772).

During presentencing proceedings, PFC FV's father testified to the impact Appellant's murder of PFC FV had on him. (JA 777). He explained his family has not been able to overcome this tragedy, as "[t]hat man did not just kill 13—he killed 15. He killed my grandson, and he killed me, slowly." (JA 777). Appellant did not object to this testimony, nor did he have any questions of the witness. (JA 777).

At the conclusion of the government's sentencing argument, and after Appellant elected to make no sentencing argument at all, (JA 797), the military judge gave additional instructions to the panel. (JA 797; SJA 1854–1869).

Appellant had no additions or objections to the military judge's instructions. (SJA 1834, 1835, 1870).

Importantly, the military judge told them that Appellant "is to be sentenced only for the offenses of which he has been found guilty." (SJA 1854). Later, she added, "You are advised that the arguments of the trial counsel, and his recommendations, are only his individual suggestions, and may not be considered as the recommendation or opinion of anyone other than such counsel." (SJA 1858). She continued:

> You also heard testimony from the father of one of the victims that he and his unborn grandchild were victims of the accused's crimes. You may only consider this as evidence of the emotional impact on the victim's family. You must bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty.

(SJA 1859). After approximately two days of sentencing proceedings and argument by government counsel, the panel deliberated for almost three hours before announcing a sentence that included death. (SJA 1809, 1812, 1871, 1875; JA 798).

Standard of Review

If an accused fails to object at trial, "improper argument during the sentencing proceeding" is reviewed "for plain error." *United States v. Norwood*, 81 M.J. 12, 19–20 (C.A.A.F. 2021). To prove plain error, "Appellant has the burden of establishing '(1) there was error; (2) it was plain or obvious; and (3) the

error materially prejudiced a substantial right.'" *Id*. (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011)). Whether an error constitutes "plain error" is a determination reviewed de novo. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007); *see also Marsh*, 70 M.J. at 104 ("Improper argument is a question of law that [this Court] reviews de novo.").

Law and Argument

"It is appropriate for trial counsel—who is charged with being a zealous advocate for the Government—to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975)). While arguments may not be aimed at "inflaming the passions or prejudices of the court members," sentencing arguments may ask members to fashion their sentences upon "cool, calm consideration of the evidence and commonly accepted principles of sentencing." *Id*. (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)).

Here, trial counsel fairly and appropriately argued the aggravating factors from evidence adduced at trial. Even if this Court finds error, it should still be confident that Appellant was sentenced on the basis of the evidence alone, considering the whole record, including the strength of the government's sentencing case. Ultimately, Appellant's claims are without merit.

A. "A single bullet—two lives lost" was factually accurate and a fair comment on the evidence adduced at trial.

Trial counsel requested the panel impose the death penalty, "because of what [Appellant] did, because of who he did it to, because of where he did it, and because of when he did it." (SJA 1836). For approximately eighteen pages in the record, trial counsel expounded upon these reasons. (SJA 1836–1853). As trial counsel reviewed the impact of Appellant's offenses on each of the thirteen dead victims, and many of the thirty-one injured victims, he dedicated only eight sentences to PFC VF. (SJA 1836–37). Noting PFC VF's last remaining thoughts were "for that of her unborn child," trial counsel correctly stated: "A single bullet punctured her lungs and her heart; a single bullet ended her life, and that of her unborn child, and broke her father's heart. Death is fickle. A single bullet - two lives lost, and a father's changed forever." (SJA 1848). This was factually accurate and fair commentary on the evidence. (JA 765). *See Norwood* 81 M.J. at 20 (taking no issue when trial counsel referred to appellant as "a child molester" because the "[a]ppellant was prosecuted for and convicted of a sexual offense against a child," therefore "this language actually was a permissible characterization supported by the charge and the evidence"); *see also United States v. Voorhees*, 79 M.J. 5, 11 (C.A.A.F. 2019) (noting that a trial counsel's "word choice" can be improper argument when it is a "personal attack on the defendant"

but not when it is a "commentary on the evidence") (citation and internal quotation marks omitted).

While Appellant was not charged with killing an unborn child, trial counsel's comments still stayed within the reasonable range of what the evidence showed. Appellant murdered a pregnant soldier. (JA 765). As the military judge correctly found, her last words were res gestae of the offense. (JA 409). Nothing in trial counsel's argument—in the direction, tone, or theme of the argument—was calculated to inflame the panel's passions based simply on an accurate statement of the circumstances surrounding PFC VF's murder.[21]

[21] Furthermore, it was not error to admit evidence of PFC VF's final words, which carried with them the inference she was pregnant, because this showed Appellant's premeditation for her murder. (JA 51; JA 775). The nonbinding cases cited by Appellant in support of error are not analogous. In those cases, the evidence of an individual's pregnancy was not relevant or part of the res gestae of the offenses as it was here. *White v. Thaler*, 610 F.3d 890, 908 (5th Cir. 2010) ("The fact that [the victim] was pregnant does not tend to make it more or less probable that [the appellant] had the requisite intent to hit either victim"); *Lewek v. State*, So.2d 527, 533–534 (Fla. Dist. Ct. App. 1997) ("Thus, we conclude that the evidence of the victim's pregnancy was irrelevant because it neither proves nor disproves any material issue in the case, and as such, it should have been excluded"); *Vaczek v. State*, 477 So.2d 1034, 1035 (Fla. Dist. Ct. App. 1985) (Trial judge granted motion in limine to exclude evidence that victim of an aggravated assault lost her pregnancy). In the present case, however, the testimony regarding PFC VF's pregnancy came only after the military judge ruled that it was admissible and was properly restricted to the issue of premeditation by a limiting instruction. (SJA 1859). Thus, there was no error in admitting evidence of PFC VF's pregnancy.

Finally, the fact that Appellant's single bullet not only took PFC VF's life, but that of her unborn baby, is also appropriate victim impact evidence for members to weigh. Victim impact testimony is admissible in capital cases to inform the panel about "the specific harm caused by the [accused]." *Akbar*, 74 M.J. at 393 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). Private VF's father testified, without objection, during presentencing about the impact Appellant's rampage had on him: "That man did not just kill 13—he killed 15. He killed my grandson, and he killed me, slowly." (JA 777). Trial counsel's reference to the loss of PFC VF's unborn baby during the sentencing argument accurately reflected the pain and loss experienced by PFC VF's father. *See United States v. Wilson*, 35 M.J. 473, 476 (C.A.A.F. 1992) (acknowledging evidence of the harm inflicted on the victim's family is admissible under RCM 1001(b)(4) to show "the full measure of loss suffered by all of the victims, including the family and the close community") (quoting *United States v. Pearson*, 17 MJ 149, 153 (C.M.A. 1984)).

B. Neither the argument's "undertones of war," nor the trial counsel's use of personal pronouns was erroneous.

Trial counsel's argument constituted neither an "explicit emotional plea," nor "an impermissible 'us vs. them' argument" as Appellant alleges. (Appellant's Br. 129–30). Instead, trial counsel's sentencing argument flowed logically from the entire theme and theory of both parties and was supported by the evidence. It

was not trial counsel who injected "heavy undertones of war" into the court-martial, (Appellant's Br. 130), but rather Appellant set this tone himself in his opening statement. (JA 723) ("And the dead bodies will testify that war is an ugly thing."). Additionally, the evidence adduced at trial demonstrated Appellant directly targeted his victims based on their active-duty status because he felt he "was on the wrong side [of] America's war on Islam." (JA 723). When trial counsel concluded his sentencing argument with reference to Appellant's motives—or as Appellant put it, his self-identification as a mujahid, (JA 723)—this was acceptable because trial counsel's commentary fit appropriately within the entirety of the ongoing proceedings. (JA 796). To hold otherwise would require this Court to surgically carve out portions of the argument without regard to context—a practice this Court has rejected. *Baer*, 53 M.J. at 238 ("The focus of our inquiry should not be on words in isolation," but on the argument "viewed within the context of the entire court-martial."). Trial counsel's message simply focused on evidence that was already appropriately admitted as evidence in aggravation: that Appellant intentionally selected his victims based on their status as active duty American military members in order to fight against "America's war on Islam." (JA 723; SJA 1765); R.C.M. 1001(b)(4).

Further, Appellant's argument that the trial counsel's use of the terms "our formation" and "we are taking his life" constituted error is without merit.

(Appellant's Br. 129–30). First, the trial counsel's reference to "13 souls who have departed our formation" is not the type of personal pronoun usage that this Court has previously found to be problematic, because there was no accompanying "[i]mproper vouching" that would otherwise risk panel members adopting the prosecutor's personal views. *See United States v. Fletcher,* 62 M.J. 175, 180–81 (C.A.A.F. 2005) (forbidding "[p]rohibited language" like "I think it is clear," "I'm telling you," and "I have no doubt"). Instead, usage of the term "our" was an appropriate reference to the specific victims involved who, like the trial counsel and each member of the panel, were members of the U.S. Army. *See United States v. Witt*, No. ACM 36785 (reh), 2021 CCA LEXIS 625, at *139 (A.F. Ct. Crim. App. Nov. 19, 2021) ("Similarly, references to the victims SrA AS and SrA JK as 'our own' were not inappropriate, especially in light of the fact those victims, the parties, Appellant, and all of the members involved in the rehearing were in the Air Force.").

Finally, this also did not constitute error because it did not impermissibly invite the panel to impose the death penalty based on sheer emotion. Counsel actually discouraged the members from allowing emotion to infiltrate their sentence deliberations: "You should, however, have mercy in your sentence. It should speak to the 13 souls who have departed our formation. You should reserve your emotion for their souls, and your compassion for their families, and your

mercy for their memory." (SJA 1853). By asking the members to "reserve [their] emotion for [the victims'] souls," trial counsel was encouraging the members *not* to take their emotion out on Appellant. This is the opposite of what the prosecutor did in *Taylor*, where he urged the jury to "get mad" at the appellant. *State v. Taylor,* 944 S.W.2d 925, 937 (Mo. 1997).

To the contrary, trial counsel essentially asked members to fashion their sentences upon "cool, calm consideration of the evidence," *Baer*, 53 M.J. at 237, when he asked members to dissect Appellant's apparent desire for martyrdom from the consequences of his actions: "Do not be fooled. He is not giving his life. We are taking his life. This is not his gift to God; this is his debt to society." (SJA 1853). Indeed, "[c]ontext is important." (Appellant's Br. 130). Context reveals that trial counsel could have communicated the same concept without the word "we" by using the passive voice: i.e., "his life is being taken." The point was that Appellant would not achieve his goal of martyrdom if he received a sentence of death—it was not an "us vs. them" argument. This was far from unduly personalizing or inflaming the passions of the court members, as in *Marsh*, where trial counsel spoke directly to the lives of those particular members—suggesting appellant would be working on their helicopters. 70 M.J. 101, 106 ("Trial counsel personalized his argument to the panel members by referring to Marsh as working on 'your'" aircraft and questioning whether Marsh could be trusted with the lives

of the unit's pilots."). Instead, it addressed why Appellant must face the death penalty, and that was because he owed a "debt" for his criminal offenses. (SJA 1853). As nothing about trial counsel's arguments was erroneous, this Court should find that no plain or obvious error occurred.

C. The trial counsel's sentencing argument was proper and fair.

"A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Norwood*, 81 M.J. at 19 (cleaned up); *Fletcher*, 62 M.J. at 179 (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). For at least two reasons, trial counsel's presentencing argument did not "overstep the bounds of . . . propriety and fairness." *Norwood*, 81 M.J. at 19.

First, throughout the entire argument, trial counsel was appropriately deferential to the panel's ability to make their own decision, instead of bullying them into his opinion on the warranted sentence. Unlike the counsel in *Norwood*, trial counsel did not "pressure[] the members to consider how their fellow service-members would judge them and the sentence they adjudged." 81 M.J. at 21. Instead of goading the panel members with what was already an inherently sensitive and emotional subject, trial counsel acknowledged "[i]t is difficult to articulate, and even harder to measure, and difficult to weigh, the emotional and

psychological loss to a parent of their son or their daughter." (SJA 1851). He then empowered the panel to exercise their own judgment, stating, "The weight to be given any item is yours alone." (SJA 1851). Trial counsel in this case exemplified "the token trait of a good prosecutor," being "adversarial without being hostile." *United States v. Voorhees*, 79 M.J. 5, 14 (C.A.A.F. 2019).

Second, trial counsel here struck legitimate "hard blows," because he was not employing unduly inflammatory commentary, but instead providing a composed recitation of the particular facts in this case. *Berger*, 295 U.S. at 88. Trial counsel "limited [himself], in the attempted murders, to only those most seriously wounded," instead of going through each listed victim on the charge sheet. (SJA 1803). He made no personal attacks on Appellant or his counsel. *See Voorhes*, 79 M.J. at 11 (finding error where the government counsel insulted the accused with terms like "perverted," "deplorable," "disgusting," "chauvinistic," "narcissistic," "pig"). This was not excess zeal but instead was the appropriate "earnestness and vigor" the adversary system permits. *Berger*, 295 U.S. at 88.

D. Even if there was error, there was no material prejudice to Appellant's substantial rights.

Even if this Court finds plain or obvious error, Appellant suffered no prejudice. In order to evaluate prejudice, the Court looks at the cumulative impact of the improper argument on the accused's substantial rights and the fairness and

integrity of his trial.[22] *Fletcher*, 62 M.J. at 184. The Court balances three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id*. In *United States v. Halpin*, this Court extended the *Fletcher* test to improper sentencing argument, considering in the third factor "whether the weight of the evidence . . . supports the sentence imposed by the panel." 71 M.J. 477, 480 (C.A.A.F. 2013). "In assessing the impact of improper sentencing argument on an Appellant's substantial rights . . . [this Court] asks whether the outcome would have been different without the error." *Norwood*, 81 M.J. at 19–20; *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014). Here, all three factors weigh heavily in favor of the government.

First, the severity of the trial counsel's misconduct, if any, was minimal. To start, these comments were such a minor part of the argument, hardly taking up a few lines out of the eighteen pages in the record that constituted trial counsel's

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[22] Appellant suggests that any error should be tested for harmlessness beyond a reasonable doubt. (Appellant's Br. 128) Appellant's reliance on *United States v. Carter* is misguided, however, as that case dealt with an improper argument that "essentially shifted the burden of proof to Appellee to establish his innocence—a violation of protections of the Fifth Amendment." 61 M.J. 30, 34–35 (C.A.A.F. 2005). Appellant does not allege any such constitutional error in the present case. *Cf. Hennis*, 75 M.J. at 842–845 (testing only the error that "derogated [the] appellant's right, guaranteed by the Sixth and Eighth Amendments to the Constitution, to present extenuation and mitigation evidence" for harmlessness beyond a reasonable doubt).

sentencing argument. (SJA 1836–53); *See Norwood*, 81 M.J. at 20 (finding no prejudice when, *inter alia*, an improper argument "only made up a few lines of [the] rebuttal argument," rendering any impact on sentencing not "severe"). This was not the focus on trial counsel's argument, nor did trial counsel harp on these statements—directly contrary to the scenario in *Fletcher*, which involved "several dozen examples of improper argument." 62 M.J. at 185; *see also United States v. Moore*, 917 F.2d 215, 225 (6th Cir. 1990) (factoring in "[t]he remarks were an isolated incident during the prosecutor's initial closing argument"); *contra United States v. Sewell*, 76 M.J. 14,20 n.1 (C.A.A.F. 2017) (noting trial counsel's use of the term "I" or "we" more than seventy-five times). As such, this factor weighs in favor of the government.

Second, the military judge's sentencing instructions cured any alleged prosecutorial misconduct. While there were no immediate curative instructions during trial counsel's arguments, the military judge appropriately provided instructions that framed these comments during her sentencing instructions. For example, the military judge told the panel:

> You also heard testimony from the father of one of the victims that he and his unborn grandchild were victims of the accused's crimes. You may only consider this as evidence of the emotional impact on the victim's family. You must bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty.

(SJA 1859). "'[This Court] presume[s], absent contrary indications, that the panel followed the military judge's instructions' with regard to . . . trial counsel's arguments." *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018) (quoting *Sewell*, 76 M.J. at 19). Accordingly, the military judge's instructions cause the second *Fletcher* factor to weigh in favor of the government.

Finally, the egregiousness of Appellant's crimes and the great weight of the evidence supporting Appellant's sentence demonstrate that any error in the sentencing argument was not materially prejudicial. The panel listened to weeks of testimony and received over one hundred prosecution exhibits. (JA 233–60). Many of these were photos of parents, children, and families—all of whom had felt the impact of Appellant's crimes. (JA 247–50). The walk-through of the crime scene following Appellant's massacre gives a sense of how truly heinous the murders were. (*See* SJA 1799). The trial counsel's actions of mirroring Appellant's war-themed opening statement, minimal use of first-person pronouns, and referencing the pregnancy of one of the deceased victims simply does not tip the scales when considering the thirteen souls lost and the many more gravely injured. Appellant offers no support for the notion that, but for any error, the outcome of the proceeding—a sentence of death—would have been different; thus, his allegation of error fails. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). Appellant's sentence of death has sufficient guarantees of reliability,

and he is not entitled to a sentencing rehearing, as he requests. (Appellant's Br. 130).

Issue Presented VII

WHETHER THE CONTINUED AND FORCIBLE SHAVING OF APPELLANT IS PUNISHMENT IN EXCESS OF THE SENTENCE HE RECEIVED AT HIS COURT-MARTIAL AND VIOLATED ARTICLE 55 AND THE EIGHTH AMENDMENT?

Summary of Argument

Appellant's presented issue has been rendered moot because the Army has since granted his request to grow a beard. Further, although Appellant spends an extensive amount of time arguing that the United States Disciplinary Barracks (USDB) violated the Religious Freedom Restoration Act (RFRA), Appellant does not actually assert a claim of the violation of his rights under RFRA. Instead, Appellant makes the baseless assertion that an alleged violation of RFRA can be regarded as an unlawful increase in the severity of Appellant's sentence and thus a violation of the Eighth Amendment and Article 55. (Appellant's Br. 144). That is simply not the case. Appellant fails to meet his burden of demonstrating any risk to his health or safety that arose from the previous failure to permit him to grow a beard, which means that Appellant cannot state a claim for a violation of the Eighth Amendment or Article 55.

Additional Facts

On June 6, 2012, while Appellant's court-martial was pending, Appellant requested a religious exception to Army shaving regulations[23] from his commander. *See Hasan v. Gross*, 71 M.J. 416, 417 (C.A.A.F. 2012); (SJA 1526). That request was denied on June 7, 2012. (SJA 1527). On June 12, 2012, Appellant requested an exemption from the Deputy Chief of Staff, G-1 (DCS, G-1), which was denied on June 26, 2012. (SJA 1528–1544).[24]

Appellant arrived at the United States Disciplinary Barracks (USDB) shortly after his trial. Inmates at the USDB who do not comply with grooming requirements and other regulations may be restrained and compelled with reasonable force. *See* Army Reg. 190-47, The Army Corrections System, para. 11-5f (Jun. 15, 2006) ("In those instances when a prisoner refuses to bathe or comply with haircut or shave standards, refuses to eat, accept necessary medical attention,

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[23] Army Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia, para. 1-8(a)(2)(c) (3 Feb. 2005) (Revised, May 11, 2012) ("Males will keep their face clean-shaven when in uniform, or in civilian clothes on duty . . . beards are not authorized . . . If appropriate medical authority allows beard grown, the maximum length authorized for medical treatment must be specific.").

[24] Appellant's pretrial requests for religious accommodation and the denials thereto precipitated extensive litigation on the subject of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*., including writs for extraordinary relief to this Court. *See Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012).

or be vaccinated in accordance with Army health regulations, the prisoner may be restrained with the reasonable force necessary to administer the appropriate action."). On September 16, 2013, Appellant requested a religious exception to the grooming standard, which was denied by the DCS, G-1, Lieutenant General (LTG) Howard Bromberg, on September 27, 2013. (JA 1393–1401).

Appellant submitted a successive request for exemption on December 11, 2016. (JA 1344) ("I request an exception to policy to the facilities shaving policy so that I may grow a beard in accordance to [*sic*] religious tradition."). That request was denied by the DCS, G-1 designee and Senior Official Performing the Duties of the Assistant Secretary of the Army (Manpower and Reserve Affairs), Mr. Raymond Horoho, on March 19, 2018. (JA 1400–01). However, on July 19, 2021, LTG Gary M. Brito, DCS, G-1, gave approval to Appellant to wear a beard no longer than one-quarter inch, subject to inspection at any time, due "to the unique security concerns present in a confinement facility . . . ." (SJA 1579–80)

Jurisdiction and Standard of Review

This Court has jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55. *United States v. White*, 54 M.J. 469, 471–72 (C.A.A.F. 2001). However, "[a] prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement

conditions." *United States v. Wise*, 64 M.J. 468, 469 (C.A.A.F. 2007). Absent some unusual or egregious circumstance, an appellant must demonstrate he has exhausted the prisoner grievance system and his right to petition his command for relief under Article 138, UCMJ. *Id*. at 471.

Further, "Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies,' and 'an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation.'" *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 169 (2016) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013)). No live controversy remains when the relief sought has been already provided. *Kingdomware*, 579 U.S. at 169 ("[D]eclaratory relief would have no effect here with respect to the present procurements because the services have already been rendered.").

Appellate courts conduct a *de novo* review of allegations of post-trial cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ. *Wise*, 64 M.J. at 473.

Argument

A. This issue presented is moot because Appellant's request to grow a beard has been granted.

If an appellant has received the relief that he seeks in lodging an appeal prior to or during the pendency of an appeal, the relevant issue is mooted, leaving nothing for this Court to decide. *See, e.g.*, *United States v. Shorter*, 27 F. 4th 572,

575 (7th Cir. 2022) ("Mr. Shorter's release from prison renders moot his pursuit of compassionate release. All that he requested—and all the district court could have done for him . . . has been accomplished by his release from prison to home confinement."); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F. 4th 1266, 1283–84 (11th Cir. 2021) ("[W]ell after the commencement of this litigation, the City repealed the challenged Ordinance. . . . [T]he repeal mooted the Plaintiffs' claims for declaratory and injunctive relief against the Ordinance."). Here, the Army's approval of Appellant's request moots his appeal of its previous denial. All that Appellant requested has been accomplished by the Army's granting of permission for him to grow a beard, subject to the requirement that its length be limited to a quarter of an inch. That approval—and not any prior denials of Appellant's request that preceded it—is the relevant decision of the Army on this matter, and it is a decision in favor of granting Appellant's claim.[25]

Although Appellant attempts to circumvent the mootness argument by stating "Appellant had requested to grow a full beard," (Appellant's Br. 138), that

[25] Appellant does not argue, nor do any facts support, the possibility that the Army will revoke its approval in the event this Court dismisses this assignment of error, indicating that the voluntary cessation exception to mootness does not apply. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167, 189 (2000) (indicating that voluntary cessation of a challenged practice does not moot a case unless "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.") (internal quotation marks omitted).

is inaccurate. Appellant's most recent request for a religious exemption, dated December 11, 2016, read as follows: "I request an exception to policy to the facilities shaving policy so that I may grow a beard in accordance to [*sic*] religious tradition." (JA 1344). The addendum to Appellant's request similarly stated, "I, Nidal Hasan, hold a sincerely held religious belief that Muslim males are required to were [*sic*] a beard because of statements that were attributed to our Prophet Muhammad and recorded in tradition." (JA 1345–46). Although Appellant went on to quote the Prophet Muhammad as having said "Cut the moustaches short and leave the beard (as it is.)," the "(as it is)" is a textual supplementation inserted by the Appellant. "[L]eave the beard"—the only portion attributable to the Prophet Muhammad—is a portion that has been debated by scholars of Islam, with many concluding that it is not an admonition to grow a beard of limitless length. *See* BBC News, *Are beards obligatory for devout Muslim men?*, June 27, 2010, at https://www.bbc.com/news/10369726. In light of that fact, nothing on the face of Appellant's request, nor of necessity implicitly read into his request, evinces a request to grow a "full" beard as he now claims in his brief to have requested.

To the extent Appellant now seeks to request relief from the Army's restriction of his beard length to a quarter of an inch, his attempt to do so for the first time in the context of this appeal runs afoul of the requirement that he first exhaust his administrative remedies. *Wise*, 64 M.J. at 473. Here, Appellant has

raised no challenge to the beard length restriction within the prisoner grievance system nor has he petitioned his command for relief from that restriction under Article 138, UCMJ. This exhaustion requirement, which is jurisdictional, exists for good reason: prison officials and commanders must be given the opportunity to assess the request *for a beard of greater length* (not just the request to have a beard) based on specific facts pertaining to the Appellant and to his conditions of confinement, something this Court is not in a position to do *ab initio de novo*.

Because the Army has, since July 19, 2021, permitted Appellant to grow a beard as he has requested, and because Appellant has failed to exhaust his administrative remedies as they relate to his novel request to grow a beard of a greater length than permitted, Appellant's argument with respect to the previous denial of his request to wear a beard is moot and should be dismissed by this Court for want of jurisdiction.

B. Appellant's purported RFRA violation fails to state an Eighth Amendment or Article 55 claim.

Even if this Court does not regard this issue as moot, it fails because Appellant does not state a claim for violation of the Eighth Amendment or Article 55. Appellant's effort to shoehorn an indirect RFRA complaint into his challenge under Article 55 and the Eighth Amendment must be rejected out-of-hand. Although RFRA arguments feature heavily in the portion of Appellant's brief addressing this issue presented, never does he directly lodge a challenge to his

sentence or to the Army's shaving policy under RFRA or the Free Exercise Clause of the First Amendment. Rather, Appellant's theory is that his forced shaving constitutes a violation of RFRA, and that a violation of RFRA is sufficient to render his punishment violative of the strictures of the Eighth Amendment and Article 55. However, neither the Eighth Amendment nor Article 55 protect prisoners from impositions on their religious freedom.

The Supreme Court has stated that punishments violate the Eighth Amendment when they "are incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) (internal quotation marks and citations omitted). Although Article 55 provides greater protections than the Eighth Amendment in that it additionally protects against specific punishments and conditions (e.g., "The use of irons" or "flogging"), Appellant does not invoke the additional protections of Article 55 and thus the legal standard for analyzing his assignment of error under Article 55 and the Eighth Amendment are the same. *See United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) ("We apply the Supreme Court's interpretation of the Eighth Amendment in the absence of any legislative intent to create greater protections in the UCMJ. Because Lovett makes no claim that the conditions of his confinement violate any greater protections afforded by Article 55, UCMJ, we need not

determine the extent to which that statute may be broader than the Eighth Amendment.").

To raise a challenge under the Eighth Amendment and Article 55, Appellant must demonstrate: "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to his health and safety; and (3) that he has exhausted the prisoner-grievance system and that he has petitioned for relief under Article 138." *Lovett*, 63 M.J. at 215 (cleaned up).

Although Appellant has exhausted the prisoner-grievance system and has sought relief under Article 138 with respect to his request to be permitted to grow a beard,[26] he cannot show that he has suffered a denial of necessities of the kind cognizable under the Eighth Amendment, nor can he show that prison officials acted with deliberate indifference to his health and safety. Appellant's burden to show deliberate indifference requires him to show that "official[s] [knew] of and disregard[ed] an excessive risk to inmate health or safety; the official[s] must both be aware of facts from which the inference could be drawn that a substantial risk of

[26] However, as noted previously *supra* at 111–12, Appellant has not exhausted his administrative remedies with respect to any request to grow a beard of unrestricted length.

serious harm exists, and [they] must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Appellant has made no such showing. In his brief, Appellant states, "There is a culpable state of mind on the part of the USDB officials amounting to deliberate indifference to appellant's health and safety, based on the refusal to provide a reconciliation between the USDB's compelling governmental interest and an individualized assessment of appellant, or to consider the least restrictive means to accomplish their identified compelling governmental interest." (Appellant's Br. 147). This argument fails on its face, as it makes no effort to assert any risk to Appellant's health and safety—let alone an "excessive" one—nor does it demonstrate official awareness and disregard thereof. The "health and safety" of inmates that must be protected under the Eighth Amendment refers to the receipt of "adequate food, clothing, shelter, and medical care" and "reasonable measures to guarantee the safety of the inmates." *Farmer*, 511 U.S. at 832 (citations omitted). Further, a prison official's act or omission "must result in the denial of the minimal civilized measure of life's necessities." *Id.* at 834 (citations and internal quotation marks omitted).

Here, Appellant's perquisites pertaining to health and safety are not implicated in the slightest, and he makes no attempt to assert that they are. Although Appellant asserts that the purported affront to his religious beliefs by

being shaved against his will is a deprivation of religious liberty, no court has interpreted the Eighth Amendment to protect against deprivations of religious liberty. *See, e.g.*, *McEachin v. McGuinnis*, 357 F.3d 197, 199 (2d Cir. 2004) (holding that the inmate's Eighth Amendment rights were not violated when he was subjected to a week-long restricted diet that violated his religious beliefs); *Tashbook v. Petrucci*, 2021 WL 8013812, *3 (S.D.N.Y. Apr. 22, 2021) (conditions of confinement amounting to denied access to educational, recreational and religious programs did not constitute a serious threat to inmate's health and safety); *Maxwell v. Clarke*, Civil A. No. 12-00477, 2013 WL 2902833, at *1, *4 (W.D. Va. June 13, 2013) (finding that conditions that did not permit inmate to attend religious services did not support a claim for violation of the Eighth Amendment because they did not entail "any significant physical or emotional injury" or "an objectively serious deprivation of a basic human need"). Thus, while Appellant's allegations regarding the shaving of his beard may be relevant to concerns under RFRA or the First Amendment, they cannot support Appellant's Eighth Amendment or Article 55 claim.

C. Appellant fails to demonstrate a violation of RFRA.

Even if this Court wishes to take notice of Appellant's RFRA argument as a direct challenge under that statute rather than as a basis for an Eighth Amendment claim, Appellant's assignment of error must be denied because it is without merit.

"To establish a prima facie RFRA defense, an accused must show by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that the defendant sincerely holds." *United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016). If a claimant establishes a prima facie case, the burden shifts to the government to show that its actions were "the least restrictive means of furthering a compelling governmental interest." *Id.* at 416; *see also* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–1(a)–(b) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

Here, there is no substantial burden imposed on Appellant's religion because the Army has permitted him to grow a beard, subject to the limitation that it be no longer than a quarter inch. (SJA 1579–80). As this Court has recognized, "having restraints placed on behavior that is religiously motivated does not necessarily equate to either a pressure to violate one's religious beliefs or a substantial burden on one's exercise of religion." *Sterling*, 75 M.J. at 417. Further, this Court has stated, "A substantial burden is not measured only by the secular costs that government action imposes; the claimant must also establish that she believes there

are religious costs as well, and this should be clear from the record." *Id.* Although Appellant has articulated a belief that there are religious costs to having *no beard*, *see* JA 1345–46 ("Muslims must obey or risk the prospect of potentially going to Hell."), Appellant has at no time clearly asserted a similar belief with respect to the consequences of having a beard that is limited to a quarter inch in length.

As noted previously, *supra* at 109–12, this Court is in no position to impute such a belief to the Appellant nor to render any assessment regarding whether such a belief was a religious belief that he sincerely held. Those would be tasks suited to the exception-to-policy-request process, the results of which this Court could then review were Appellant to remain aggrieved. *Wise*, 64 M.J. at 473. Because Appellant fails to demonstrate that the government's decision to limit his beard to a length of a quarter of an inch "(1) substantially burdens (2) a religious belief (3) that [he] sincerely holds," *Sterling*, 75 M.J. at 415, he has failed to establish a prima facie RFRA case.

Even if Appellant were able to establish a prima facie case, his RFRA claim would fail because the quarter-inch length restriction is "the least restrictive means of furthering a compelling governmental interest." *Sterling*, 75 M.J. at 416. That the government has a compelling interest in furthering prison safety and security by preventing prisoners from hiding contraband in their beards has been recognized by the Supreme Court. *See Holt v. Hobbs*, 574 U.S. 352, 363 (2015)

("We readily agree that the Department [of Correction] has a compelling interest in staunching the flow of contraband into and within its facilities . . . ."). The beard-length limitation is "the least restrictive means" of furthering that compelling interest. The very threat posed by beards with respect to contraband concealment arises from their length. Because shorter beards would not be effective at hiding contraband and would have no means of preventing contraband from falling out, limiting beard length is directly and tightly connected to furthering the government's safety and security objectives while balancing the interest of Appellant in being able to grow a beard. That said, to the extent Appellant now presses for a full beard, that is not a remedy that would be consistent with the government's recognized safety and security interests. *Cf. Smith v. Owens*, 13 F. 4th 1319, 1328 (11th Cir. 2021) ("[T]he district court correctly refused to allow Smith to grow an untrimmed beard. . . . [T]he [government] presented evidence that untrimmed beards would be unworkable and dangerous in its prisons, both generally and as applied to Smith."). But, again, Appellant must be required first to press his full-beard argument in the administrative process so that relevant Army officials have the opportunity to undertake the fact-specific, particularized inquiry necessary to weigh Appellant's request in the context of his unique circumstances.

In sum, Appellant fails to establish a prima facie RFRA case because he has failed to demonstrate that being permitted to grow a beard of limited length places

a substantial burden on his practice of a sincerely held religious belief. Further, to the extent Appellant now seeks permission to grow a full beard, this Court lacks jurisdiction because Appellant has not previously presented a full-beard request to the prisoner-grievance system nor to his command under Article 138, where relevant fact-finding and fact-specific determinations could be properly made that this Court could then review.

This Court should dismiss this assignment of error and reject Appellant's claim that his conditions of confinement violate his rights under the Eighth Amendment and Article 55.

Issue Presented VIII

WHETHER APPELLANT WAS DEPRIVED HIS RIGHT TO COUNSEL DURING POST-TRIAL PROCESSING?

Summary of Argument

Appellant knowingly, intelligently, and voluntarily waived his right to counsel during post-trial processing. Appellant, after going over his post-trial rights on two occasions, and after consulting with an attorney over the course of three years, decided to submit an extensive and exhaustive post-trial submission. Appellant submitted a letter to the Staff Judge Advocate (SJA) acknowledging that he was allowed to represent himself at trial and that he was aware he was waiving his separate right to representation during the post-trial phase, and the letter stated

his specific goals in making his submission. These acknowledgements, coupled with the 456-page matters Appellant submitted, evince the clear intent to represent himself during this stage of the proceedings.

Standard of Review

The waiver of a constitutional right is reviewed de novo. *See United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005) (per curiam) (citing *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002)).

Additional Facts

Before Appellant's trial adjourned, the military judge advised him of his post-trial rights. (SJA 1872). Appellant's standby counsel acknowledged that he had advised Appellant of his post-trial rights both orally and in writing. (SJA 1872). Appellant acknowledged that his standby counsel advised him that he could submit matters to the convening authority, that he understood what matters he could submit, that he should stay in contact with his counsel to make the post-trial process easier, and that his standby counsel could submit matters for him if they were unsuccessful in contacting him. (SJA 1873–74). In his post-trial rights advisement form, Appellant further acknowledged he understood he was entitled to the assistance of counsel, what actions the convening authority could take on the findings and sentence, that the SJA would make a recommendation to the

convening authority regarding which action to take, and that Appellant had the right to submit matters for the convening authority's consideration. (JA 1336–39).

On January 29, 2015, the military judge held a post-trial Article 39(a) session. (SJA 1877). During this session the military judge again confirmed that Appellant understood his post-trial rights. (SJA 1878). Appellant also confirmed that he wanted his standby counsel to represent him during the course of his post-trial submission. (SJA 1879–80).

On February 13, 2017, Appellant wrote a letter to the SJA advising the convening authority on his post-trial submissions. (JA 74–75). Appellant indicated that he would be representing himself, that he understood the consequences of his choice, and asked the SJA to not involve any of his lawyers in the post-trial process. (JA 74–75). Appellant indicated that the trial judge had allowed him to represent himself during his court-martial, and that he should be allowed to proceed pro se for this portion of the process. (JA 74–75).

At this point, Appellant was represented by Mr. John Galligan. Mr. Galligan confirmed that Appellant wanted to proceed pro se—he told the SJA that Appellant only wanted the convening authority to consider Appellant's 456-page handwritten manuscript. (JA 76–77). The SJA confirmed receipt of Mr. Galligan's correspondence and confirmed that Mr. Galligan spoke to Appellant and the post-trial submissions accorded with his requests. (JA 76–77).

Law

The right of assistance of counsel in post-trial proceedings is a fundamental right. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000); *see United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977); *see also United States v. Scott*, 51 M.J. 326, 329 (C.A.A.F. 1999) ("Sixth Amendment right to counsel codified under Article 27 applies to the . . . post-trial stag[e]."). "Representation by adequate counsel is an integral part of [our] system." *Knight*, 53 M.J. at 343.

The waiver of this fundamental right must be knowing, intelligent, and voluntary. Before waiver can take effect, an accused must be warned specifically of what lies ahead; however, the information an accused must possess in order to make an intelligent election will depend, in part, on the stage of the process. *Iowa v. Tovar*, 541 U.S. 77, 88–89 (2004). At trial, the inquiry into an accused's waiver of counsel must be sufficient to make him aware of the dangers of self-representation so that his decision is made with eyes wide open. *Faretta*, 422 U.S. at 835 (citations omitted). On appeal, "[a]n accused convicted at trial cannot make an informed decision concerning whether to accept or reject representation by an attorney in his appeal from that conviction unless he is made aware of the powers of the Court of Military Review and of the defense counsel's role in causing those powers to be exerted." *Palenius*, 2 M.J. at 91. Importantly, however, "[t]he Supreme Court has never held that waivers of counsel at any stage of the

proceedings other than trial require such a give-and-take between the accused and someone trying to educate him about counsel's benefits . . . . Once the trial is over, the major complexities, choices, and risks are past." *Speights v. Frank*, 361 F.3d 962, 965 (7th Cir. 2004) (citing *Tovar*, 541 U.S. at 89).

Argument

Appellant made a knowing, intelligent, and voluntary waiver of his right to post-trial counsel. Appellant, after being notified twice about his right to counsel during the post-trial proceedings, made an unequivocal waiver of counsel. It is clear that this waiver was knowing, intelligent, and voluntary in the context of the entire proceedings. Appellant had previously waived his right to counsel during the merits after an extensive colloquy. He was then thoroughly advised about his post-trial rights orally and in writing by standby counsel, which the military judge confirmed on the record. (SJA 1872–74).

Contrary to his assertions on appeal, Appellant was "adequately and fully advise[d]" concerning his post-trial rights. (Appellant's Br. 51 (citing *Palenius*, 2 M.J. at 91)). Appellant's reliance on *Palenius* in the present case is misguided. *Palenius* concerned an invalid waiver of the right to appellate counsel because the appellant's defense counsel erroneously advised him against appellate representation. 2 M.J. at 89 ("In effect, the appellant's trial defense counsel advised his client that appellate defense counsel could do him no good and that, in

fact, counsel only would unduly delay matters."). The differences in *Palenius* to Appellant's case are obvious: Appellant waived post-trial counsel—not appellate counsel—and Appellant did not receive erroneous legal advice that overcame or negated his prior advisements concerning his post-trial rights. The advice Appellant received concerning his rights, reflected in his post-trial advisement form,[27] was adequate to ensure his choice to waive counsel was knowing, intelligent, and voluntary.

Military precedent supports that Appellant's waiver of counsel was effective and the convening authority and SJA acted appropriately. First, the SJA fulfilled her duty to ensure Appellant received his right to counsel by reaching out to Mr. Galligan to inquire about the status of his representation once aware of Appellant's desire to proceed pro se. *See United States v. Carter*, 40 M.J. 102, 105 (C.A.A.F. 1994) (requiring the SJA to notify "defense counsel of appellant's complaint so that the issue of further representation could [be] resolved" when made aware of a

[27] Appellant cites *Palenius* for the proposition that "[r]elying merely on the advice contained on the post-trial forms is unduly restricted and does not adequately and fully advise post-trial rights." (Appellant's Br. 151). This was not the holding of *Palenius*, however. In *Palenius*, the form signed by the appellant indicated that he had received advice from his counsel, and the court found that "the *advice given*"—which the court held to be erroneous—"was unduly restricted and did not adequately and fully advise the appellant concerning the appeal process." 2 M.J. 91–92 (emphasis added). In other words, it was the advice itself and not the form the appellant signed that was problematic.

potential conflict of interest). Mr. Galligan confirmed that Appellant wanted to represent himself and only wanted the convening authority to consider his 456-page handwritten manuscript. (JA 76–77). Additionally, Appellant did not desire different counsel when he terminated Mr. Galligan's representation—he was clear and unambiguous in his desire to represent himself. (JA 166) ("Please don't involve any lawyers for I have clearly stated above I am representing myself and understand the consequences"); *contra United States v. Leaver*, 36 M.J. 133, 135 (C.A.A.F 1992) (finding invalid waiver of post-trial counsel when the appellant had terminated his prior counsel's representation and requested substitute counsel but received none).

Like Appellant's waiver of counsel during trial, his waiver of post-trial counsel was the result of a knowing, intelligent, and voluntary choice. Appellant cannot now complain of his choice.

Part A: Section III

Issue Presented IX

WHETHER THEN-COLONEL STUART RISCH WAS DISQUALIFIED FROM PARTICIPATING ON THIS CASE AS THE STAFF JUDGE ADVOCATE?

Summary of Argument

Then-Colonel (COL) Risch was not disqualified from participating as the SJA because he did not act in any disqualifying role identified in Article 6(c),

UMCJ. Further, he had no personal interest in this case because he was not a target of Appellant's attack, did not personally witness Appellant's attack, did not interact with Appellant before the attack, did not have a close personal connection with any of the victims of Appellant's attack, and Appellant's attack did not occur at his home or workplace. His understandable concern for his family and employees located on Fort Hood and his human reaction to this unspeakable tragedy did not prevent him from providing independent and informed advice to the convening authority.

Additional Facts

Captain (CPT) NF was a judge advocate in the III Corps Office of the Staff Judge Advocate (OSJA) at the time of the shooting. (JA 1349). On 5 November 2009, CPT NF was at the SRP site to execute wills for individuals about to deploy. (JA 1347). Though he was present at the SRP site when Appellant began his rampage, CPT NF was not harmed and rendered first aid to those who were less fortunate. (JA 1349).

That evening, he returned to the OSJA and saw COL Stuart Risch,[28] the III Corps Staff Judge Advocate (SJA). (JA 1349). Colonel Risch was predictably

[28] Although now a Lieutenant General (LTG), the government will refer to LTG Risch as COL Risch in this issue presented to reflect the rank at which he rendered the pretrial advice in this case and for the sake of consistency.

concerned about CPT NF after he was caught in the horrific attack and inquired about his wellbeing. (JA 1349). Captain NF then described what he had witnessed during the attack to COL Risch. (JA 1349).

Several days later, COL Risch spoke to CPT NF and suggested that he seek behavioral health assistance as necessary. (JA 1349). According to CPT NF, COL Risch described taking a tour of the SRP site and acknowledged it was "a difficult experience that would make it hard to sleep at night," or words to that effect. (JA 1349).

Standard of Review

Whether an individual is disqualified from acting as an SJA is a legal question reviewed de novo. *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010).

Law

Article 6(c), UCMJ, provides that "[n]o person who has acted as a member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as [an SJA] or legal officer to any reviewing authority upon the same case." The discussion section for R.C.M. 406(b) states that an SJA providing pretrial advice "must make an independent and informed appraisal of the charges and evidence in order to render the advice," and specifically, grounds for disqualification include "previous

action in that case as investigating officer, military judge, trial counsel, defense counsel, or member." R.C.M. 406(b), Discussion.[29]

"[A] person will be disqualified from acting as the SJA if that person performed the duties of a disqualifying position." *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (internal citations omitted). "An SJA may become ineligible when (1) he or she displays a personal interest or feeling in the outcome of a particular case . . . (2) there is a legitimate factual controversy with defense counsel . . . or, (3) he or she fails to be objective, such that it renders the proceedings unfair or creates the appearance of unfairness." *United States v. Chandler*, 80 M.J. 425, 429 (C.A.A.F. 2021) (internal citations omitted).

Argument

A. Colonel Risch had no personal interest in Appellant's case and was not disqualified to act as SJA.

Colonel Risch was not disqualified from providing Article 34 in this case because he did not act in any disqualifying role identified in Article 6(c), UMCJ, he did not display a personal feeling in the outcome of this case, and he remained objective. Colonel Risch did not perform the duties of "a member, military judge,

[29] The provisions of a discussion section to the R.C.M. are not binding but instead serve as guidance. *See, e.g., United States v. New*, 55 M.J. 95, 113 (C.A.A.F. 2001) (Effron, J., concurring) (referring to an R.C.M. Discussion section as "non-binding").

trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer" in this case. Article 6(c), UMCJ. Despite being a member of the Fort Hood community at the time of this tragedy, he remained independent and had nothing other than an official interest in the case. There is no evidence that COL Risch acted in anything but a fair, impartial, and unbiased manner.

Colonel Risch had no "personal vendetta . . . or any prior relationship with" Appellant. *Chandler*, 80 M.J. at 431 (finding the SJA was not disqualified when he negotiated the inclusion of aggravating evidence in a stipulation of fact). Nor was COL Risch "so deeply and personally involved as to move from the role of adviser to the role of participant." *United States v. Willis*, 22 U.S.C.M.A. 112, 114, 46 C.M.R. 112, 114 (1973). There is no evidence that COL Risch had a personal connection with any of Appellant's thirteen murder victims or thirty-two attempted murder victims.[30] Merely being a member of the Fort Hood community at the time of the attack did not cause him to move from the role of adviser to participant.

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[30] Captain NF was not one of the thirty-two victims of attempted murder on Appellant's charge sheet. (JA 51). All of Appellant's attempted murder victims were shot by Appellant, except for Sergeant MT. Sergeant MT was a civilian police officer and engaged Appellant during his attack, ordering him to stop. (SJA 1521). In his stipulation of expected testimony, Sergeant MT stated he saw Appellant point his red laser sight at him and fire several rounds at him. (SJA 1521). They exchanged gun fire, and Sergeant MT shot and immobilized Appellant. (SJA 1522). In his letter, CPT NF describes, "rounds were fired in my direction . . ." but "whether the shooter was aiming at me I do not know." (JA 1349).

Appellant's argument that COL Risch had "an other than official interest in the prosecution of the accused," and was therefore disqualified is misplaced. To begin with, all the authorities Appellant cites regarding disqualification refer to convening authorities, not advising SJAs. In *United States v. Corcoran*, the Court of Military Appeals held that "an accuser may not *appoint* the court that tries an accused." 17 M.J. 137, 138 (C.M.A. 1984) (emphasis added). Nothing in the opinion suggests that the analysis in *Corcoran* would extend beyond convening authorities. More importantly, to state the obvious: SJAs do not appoint courts. Whether an SJA is disqualified for acting as an accuser is not the appropriate analysis for SJA disqualification in this case.[31] Regardless, COL Risch did not meet the definition of an accuser. As the Army Court correctly found, COL Risch "had only an official interest in preparing the pretrial advice." *Hasan*, 80 M.J. at 706. Tellingly, Appellant offers no authority where any court found an SJA

[31] The Navy-Marine Court of Criminal Appeals has held that "[a]n SJA who has acted as the accuser for any of the charges or specifications where he or she is more than a 'nominal' or 'statutory' accuser is disqualified from preparing the post-trial recommendation." *United States v. Zaptin*, 41 M.J. 877, 880 (N-M. Ct. Crim. App. 1995) (citing *United States v. Hill*, 32 M.J. 940 (N.M.C.M.R. 1991); *United States v. Schaffer*, 40 C.M.R. 794, 796 (A.B.R. 1969), *United States v. Ross*, 16 C.M.R. 579 (A.F.B.R. (1954)). By the time Appellant was convicted, COL Risch was no longer the Fort Hood SJA and did not participate in the post-trial recommendation.

disqualified in circumstances remotely similar to these. A reasonable explanation for the lack of authority is that the circumstances here simply are not disqualifying.

The case law Appellant provides in support of COL Risch's disqualification concerns convening authorities, not SJAs. Nevertheless, these cases are even further distinguishable on their facts. For example, in *Gordon*, the Court of Military Appeals found that the convening authority was disqualified when his home was the target of an attempted burglary. *United States v. Gordon*, 2 C.M.R. 161, 168 (C.M.A. 1952)). Dissimilarly, the location of Appellant's massacre, the SRP site, was not COL Risch's home or office. *Cf. Nichols v. Alley,* 71 F.3d 347 (10th Cir. 1995) (finding a judge was disqualified when the appellant's attack caused damage to the judge's chambers).

Additionally, unlike in other cases relied on by Appellant, COL Risch did not personally witness the attack, nor did he communicate directly with Appellant. In *Brookins*, the convening authority witnessed a riot on his ship and later tried to mediate between the parties involved. *Brookins v. Cullins*, 23 U.S.C.M.A. 216, 217, 49 C.M.R. 5, 6 (1974). In *Jackson*, the convening authority confronted witnesses regarding a plot of perjury. *United States v. Jackson*, 3 M.J. 153, 154 (C.M.A. 1977). In these cases, the convening authorities had direct communication with the appellants or personally witnessed the crimes, unlike in the present case, where COL Risch was not at the SRP site during Appellant's

attack and never had any direct communication with him. Further, COL Risch's later visit to the SRP site and communication with CPT NF do not bring this case within the ambit of the disqualifying events in *Brookins* and *Jackson*. Colonel Risch did not observe Appellant's attack as it unfolded, but merely visited the SRP site after the fact. In *Brookins*, the Military Appeals Court specifically found the convening authority was disqualified "because [he] was a participant in the material events and perhaps even a personal victim of the crime." *Brookins*, 23 U.S.C.M.A. at 218, 49 C.M.R. 5. Clearly, these circumstances were not the case for COL Risch.

Appellant's argument that COL Risch "personally investigated" the crime scene and therefore is disqualified is similarly without merit. First, the only evidence of COL Risch's visit to the crime scene is an unsworn letter from CPT NF—written years after the shooting—indicating COL Risch told him that he had "toured the medical SRP building" and that it was a "difficult experience that would make it hard to sleep at night . . . ." (JA 1349). Setting aside the questionable reliability and persuasive value of this hearsay within hearsay, as the Army Court noted, COL Risch's comment is appropriately characterized as one expressing empathy. *Hasan*, 80 M.J. at 706. Visiting the scene where thirteen people were murdered and being affected simply does not rise to the level of creating a personal interest that would prevent COL Risch from performing his

duties as the SJA to the convening authority—a point Appellant himself seems to recognize. (Appellant's Br. 159) (acknowledging that "this fact alone may not be disqualifying").

Appellant's case is further distinguishable from the authority he cites because COL Risch had no personal connection to Appellant. In *Nix*, the convening authority later married a woman who flirted openly with the appellant in that case, thus creating a personal connection between appellant and the convening authority that could presumably affect the convening authority's judgment. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Captain NF's presence at the SRP site during Appellant's attack did not create a comparable personal connection between Appellant and COL Risch. First, the relationship of supervisor to his subordinate is of an entirely different nature than the spousal relationship in *Nix* and does not carry the same weight. Likewise, this relationship is distinguishable from *People v. Superior Court (Greer)*, 561 P.2d 1164 (Cal. 1977), another case cited by Appellant, where a district attorney's office was disqualified because the mother of the victim worked there. Captain NF was COL Risch's subordinate officer—not his spouse, significant other, or family member. Appellant's argument that "*Nix* would have come to the same result if . . . [the convening authority's girlfriend] had been among the targets of [the appellant's] murderous plot," is irrelevant because these relationships are not analogous. (Appellant's Br. 158). Second,

CPT NF was not a target of Appellant's murderous plot. He had the misfortune of being at the SRP site when Appellant attacked, but he was not injured in the attack, nor did he know whether Appellant specifically targeted him. His mere presence at the SRP site and COL Risch's human concern for the well-being of his subordinate who witnessed a horrific event simply does not create a disqualifying personal connection between Appellant and COL Risch.

Appellant provides no case law support for disqualification of a convening authority, let alone an SJA, due to fearing for the safety of another individual due to an Appellant's actions. Colonel Risch's concern for the safety of his family when he first heard of Appellant's attack did not give him a personal interest in the outcome of this case. Colonel Risch's family was unaffected by Appellant's attack. A reasonable person would not conclude that COL Risch, by merely contacting his family in the immediate aftermath of an on-post shooting, was so closely connected to this case that he had a personal interest in its outcome when his family was not even harmed in Appellant's attack.

Finally, it is wholly unremarkable that COL Risch expressed concern for the well-being of his subordinates. This very human response did not give COL Risch an other-than-official interest in the outcome of Appellant's court-martial. *See In re J.P. Linahan, Inc.*, 138 F.2d 650, 653–54 (2d Cir. 1943) ("Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as

a judge, a man ceases to be human and . . . becomes a passionless thinking machine."). None of his comments rose to the level of personally judging, impugning the accused, or indicating a personal bias. Nor did COL Risch's membership in the Fort Hood community create a personal interest in the outcome of this litigation. A sense of community brought about by a tragedy does not rise to the level of a disqualifying personal interest. Absolutely no evidence suggests that COL Risch had "a personal interest or feeling in the outcome" of Appellant's case or otherwise failed to be objective in his duties. *Chandler*, 80 M.J. at 429. Colonel Risch did not act in a disqualifying role identified in Article 6(c), UMCJ, and the totality of the circumstances support that he was not disqualified from participating in this case.[32]

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[32] In a footnote, Appellant argues that "this Court should review the pretrial advice under a quasi-judicial standard," due to the Army Court of Military Review stating that, "in light of the 1983 UCMJ amendments, the Article 34, UCMJ, advice became less of a prosecutorial tool and more of a substantial right of the accused." (Appellant's Br. 159, n.40)(citing *United States v. Hayes*, 24 M.J. 786, 790, n. 7 (A.C.M.R. 1987).) Appellant overstates the significance of the 1983 amendments to Article 34, UCMJ. The 1983 amendment shifted the responsibility of evaluating the evidentiary basis for the charges from the convening authority to the SJA, but the earlier version still required advice from the SJA on that subject. *See* Manual for Courts-Martial, United States (1969 Rev. ed.), Appendix 2, A2-13. While the SJA's approval became a prerequisite to referral after the amendments, he always needed to render dispassionate, correct legal advice. *See id; see also United States v. Hardin,* 7 M.J. 399, 405 (C.M.A. 1979) (demanding that the pretrial advice be accurate). Even if the amendments elevated the role of the SJA to that of the convening authority, the SJA would still not be held to the same disqualification standard as a military judge. Convening authorities are not held to such standard

B. Even if there was error, Appellant suffered no prejudice.

Even if COL Risch were disqualified from acting as SJA in Appellant's case, Appellant suffered no prejudice and therefore merits no relief. Where the pretrial advice did not "adversely affect[] the accused's rights at the trial, there is no good reason in law or logic to set aside his conviction." *United States v. Ragan*, 14 U.S.C.M.A. 119, 124, 33 C.M.R. 331, 336 (1963). There is no question that COL Risch provided appropriate, accurate advice under Article 34, UCMJ. Appellant makes no argument that the specifications failed to allege offenses, that the specifications were not warranted by the evidence, or that the court-martial lacked jurisdiction. The advice need only meet those statutory criteria and "need not set forth the underlying analysis or rationale for its conclusions." R.C.M. 406(b), Discussion.

An SJA's advice is categorically different than a convening authority's recommendation, and this Court should not presume prejudice as Appellant suggests. (Appellant's Br. 160). The CMA has implicitly rejected presuming prejudice with respect to alleged disqualification of the SJA providing pretrial

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when referring a case; rather, they are disqualified if they are an accuser, and COL Risch did not meet the definition of an "accuser." *See supra* pp. 131–33. As the Army Court correctly held, no case law "supports the assertion that the SJA, in providing pretrial advice, must be held to the same standard of impartiality as a military judge." *United States v. Hasan*, 80 M.J. 682, 705 (Army Ct. Crim. App. 2020).

advice. *United States v. Hardin,* 7 M.J. 399, 404 (C.M.A. 1979) ("To find no error in the contents of the pretrial advice but per se error in the one who writes it is perception for perception's sake alone"). Unlike in *Nix*, where the special court-martial convening authority provided recommendations to the general court-martial convening authority based on his personal judgment, COL Risch merely summarized the recommendations of the subordinate commanders—all of whom recommended capital referral—and the preliminary hearing officer—who also recommended capital referral—and provided his legal advice based on the law controlling capital referral. R.C.M. 1004(c)(7)(J), (JA 179–181). Additionally, he provided the convening authority with an alternative course of action to refer the case as non-capital. (JA 180).

It is hard to conceive of a case more deserving of a capital referral than here, where Appellant murdered a dozen soldiers and a retiree and grievously wounded many more. Nothing in the record suggests that—even absent COL Risch's alleged personal interest—any SJA would find that the evidence did not support referring this case capital. *See United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) ("In the context of nonconstitutional errors, courts consider whether there is a '*reasonable probability* that, but for the error, the outcome of the proceedings *would have been different.*'") (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 136 S. Ct. 1338, 1343 (2016)) (emphasis in original).

Thus, even if the court accepts Appellant's conclusions with respect to error, he deserves no relief because he suffered no prejudice.

Issue Presented X

WHETHER THE JUDGES OF THE ARMY COURT OF CRIMINAL APPEALS SHOULD HAVE BEEN RECUSED BECAUSE THEY WERE SUPERVISED BY THEN-MAJOR GENERAL STUART RISCH WHILE HIS ERROR AS THE STAFF JUDGE ADVOCATE WAS PENDING LITIGATION BEFORE THEM?

Summary of Argument

The Army Court judges should not have recused themselves from reviewing Appellant's case. A reasonable person with knowledge of all the facts regarding Major General (MG) Risch's[33] involvement in this case would have no doubts about the impartiality of the Army Court judges. Major General Risch was no longer in the Army Court judges' rating chain when they heard argument in this case and issued their opinion. What's more, the sole assignment of error involving MG Risch before the Army Court did not challenge the substance of his legal advice, nor did the allegation of a personal interest rise to the level of an allegation of impropriety. The Army Court judges were, therefore, never in a position where they had to rule on the impropriety of a superior or judge a superior's legal

[33] For purposes of this issue, now-LTG Risch will be referred to by the rank of major general, as that was his rank at all times relevant to the issue presented.

reasoning. Regardless, the removal of MG Risch from their rating chain before they issued their opinion entirely mooted any concerns of impartiality.

Additional Facts

In the years since the attack, MG Risch has been promoted multiple times, ultimately being promoted to the rank of Lieutenant General, when he became the 41st Judge Advocate General (TJAG) of the U.S. Army on July 12, 2021. Prior to assuming his role as TJAG, MG Risch was appointed as the Deputy Judge Advocate General (DJAG) on August 2, 2017.[34] As DJAG, he became the rater and senior rater for the judges for the Army Court.

At the Army Court Appellant raised an assignment of error—similar to that raised before this Court—arguing that MG Risch should have been disqualified from providing the convening authority with Article 34, UCMJ, pretrial advice. *Hasan*, 80 M.J. at 704. While his appeal was pending at the Army Court, Appellant submitted a request to the 40th TJAG, LTG Charles Pede, requesting to modify the rating scheme of the Army Court judges, considering Appellant's assignment of error involving MG Risch. (SJA 1582–83). On September 14, 2020, LTG Pede responded to the request, stating that he determined "there [was] no conflict of interest with [MG Risch] serving in the rating chain of the judges in

[34] The Army Court received the record of trial in this case on March 31, 2017, before MG Risch became DJAG and the rater for the Army Court judges.

this case," but he had decided he would serve as the rater and senior rater of the Army Court judges instead of MG Risch "out of an abundance of caution, and to moot any concerns." (SJA 1577). After the decision had been made to remove MG Risch from the Army Court judges' rating chains, the Army Court heard argument in this case on October 15, 2020, and issued its opinion on December 11, 2020.

Standard of Review

On appeal, the decision of a military judge regarding recusal is reviewed for abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001).

Law

Members of the armed forces have a right to have their cases heard before a fair and impartial judicial body. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). That right "applies with equal force to review of those courts-martial by a fair and impartial appellate court." *United States v. Mitchell*, 37 M.J. 903, 906 (N.M.C.M.R. 1993) (citing *Graf*, 35 M.J. at 450). Article 66(j), UCMJ, states an appellate judge is not eligible "to review the record of any trial if such member served as an investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial." An appellate judge bears the independent obligation to recuse himself only when "his impartiality might

reasonably be questioned." *United States v. Martinez*, 19 M.J. 652, 653 (C.M.A. 1984) (adopting the recusal standard set out for federal judges and magistrates in 28 U.S.C. § 455(a) (1982)) (emphasis in original); R.C.M. 902(a). "A judge shall hear and decide matters assigned to the judge except when disqualification is required . . . ." United States Army Judiciary, Code of Judicial Conduct for Army Trial and Appellate Judges, Rule 2.7 (May 16, 2008). "The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues." *Id.* at Rule 2.7, Comment 1.

In *Martinez,* the CMA noted that "[t]he proper test . . . is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the [appellant], but rather in the mind of a reasonable man . . . who has knowledge of all the facts." 19 M.J. at 654 (quoting *Union Independiente v. Puerto Rico Legal Services*, 550 F. Supp. 1109, 1111 (D. Puerto Rico 1982) and *Idaho v. Freeman*, 507 F. Supp. 706, 733 (D. Idaho 1981) (internal quotations omitted)).

In *United States v. Mitchell*, the CMA held that the preparation of fitness reports for appellate military judges by senior judge advocates does not render

appellate judges inherently disqualified or impartial. 39 M.J. 131, 135 (C.M.A. 1994). The CMA found that the TJAG and Assistant Judge Advocate General of the Navy were neither prosecutors nor "aligned with the Government as a result of their duties" such as to present a bias in favor of the Government. *Id.* at 138. The CMA held that: (1) the appearance issue created by officer fitness reports for military judges was not "so extraordinarily weighty as to overcome the balance struck by Congress" and the Department of the Navy; and (2) that the appellant failed to demonstrate the constitutional invalidity of this aspect of the military justice system. *Id.* at 137. In dicta, the CMA noted that its "judgment might be different if the judges of the Court of Military Review were reviewing a case where the Judge Advocate General or the Assistant Judge Advocate General, prior to their appointment, acted as a military trial judge, trial counsel, defense counsel, or staff judge advocate in that case." *Id.* at 138 n.8.

The CMA has expressly prohibited "the Judge Advocate General or his designee's use of fitness reports to control the findings-and-sentencing decisions of military judges." *Id.* at 140. Specifically, the CMA in *United States v. Mabe* held that the TJAG or his designee may not base the periodic rating of a military judge upon his opinion of the appropriateness of sentences awarded by a judge. 33 M.J. 200, 206 (C.M.A. 1991). Similarly, in *United States v. Graf*, the CMA held that the decertification or transfer of a military judge based upon a senior leader's

opinion of the sentences awarded by the judge would violate Articles 26 and 37, UCMJ. 35 M.J. 450, 462 (C.M.A. 1992). In *Graf*, the court also noted that the UCMJ "provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy, such as the ability to file an Article 138, UCMJ, complaint against interfering superiors." *Id.*

Argument

A. The Army Court judges did not have to recuse themselves.

The fact that MG Risch once served as the rater for the Army Court judges in this case does not create an appearance issue that is "so extraordinarily weighty as to overcome the balance struck by Congress," *Mitchell*, 39 M.J. at 137, especially when MG Risch did not ultimately serve as rater when the judges heard argument in this case and issued their opinion. A reasonable person with knowledge of all the facts would have no doubts concerning the Army Court judges' impartiality in this case. *Martinez*, 19 M.J. at 654. Recusal was not required by the UCMJ, R.C.M. 902(a), or military precedent.

The crux of Appellant's argument rests on one line from a footnote in *Mitchell* where this Court said their "judgment *might* be different if the judges . . . were reviewing a case where the [rater], prior to their appointment, acted as a military trial judge, trial counsel, defense counsel, or staff judge advocate in that

case." *Mitchell*, 39 M.J. at 137 n.8 (emphasis added). In support of this footnote, this Court cited to *United States v. Engle*, 1 M.J. 387, 390 (C.M.A. 1976). In *Engle*, the court found an SJA should have recused himself from participating in the post-trial review when an assignment of error concerned a challenge to the substance of the SJA's pretrial advice. The Court concluded, "Human nature being what it is . . . the very fact of being called upon to condemn or countenance one's own workmanship cannot create a healthy outcome and less so when the outcome concerns the accused's denial of substantial rights." *Id.* (internal quotation marks and citations omitted).

In Appellant's case, there was no assignment of error that concerns MG Risch's workmanship or the substance of his actions as SJA. Appellant alleged MG Risch should have been disqualified from providing pretrial advice to the convening authority due to a personal interest in Appellant's case but made no argument that MG Risch's pretrial advice was in any way substantively flawed. Unlike in *Engle,* the Army Court judges were not forced to rule on the correctness of MG Risch's legal analysis. Considering the CMA's citation to *Engle,* it is evident that its caveat in *Mitchell* that its judgment *might* be different under other circumstances referred to cases where there is a substantive challenge to the superior's legal analysis. *Mitchell*, 39 M.J. at n.8. As there had been no

substantive challenge to MG Risch's legal analysis as SJA in this case, the footnote in *Mitchell* does not carry the day for Appellant.

Nor does *United States v. Hutchins* help Appellant because he has made no allegation of impropriety against MG Risch. 2018 CCA LEXIS 31 (N-M. Ct. Crim. App. 2018). Appellant cites to *Hutchins* for the proposition "that a military judge should disqualify himself or herself from ruling on the impropriety of a superior." (Appellant's Br. 164–65). However, the court in *Hutchins* ultimately found there was insufficient evidence "of a credible extrajudicial threat to the military judge that overcomes the presumption that his supervisors will follow the law." *Hutchins*, 2018 CCA LEXIS 31, at *117. As Appellant's assignment of error before the Army Court involving MG Risch did not rise to the level of an allegation of impropriety, he has not overcome the presumption that the Army Court judges, and MG Risch, would act impartially and follow the law.

Furthermore, any concern was completely mooted by LTG Pede's act of removing MG Risch from the Army Court judges' rating chain. Ultimately, the Army Court judges never ruled on any action taken by their rater in this case because MG Risch was no longer their rater when they heard argument and issued their opinion. Despite this, Appellant vaguely alleges that this "did not resolve the conflict" because, while MG Risch was the rater, the Army Court "issued numerous rulings that directly and substantively affected the resolution of this

case. Rulings include those involving then-MG Risch." (Appellant's Br. 165). However, the only motions Appellant filed that related to MG Risch were motions for the Army Court judges to recuse themselves because he was their rater. While the Army Court denied these motions, there could be no prejudice to Appellant because, in the end, MG Risch did not serve as the Army Court judges' rater.[35]

Appellant has not carried his "substantial burden" of proving that the Army Court judges were disqualified. *Martinez*, 19 M.J. at 653; *Idaho v. Freeman*, 478 F. Supp 33, 35 (D. Idaho 1979) ("It is well settled that a judge is presumed to be qualified and that the movant bears a substantial burden of proving otherwise. Furthermore, the Court has a sworn duty not to disqualify itself unless there are proper and reasonable grounds for doing so."). The Army Court judges were duty-bound to hear Appellant's appeal absent disqualification. There were no reasonable grounds for the Army Court judges to disqualify themselves in this case, and their decision to remain detailed to Appellant's case aligned with their sworn duty.

[35] Appellee does not concede that the Army Court judges would have to recuse themselves even if MG Risch had *not* been removed from their rating chain.

B. Even assuming that the Army Court judges should have recused themselves, the *Liljeberg* factors do not require relief.

"[N]ot every judicial disqualification requires reversal," and this Court has "adopted the standards announced by the Supreme Court in *Liljeberg* to determine whether a military judge's conduct warrants that remedy to vindicate public confidence in the military justice system." *United States v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2011). "[I]n determining whether a judgment should be vacated 'it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.'" *Id.* at 159 (quoting *Liljeberg*, 486 U.S. at 864).

With respect to the first factor, despite the gravity of the penalty in Appellant's case, the risk of injustice to Appellant is not high. Ultimately, MG Risch did not serve as the rater for the Army Court judges. When the judges heard argument in this case and issued their opinion, MG Risch was no longer their rater. Appellant's concern had been alleviated. Appellant does not describe any specific injustice due to the Army Court judges—no longer rated by MG Risch—reviewing his case.

With respect to the second factor, there is no risk that the denial of relief will produce injustice in future cases. In the end, Appellant achieved his goal: the judges who reviewed his case were not rated by MG Risch. Even if it were error

for the Army Court judges not to recuse themselves, they acted reasonably given the circumstances—especially when, at the time they heard argument and decided the case, MG Risch had been removed as their rater. Additionally, the specific facts of this case are unlikely to arise again in future cases. It is simply "not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future." *Butcher*, 56 M.J. at 93.

Finally, there is no risk the denial of relief will undermine the public's confidence in the military justice system. If Appellant receives the relief he requests, the opposite would be true. Appellant requests this Court vacate the entire decision of the Army Court and remand this case for a second review of all assignments of error, despite a sole issue presented involving MG Risch.[36] Appellant would thereby receive a second plenary review. A second review of Appellant's case—where only one issue presented is the subject of the challenge—would undermine the public's confidence in the certainty of military appeals

[36] Appellant does not argue that the judges' alleged partiality to MG Risch would bleed over into other assignments of error, and such an argument would not be rational. Merely being involved in a case as the advising SJA—as opposed to a trial counsel, defense counsel, or military judge acting as fact-finder—would not give an individual a bias in favor of the prosecution or defense. Furthermore, the law is clear: the DJAG is not a prosecutor nor "aligned with the Government as a result of [his] duties." *Mitchell*, 39 M.J. at 138.

courts' judgments. By the same token, public confidence would not be undermined if Appellant receives no relief because a reasonable person knowing all the facts—including that MG Risch had no personal interest in Appellant's case and did not ultimately serve as the rater for the Army Court judges—would have no doubts concerning the Army Court judges' impartiality. This is especially true when this Court—which is necessarily immune from even the appearance of any sort of improper influence by a superior military officer—is reviewing Appellant's same argument regarding then-COL Risch's qualification to provide Article 34, UCMJ, advice. Certainly, this Court reaching the same conclusion on the issue as the Army Court would provide members of the public with confidence in the result and do nothing to risk undermining the integrity of the judicial system.

The Army Court judges were correct to not recuse themselves from reviewing Appellant's case. Even if they were not, however, there is no risk of injustice in this or future cases, nor is there risk of undermining the public's confidence in the judicial process. Accordingly, Appellant is entitled to no relief.

Issue Presented XI

WHETHER THE CONVENING AUTHORITY WAS DISQUALIFIED TO PERFORM THE POST-TRIAL REVIEW OF APPELLANT'S CASE AFTER AWARDING PURPLE HEART MEDALS TO THE VICTIMS OF APPELLANT'S OFFENSES?

Summary of Argument

Appellant waived the disqualification issue by failing to raise it prior to the convening authority's action on the sentence in this case. Regardless, the convening authority was not disqualified from executing his post-trial responsibilities because he did not have a personal interest in this case. Finally, any error in permitting the convening authority to take action in this case did not prejudice Appellant's substantial rights, given that Appellant sought no clemency from the convening authority, presented no basis upon which the convening authority could have disapproved the findings or sentence, and made no request for the convening authority to disapprove the findings or sentence.

Additional Facts

On December 19, 2014, Congress enacted legislation that authorized the award of the Purple Heart to servicemembers on active duty killed by an individual who was in contact with a foreign terrorist organization before the attack and the attack was inspired or motivated by the terrorist organization. 10 U.S.C. § 1129a. Pursuant to this legislation, the III Corps and Fort Hood commanding general,

LTG Sean MacFarland, presented Purple Hearts to victims and family members at a ceremony on April 10, 2015.[37] On March 27, 2017, LTG MacFarland, acting in his capacity as the convening authority with jurisdiction over this case, approved the sentence in Appellant's case. (JA 75).

Standard of Review

The failure to make a timely motion or objection asserting the disqualification of the convening authority waives the issue, unless the appellant was unaware of the ground for disqualification. *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002) (citations omitted). This Court "consider[s] the issue of waiver as a question of law under a de novo standard of review." *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005). While waived issues cannot be reviewed by this Court at all, *Ahern*, 76 M.J. at 197, forfeited issues may only be considered by this Court if there is plain error. *See United States v. Voorhees*, 50 M.J. 494, 499–500 (C.A.A.F. 1999) (finding no plain error where an objection to the convening authority taking action was "preserved . . . as to possible future action" but no objection was raised prior to appeal).

[37] *Fort Hood presents Purple Hearts, medals to shooting victims, Families*, Heather Graham-Ashley, III Corps and Fort Hood Public Affairs (Apr. 13, 2015), https://www.army.mil/article/146286/fort_hood_presents_purple_hearts_medals_to_shooting_victims_families [Ceremony Press Release].

"Whether a staff judge advocate or convening authority is disqualified from participating in the post-trial review is a question of law . . . ." *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004). Appellant "has the initial burden of making a prima facie case for disqualification." *Id.* (citation and internal quotation marks omitted).

Argument

A. Appellant has waived the disqualification issue.

As Appellant acknowledges, he has raised the question of the disqualification of the convening authority for the first time in this appeal. (Appellant's Br. 167 n.41). Appellant has thus waived the issue. *Gudmundson*, 57 M.J. at 495 ("We hold that the issue was waived in this case. Appellant was aware of the convening authority's involvement, but he chose to not raise the disqualification issue at trial or in his post-trial submission to the convening authority."); *cf. United States v. Jeter*, 35 M.J. 442, 447 (C.M.A. 1992) (holding, in the referral context, that if an accused is aware of the convening authority's "personal interest" in a case and fails to object, the accused waives the issue). Appellant makes no effort to excuse or justify his tardy assertion of this issue, nor could he. The information that serves as the basis for Appellant's disqualification objection is LTG MacFarland's participation in the ceremony where Purple Hearts were presented to the victims and families of the victims of Appellant's crimes.

This participation occurred in April 2015—two years before LTG MacFarland took action on the sentence in this case—and was much publicized as Appellant recounts in his brief. (Appellant's Br. 39–40). Appellant makes no claim that he was unaware of LTG MacFarland's role in the Purple Heart ceremony.

Because this ground of Appellant's challenge was well-known when Appellant submitted his post-trial matters pursuant to R.C.M. 1105 and 1106 in March 2017, Appellant was obliged to raise the objection in his submission. *Gudmundson*, 57 M.J. at 495. This Appellant failed to do. The only defense matter submitted for consideration by the convening authority was a 450-plus page document titled "Mans [*sic*] Duty to His Creator and The Purpose of Life," along with a one-page cover letter. (*See* JA 77, 166). Nothing in this material raised the issue of disqualification of the convening authority.[38] Thus, the issue has been waived.

[38] Appellant's civilian defense counsel also submitted a letter on behalf of Appellant pursuant to Articles 38(c) and 60 and R.C.M. 1105 and 1106, but this letter was not included with Appellant's post-trial submission nor was it presented to the convening authority. (*See* JA 79–164, 166). In any event, this letter from Appellant's civilian defense counsel did not raise the disqualification issue that Appellant presses here at all.

B. There is no error with respect to the disqualification issue because LTG MacFarland had no personal interest in this case.

Even if this Court finds Appellant merely forfeited the issue, this Court can only review the matter for plain error. *Voorhees*, 50 M.J. at 499–500. But no plain error exists here because there was no error, let alone a clear or obvious one, and Appellant suffered no prejudice. "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Miller*, 82 M.J. 204, 207–08 (C.A.A.F. 2022) (citing *United States v. McPherson*, 81 M.J. 372, 377 (C.A.A.F. 2021)).

Appellant has failed to meet his burden of demonstrating that the convening authority was disqualified in this case. "[A] convening authority will be disqualified if he or she is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused." *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003); *see also United States v. Nix*, 40 M.J. 6 (C.M.A. 1994) (convening authority had a personal grudge because of the defendant's remark to his fiancée); *United States v. Jeter*, 35 M.J. at 445 ("The test of a convening authority's status as an accuser is whether, under the particular facts and circumstances . . . a reasonable person would impute to him a personal feeling or interest in the outcome of the litigation.") (internal citations and quotation marks omitted); *cf. United States v. Sorrell*, 47 M.J. 432, 433 (C.A.A.F. 1998) (finding an

SJA may be disqualified if he or she has "a personal interest or feeling in the outcome of a particular case").

Here, LTG MacFarland's presenting of Purple Hearts and statements at the award ceremony in no way demonstrated that he had a disqualifying personal interest in Appellant's case. In presenting the medals, LTG MacFarland was performing an administrative act in his capacity as Commander of III Corps and Fort Hood. Although LTG MacFarland made statements valorizing the victims of the shooting, none of his statements indicated that he had the kind of personal connection with the case or bias that would be disqualifying. *See, e.g.*, Ceremony Press Release ("We also remember the acts of courage and selflessness by Soldiers and civilians, which prevented an even greater calamity from occurring that day."). There is no evidence LTG MacFarland's statements in any way suggest that he had prejudged Appellant's guilt or the propriety of the sentence imposed, nor did he cast aspersion on or even mention Appellant. Rather, LTG MacFarland focused on the victims and their sacrifice—commentary that would be warranted regardless of who caused their deaths. Instead of pledging vengeance or suggesting that he would throw the book at the perpetrator, LTG MacFarland merely recognized—appropriately—the fact that the victims had been injured or killed on the day of the shooting was lamentable, and that steps were undertaken by others to mitigate the scope of the harm that the shooting ultimately imposed that day. *Cf. Voorhees*, 50

M.J. at 499 ("A convening authority's dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity. Misguided zeal, alone, however, is not sufficient.") (citations and internal quotation marks omitted); *Davis*, 58 M.J. at 103 (convening authority was disqualified where he commented that people convicted of using drugs "should not come crying to him about their situations or their families").

This Court's decision in *United States v. Voorhees* is instructive in showing that LTG MacFarland's comments do not evince a disqualifying personal interest. 50 M.J. at 499. In *Voorhees*, the convening authority approached the accused in a hallway to ask whether he had signed the pretrial agreement and stated, "If you don't take it, I'm going to burn you." *Id.* at 498. However, in response to a disqualification challenge to the convening authority in that case, this Court stated, "this record contains no evidence of personal interest on the part of the officer acting in appellant's case or evidence of personal bias on that officer's part towards him." *Id.* at 499. Thus, this Court concluded "that no plain error occurred in these circumstances." *Id.* at 500. If the convening authority in *Voorhees* was deemed not to have had a disqualifying personal interest in a case in which he told the accused that he would "burn" him if he did not sign the pretrial agreement, it is hard to fathom how innocuous statements recognizing the loss that victims and their families faced as a result of the shooting could meet the personal interest

standard in this case. *Cf. United States v. Rice*, 33 M.J. 451, 453 (C.M.A. 1991) (legal officer who testified for the government during sentencing and "had strong personal feelings or biases about appellant" was disqualified from writing post-trial recommendation).

Rather, a reasonable person would conclude that LTG MacFarland's presenting of the Purple Hearts and associated statements were appropriate for him to make in his or her official capacity as the Commander of III Corps and Fort Hood. Indeed, this Court has previously found no disqualification of the convening authority when the performance of his official duties much more directly touched upon a case under review. *See, e.g.*, *United States v. Newman*, 14 M.J. 474, 482 (C.M.A. 1983) (no evidence that convening authority had a belief regarding the credibility of a prosecution witness simply because he granted the witness testimonial immunity); *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979) (convening authority had "official" not "personal" interest in case where he directed others to apprehend accused); *see also Davis*, 58 M.J. at 103 ("It is not disqualifying for a convening authority to express disdain for illegal drugs and their adverse effect upon good order and discipline in the command. A commanding officer or convening authority fulfilling his or her responsibility to maintain good order and discipline in a military organization need not appear indifferent to crime."). Lieutenant General MacFarland's presenting of Purple

Hearts and expressions of condolence, respect, and appreciation for the victims and their families does not come close to the level of engagement with a case that this Court has previously deemed to be insufficient to support a finding of a personal interest. Thus, this Court should conclude that LTG MacFarland was not disqualified from taking post-trial action in this case.

C. Any error was harmless and not prejudicial because Appellant sought no relief from the convening authority.

When an error is committed during the post-trial process, Appellant must make a "colorable showing of possible prejudice" resulting from the error in order to obtain relief. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323–24 (C.A.A.F. 1997)). Further, this Court can only set aside the findings or the sentence if the error "materially prejudices the substantial rights of the accused." Article 59, UCMJ. A showing of possible prejudice cannot be made in this case because Appellant sought no relief from the convening authority and presented no matters to the convening authority that could have provided the basis for him to disapprove the findings or sentence in this case.

As declared by Appellant in the cover letter to his post-trial submission,

> [M]y only submission to the General Court-Martial Convening Authority (GCMCA) is a piece entitled 'Mans [*sic*] Duty to His Creator and The Purpose of Life' which is approximately 450 pages. . . . Please don't involve any lawyers for as I have clearly stated above I am representing

> myself and understand the consequences. Upon receipt and review of my submission the Convening Authority can take action and send me his final decision.

(JA 166). In his submission, the sole point urged upon the convening authority by Appellant was that he committed his crimes to defend Islam. In the underlying document, Appellant wrote, "Their [*sic*] should be no doubt that my actions on November 5, 2009 at Fort Hood were in the defense of Islam." (JA 166).

Such a claim provided no cognizable basis for the convening authority to grant Appellant clemency. Rule for Courts-Martial 1105 permits an accused to "submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence . . . ." R.C.M. 1105(b)(1). Appellant's submission contained no such matters, as ascribing a religious motivation for committing murder is not recognized as a matter that may "reasonably" affect the convening authority's post-trial decision. Appellant was also permitted to submit allegations of errors affecting the legality of the findings or sentence and matters in mitigation not available for consideration at the court-martial but failed to do so.

Indeed, Appellant expressly *disclaimed* that he was seeking clemency from the convening authority or any alteration or rejection of the findings and sentence at all. On page 4 of his submission, Appellant wrote, "[T]his submission *is not a plea for mercy*. . . . My intention is not to offend anyone, but to try to accurately

convey my understanding of Islam and how I view the world; the purpose of life and mans [sic] duty to his Creator." (SJA 1519) (emphasis added). Appellant cannot now complain that he failed to receive clemency or other favorable action that he expressly stated that he was not seeking. Put differently, there can be no prejudice here because Appellant did not request that the convening authority disapprove the findings and sentence in whole or in part. An accused who fails to seek clemency from the convening authority has no basis for asserting that the convening authority prejudiced him by not granting him any.

Furthermore, the convening authority only took action after receiving the recommendation from two separate SJAs. The initial SJA recommendation (SJAR) came on December 28, 2015, before Appellant submitted his matters under R.C.M. 1105. Therein, the SJA recommended that the convening authority approve the sentence. (JA 73). After Appellant submitted the aforementioned document pursuant to R.C.M. 1105, a new SJA prepared an addendum to the 2015 SJAR. The addendum noted, "The Accused does not request mercy from the Convening Authority" but merely attempts to convey his "understanding of Islam" and "help in understanding the mindset of the knowledgeable mujahideen [sic] (holy warriors) around the world." (JA 74). The SJA then rightly concluded, "No corrective action is required" in light of Appellant's submission and that "clemency is not warranted." (JA 74–75). At the end of the addendum, the

convening authority noted that he had considered Appellant's submission, the Result of Trial report, the SJAR, and the addendum to the SJAR and determined to approve the recommendation. (JA 75). With neither SJA identifying any basis for not approving the sentence, combined with Appellant's submission of material that he acknowledged sought no clemency or relief from the convening authority, the convening authority's approval was fully warranted and the absence of the purported error Appellant now asserts would not have led to a different outcome. Accordingly, this Court should reject Appellant's claim that the convening authority was disqualified from executing his post-trial review duties in this case.

Part A: Section IV (Issues previously raised at the Army Court)

Issue Presented I

WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT APPELLANT'S WAIVER OF COUNSEL WAS KNOWING AND INTELLIGENT WHEN SHE RECEIVED NOTICE FROM HIS EXPERT [redacted] BUT FAILED TO REOPEN THE WAIVER INQUIRY, [redacted]

The military judge did not err by failing to reopen Appellant's *Feretta* waiver inquiry. There is no basis in the record to support Appellant's claim that an

alleged mental condition rendered him incompetent to waive his right to counsel. Appellant had two separate expert psychologists/psychiatrists appointed as defense expert consultants and at no time was his mental state called into question. The military judge conducted an extensive inquiry into Appellant's physical and mental condition prior to granting his request to proceed pro se. The military judge ordered Appellant to undergo a medical examination, reviewed the subsequent medical examination report, and reviewed the results of the R.C.M. 706 board. (JA 315–32; SJA 1550–1559). The R.C.M. 706 board found that that Appellant had sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in his own defense. (JA 1324). The military judge also conducted an extensive colloquy with Appellant regarding his physical and mental faculties. Appellant stated that he had the physical and mental ability to act as his own counsel. (JA 332, 351, 365, 354). The military judge's inquiry with Appellant and his physician and results of Appellant's mental and physical examinations reveals no concerns about Appellant's competency to waive his right to counsel. Based on this, and her observations of Appellant in the five and a half months preceding her ruling on Appellant's pro se request, the military judge appropriately found that Appellant had sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in his own defense; that there was no evidence of any mental capacity issues; and that

Appellant understood his physical limitations and was physically able to represent himself with accommodations made by the court. (JA 358). She certainly had sufficient evidence to make these findings.

Simply put, the military judge's finding that Appellant was competent to waive his right to counsel was undoubtedly supported by the record. Appellant's assertion that his physical and mental condition rendered him incompetent is without merit.

Issue Presented II

WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY DENYING HIS MOTION FOR CHANGE OF VENUE.

As the Army Court correctly found, the military judge did not err when she denied Appellant's motion for change of venue. *Hasan*, 80 M.J. at 714. Security around the courthouse, negative publicity, and proximity to the crime scene did not create "such an atmosphere of hostility or partiality against [Appellant] at the place of trial" such that he would not receive a fair trial. *Loving*, 34 M.J. at 964. This is especially true because the military judge instructed the panel not to visit the crime scene before every recess, (*e.g.*, JA 594, 605, 674; SJA 1613), the military judge voir dired the panel on media exposure, (JA 468–470), the venire was not from the Fort Hood community, (SJA 1509–19), and the courthouse security was necessary for Appellant's protection. (SJA 1608–09). "[T]he record of trial is barren of any

hint that hysteria, partiality, or emotional excitability gripped the courtroom . . . ." *United States v. Vigneault*, 3 U.S.C.M.A. 247, 254, 12 C.M.R. 3, 10 (1953). Thus, the denial of Appellant's motion for change of venue did not prejudice Appellant's substantial rights.

Issue Presented III

WHETHER THE MILITARY JUDGE ERRED BY NOT ENSURING ADEQUATE VOIR DIRE THAT RESULTED IN A PANEL THAT WAS TAINTED BY EXCESS PUBLICITY.

[redacted] Each of them indicated that they were able to disregard the publicity and decide the case based solely on the evidence presented in court. (*e.g.* JA 470). Accordingly, there was no error in the amount of voir dire or in the final composition of the panel. *Akbar*, 74 M.J. at 397 (noting the "long-standing principle that a member 'is not disqualified just because he has been exposed to pretrial publicity or even has formulated an opinion as to the guilt or innocence of an accused on the basis of his exposure.'" (quoting *United States v. Calley*, 22 C.M.A. 534, 537, 48 C.M.R. 19, 22 (1973))). Regardless, Appellant waived any challenge to the panel as constituted by not challenging the members for cause or exercising his peremptory challenge, and the military judge had no duty to sua

sponte excuse any members in the absence of a challenge for cause. *See supra*, pp.50–71.

Issue Presented IV

WHETHER THE AGGRAVATING FACTORS IN THIS CASE, TO INCLUDE "THE PROSECUTION EXHIBITS" AND "THE NATURE OF THE WEAPON," WERE UNCONSTITUTIONALLY VAGUE AND DUPLICATIVE. *SEE JONES V. UNITED STATES*, 527 U.S. 373 (1999).

No aggravating factor was unconstitutionally vague and duplicative. To begin, "the prosecution exhibits" and "the nature of the weapon" were aggravating *circumstances*, not *factors*. The sole aggravating factor was: "Having been found guilty of premeditated murder, the accused has been found guilty in the same case of another premeditated murder." (SJA 1860). Once the panel finds the aggravating factor beyond a reasonable doubt, the panel then determines whether the aggravating circumstances outweigh the extenuating and mitigating circumstances to impose a sentence of death. (SJA 1861).

The two specified aggravating circumstances are not unconstitutionally vague and duplicative. The Supreme Court has "never before held that aggravating factors could be duplicative so as to render them constitutionally invalid" but has only found "that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor." *Jones v. United States*, 527 U.S. 373, 398 (1999) (citing *Stringer v. Black*, 503 U.S. 222, 232 (1992)). "As long as an

aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster." *Jones*, 527 U.S. at 400 (citing *Tuilaepa v. California*, 512 U.S. 967, 973 (1994)). "The prosecution exhibits" and "the nature of the weapon" have a clear, unambiguous meaning that the panel was indisputably capable of understanding.

Furthermore, even assuming error, the error was harmless. As in *Jones*, the government's sentencing argument "placed great emphasis on" the other aggravating circumstances: "The degree to which the crimes were planned and premeditated; The nature and extent of the injuries suffered by the victims; and The psychological, financial, emotional and physical impact of the offenses on the victims, their family members, and friends." *Id.* at 402–03; (SJA 1861–62; JA 780–97). Considering these aggravating circumstances alone, this Court should be convinced beyond a reasonable doubt that the panel would have voted for a sentence of death, regardless. *See Jones*, 527 U.S. at 403–04.

Issue Presented V

WHETHER THE MILITARY JUDGE ERRED BY ABDICATING HER RESPONSIBILITY OF COURTHOUSE SECURITY TO THE GOVERNMENT.

The military judge did not abdicate any responsibility with respect to courthouse security. In the Army, senior commanders, through their installation provost marshals, are responsible for physical security. Army Reg. 190-13: The

Army Physical Security Program, paras. 1-24, 1-29 (Jun. 27, 2019). The military judge—whose role is different with respect to courtroom security—fulfilled her duty in ensuring Appellant was not prejudiced by the heightened security measures at his court-martial. *Hasan*, 80 M.J. at 716–18; (*e.g.* SJA 1610; JA 454–55). Accordingly, Appellant's argument fails.

Issue Presented VI

ASSUMING *ARGUENDO* THAT THIS COURT DOES NOT OVERTURN *UNITED STATES V. DOCK*, WHETHER APPELLANT'S ACTIONS AT TRIAL, TO INCLUDE ADMITTING THAT HE WAS THE SHOOTER, AMOUNT TO A GUILTY PLEA PROHIBITED BY ARTICLE 45, UCMJ. See also *UNITED STATES V. MCFARLANE*, 23 C.M.R 320 (1957).

Appellant's actions during trial did not amount to a *de facto* plea of guilty. Unlike the defense counsel in *McFarlane*, Appellant did not specifically intend to circumvent Article 45(b)—instead, he attempted to argue the murders were justified killings committed during "America's war on Islam," (JA 723), to the extent the Military Rules of Evidence would allow. Nor were Appellant's actions like the factual circumstances in *Dock* that led that court to conclude a *de facto* plea had occurred. A key distinction between Appellant's opening statement and Dock's attorney's was that Appellant's statement—specifically, "I am the shooter," (JA723)—did not meet all the elements of a capital offense. Dock's attorney's opening statement admitted all the elements of felony murder. *Dock*, 26 M.J. at

623. At most, Appellant admitted to the actus reus of the charges, but did not admit that the murders and attempted murders were unlawful. Indeed, Appellant's desired "defense of others" made exceptionally clear he believed the killings were not unlawful. As Appellant neither intended to plead guilty nor admitted to all the elements of a capital offense, his actions during trial were not a confession of guilt in open court and did not rise to the level of a *de facto* plea of guilty in violation of Article 45(b).

Issue Presented VII

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING STANDBY COUNSEL'S MOTION TO SUBMIT MATTERS IN MIGITATION AND EXTENUATION.

The military judge did not err by denying standby counsel's motion for the independent presentation of mitigation evidence after Appellant, acting as his own counsel, affirmatively chose not to present such evidence. Neither the Eighth Amendment nor the military justice system affirmatively requires the admission of mitigation evidence at a capital sentencing proceeding. Accordingly, this argument is without merit.

In this case, Appellant affirmatively waived his right to present mitigation and extenuation evidence and stated that his decision to not present such evidence or call

his mitigation and religious conversion expert and other witnesses was a voluntary and tactical choice that he made. (SJA 1813–19).

The Supreme Court has never held or suggested that the Eighth Amendment "justifies forcing an unwilling defendant to accept representation or to present an affirmative penalty defense in a capital case." *People v. Bloom,* 774 P.2d 698, 718–19 (Cal. 1989). In *Blystone v. Pennsylvania*, the Supreme Court affirmed a death sentence where the appellant chose not to present any mitigation evidence during the sentencing phase of his trial. 494 U.S. 299, 309 (1990). In *Lenhard v. Wolff*, the Supreme Court refused to grant a stay of execution where a judge refused to allow a pro se accused's standby counsel to present mitigation evidence after the accused chose not to. 444 U.S. 807 (1979); *see also Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005) ("[T]he Constitution does not prohibit a competent capital defendant from waiving the presentation of mitigation evidence.").

"Society's interest in the proper administration of justice is preserved by giving a defendant the right freely to present evidence in mitigation." *Hamblin v. State*, 527 So.2d 800, 804 (Fla. 1988) (internal quotations and citations omitted). This interest is reflected by R.C.M. 1004 and a wealth of Supreme Court precedent demonstrating the Eighth Amendment only compels the panel's consideration of mitigation evidence to the extent that it is presented. This is a far cry from affirmatively requiring an accused to present such evidence as Appellant suggests

this Court hold. Such a finding interferes with Appellant's constitutional right to represent himself and conduct his defense in the manner he chooses by requiring that mitigation evidence be presented to the panel over his objection. The military judge properly denied standby counsel's motion for the independent presentation of mitigation evidence. Accordingly, because the military judge did not abuse her discretion, this Court should deny Appellant's request for a sentence rehearing.

Issue Presented VIII

THE GOVERNMENT FAILED TO OFFER REASONABLE, PLAUSIBLE, AND NONDISCRIMINATORY REASONS TO CHALLENGE LTC S.,[39] A PROSPECTIVE PANEL MEMBER, PURSUANT TO *BATSON V. KENTUCKY*, 476 U.S. 79 (1986).

The government used its peremptory challenge on COL ES, who is African American. (JA 677). On her own accord, the military judge asked the government to state a race-neutral basis for the peremptory challenge. (JA 677). The government cited their concern about COL ES's ability to follow the military judge's orders and that the manner in which he wore his uniform indicated that he "follow[ed] his own values." (JA 678). On its face, this explanation is reasonable,

[39] Appellant refers to "LTC S;" however, there was no panel member holding the rank of LTC with a last name beginning with "S." Appellee believes Appellant is referring to COL ES, who is African American and whom the government challenged first for cause, then used its peremptory challenge after the military judge denied the challenge for cause. (JA 676–77).

plausible, and non-discriminatory. Additionally, Appellant did not object to the explanation at trial, so this Court should not consider the argument on appeal. *United States v. Watson*, 54 M.J. 779, 782 (A.F. Ct. Crim. App. 2001) (citing *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999)).

Issue Presented IX

THE CUMULATIVE ERRORS IN THIS CASE COMPEL REVERSAL OF THE FINDINGS AND SENTENCE.

Appellant's issue presented—ostensibly raising the cumulative-error doctrine—is without merit. Under the cumulative-error doctrine, "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992) (internal citation and quotation marks omitted). Reversal is only warranted where the cumulative errors denied Appellant a fair trial. *See Banks*, 36 M.J. at 171. "Assertions of error without merit are not sufficient to invoke this doctrine." *Gray*, 51 M.J. at 61. "[A]ppellate courts are far less likely to find cumulative error where the record contains overwhelming evidence of a defendant's guilt." *United States v. Flores*, 69 M.J. 366, 373 (C.A.A.F. 2011) (citing *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996)). In *Flores*, the Court found any error was harmless beyond a reasonable doubt because the evidence of guilt was "truly overwhelming." *Id.* at 371. The Court then conducted a cumulative error analysis

and cited to the fact that the evidence of guilt was "indeed overwhelming" in finding a lack of cumulative error. *Id.* at 373.

As in *Flores*, evidence of Appellant's guilt here "was indeed overwhelming." *Id.* If there was error at all, there were no errors amounting to any effect on Appellant's trial that materially prejudiced Appellant's substantial rights—nor was Appellant denied a fair trial. *See United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) ("Consequently, the errors, in the aggregate, do not come close to achieving the critical mass necessary to cast a shadow upon the integrity of the verdict."). Therefore, the cumulative-error doctrine is inapplicable in this case.

PART B: SYSTEMIC ISSUES

Issue Presented I

WHETHER THE PRESIDENT EXCEEDED HIS AUTHORITY IN PROMULGATING AGGRAVATING FACTORS IN RULE FOR COURTS-MARTIAL (R.C.M.) 1004.

This argument lacks merit because the Supreme Court in *Loving v. United States* considered this issue and held the President did not exceed his authority in promulgating aggravating factors in military capital cases. 517 U.S. at 770–73 (affirming Congress could delegate the power to establish aggravating factors in military capital cases to the President, and holding that the President, "acting in his constitutional office of Commander in Chief, had undoubted competency to

prescribe those [aggravating] factors without further guidance"); *see also Akbar,* 74 M.J. at 404 (rejecting the appellant's "constitutional challenge to R.C.M. 1004 on the basis that it constitutes an improper delegation of power").

Issue Presented II

STANDARDS APPLICABLE TO FEDERAL AND STATE CAPITAL DEFENSE COUNSEL HAVE APPLICABILITY TO COURTS-MARTIAL AS RELEVANT STANDARDS OF CARE, AND THE ARMY COURT'S ANALYSIS OF MAJOR HASAN'S CASE WAS FLAWED BECAUSE OF ITS MISAPPLICATION OF THE GUIDELINES AND ITS DETERMINATION COUNSEL WERE "WELL QUALIFIED."

Appellant chose to waive representation by counsel and proceed pro se during the merits portion of the trial. (JA 347). Nevertheless, Appellant's counsel, who acted as standby counsel and provided representation prior to the merits portion, were well qualified because they were well informed, diligent counsel with no substandard work alleged. (ABA, *Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases,* Guideline 5.1(B)(2.)(2003)) (requiring knowledge and skill in certain areas but not previous capital litigation experience). While the ABA Guidelines do not require defense counsel to have prior capital litigation experience, Appellant's lead counsel, LTC Kris Poppe, did have previous capital litigation experience. (SJA 1524–25). In fact, Appellant himself acknowledged LTC Poppe had previous experience on a

death penalty case and was "very learned and experienced." (JA 347). For these reasons, while the error is inapplicable to the merits portion of the case because Appellant proceeded pro se, his appointed counsel who represented him pre-trial were well-qualified, both under the military and ABA standards.

Issue Presented III

UNDER THE SUPREME COURT'S REASONING IN *RING v. ARIZONA*, 536 U.S. 584 (2002), CONGRESS UNCONSTITUTIONALLY DELEGATED TO THE PRESIDENT THE POWER TO ENACT ELEMENTS OF CAPITAL MURDER, A PURELY LEGISLATIVE FUNCTION.

In *Ring*, the Supreme Court found aggravating factors in capital sentencing schemes must be submitted to a jury and proven beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584, 609 (2002). *Ring* was limited solely to the question of whether the Sixth Amendment jury trial right required that the "factors" be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 588, 597 n.4 (noting "[t]his case concerns the Sixth Amendment right to a jury trial in capital prosecutions" and "Ring's claim is tightly delineated. He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him"). To begin, this holding is inapplicable to courts-martial because "there is no Sixth Amendment right to trial by jury in courts-martial." *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing *Ex parte Quirin*, 317 U.S. 1, 39 (1942)). Regardless, based on the limited nature of this holding, there is

no question that the military sentencing scheme under R.C.M. 1004 explicitly complies because it requires that the members find that at least one of the listed aggravating factors exists beyond a reasonable doubt. R.C.M. 1004(b)(4)(A), (c).

Issue Presented IV

THE LACK OF A SYSTEM TO ENSURE CONSISTENT AND EVEN-HANDED APPLICATION OF THE DEATH PENALTY IN THE MILITARY VIOLATES BOTH MAJOR HASAN'S EQUAL PROTECTION RIGHTS AND ARTICLE 36, UCMJ. See 18 U.S.C. § 2245 AND U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-10.010 (JUNE 1998) (USAM) AND 10 U.S.C. § 949a(b)(2)(C)(ii). IN CONTRAST TO THE USAM, NO PROTOCOL EXISTS FOR CONVENING AUTHORITIES IN CAPITAL CASES, CREATING AN AD HOC SYSTEM OF CAPITAL SENTENCING.

The foundation of Appellant's argument is the flawed premise that Due Process and Equal Protection require that the decision to pursue a death penalty case within the military justice system must follow the same process as the one followed by the Department of Justice, pursuant to the United States Attorney's Manual (USAM). However, federal courts have consistently held that these procedures do not confer any substantive or procedural rights. *United States v. Jackson*, 327 F.3d. 273, 295 (4th Cir. 2003), cert. denied, 540 U.S. 1019 (2003); *United States v. Lopez-Matias*, 522 F. 3d 150, 155–56 (1st Cir. 2008) (citing *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990); *United States v. Lee*,

274 F.3d 485, 493 (8th Cir. 2001) (finding that the USAM is not enforceable by individuals); *Nichols v. Reno*, 124 F.3d 1376, 1376 (10th Cir. 1997) (defendant has no "protectable interest" in enforcement of death penalty protocols); *United States v. Myers*, 123 F.3d 350, 355–56 (6th Cir. 1997) ("[A] violation by the government of its internal operating procedures, on its own, does not create a basis for suppressing . . . grand jury testimony."); *United States v. Gillespie*, 974 F.2d 796, 800–02 (7th Cir. 1992); *United States v. Busher*, 817 F.2d 1409, 1411–12 (9th Cir. 1987)). Because the provisions of the USAM offer no legal protections to any accused within the civilian federal system, Appellant cannot be denied the equal protection of legal safeguards that do not exist.

Nevertheless, assuming there were legal protections available to Appellant, he does not have an equal protection claim because accused servicemembers and civilian defendants are not similarly situated. *See Cleburne v. d Living Center, Inc.*, 473 U.S. 432, 439 (1985) (finding that in order to apply the equal protection principles of the Fourteenth Amendment, all persons affected by the legislature's distinctions must be "similarly situated"). Accused servicemembers and civilian defendants are not similarly situated for the purpose of criminal trials. *United Akbar*, 74 M.J. at 404 ("Appellant, as an accused servicemember, was not similarly situated to a civilian defendant.") (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). Therefore, Appellant's equal protection argument fails on its face.

Issue Presented V

THE MILITARY JUSTICE SYSTEM'S PEREMPTORY CHALLENGE PROCEDURE, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE MEMBER WITHOUT CAUSE, IS AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION IN CAPITAL CASES, WHERE THE PROSECUTOR IS FREE TO REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A CHALLENGE FOR CAUSE. But *see UNITED STATES v. CURTIS*, 44 M.J. 106, 131-33 (C.A.A.F. 1996); *UNITED STATES v. LOVING,* 41 M.J. 213, 294-95 (C.A.A.F. 1994).

This Court rejected this argument in *United States v. Loving*, 41 M.J. at 294–95*, United States v. Curtis*, 44 M.J. at 131–33*,* and *United States v. Gray*, 51 M.J. at 33.

Issue Presented VII

RULE FOR COURTS-MARTIAL (R.C.M.) 1004 DOES NOT ENSURE THE GOALS OF INDIVIDUAL FAIRNESS, REASONABLE CONSISTENCY, AND ABSENCE OF ERROR NECESSARY TO ALLOW THIS COURT TO AFFIRM APPELLANT'S DEATH SENTENCE BECAUSE R.C.M. 1004 DOES NOT ENSURE THE RACE OF THE VICTIM OR ALLEGED PERPETRATOR IS NOT A FACTOR IN THE DEATH SENTENCE. *McCLESKEY v. KEMP,* 481 U.S. 279 (1987).

This issue has already been resolved against Appellant in *United States v. Curtis*. 32 M.J. 252, 268 (C.A.A.F. 1991) (finding that there is no constitutional

mandate to include a provision to prevent racial bias in death penalty deliberations).

Issues Presented VIII to IX

Issue Presented VIII

THE VARIABLE SIZE OF THE COURT-MARTIAL PANEL CONSTITUTED AN UNCONSTITUTIONAL CONDITION ON MAJOR HASAN'S FUNDAMENTAL RIGHT TO CONDUCT VOIR DIRE AND PROMOTE AN IMPARTIAL PANEL. I*RVIN v. DOWD*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

Issue Presented IX

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BECAUSE THE MILITARY SYSTEM DOES NOT GUARANTEE A FIXED NUMBER OF MEMBERS. *IRVIN v. DOWD,* 366 U.S. 717, 722, (1961).

This Court has already rejected Appellant's arguments concerning a required number of members for the panel. *Curtis*, 32 M.J. at 267–68 ("[W]e are not convinced that a court-martial must have 12 members in a capital case when this is not required in any other type of trial.")

Issue Presented X

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED MAJOR HASAN A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY ALLOWING THE CONVENING AUTHORITY TO ACT AS A GRAND JURY IN REFERRING CAPITAL CRIMINAL CASES TO TRIAL, PERSONALLY APPOINTING MEMBERS OF HIS CHOICE, RATING THE MEMBERS, HOLDING THE ULTIMATE LAW ENFORCEMENT FUNCTION WITHIN HIS COMMAND, RATING HIS LEGAL ADVISOR, AND ACTING AS THE FIRST LEVEL OF APPEAL, THUS CREATING AN APPEARANCE OF IMPROPRIETY THROUGH A PERCEPTION THAT HE ACTS AS PROSECUTOR, JUDGE, AND JURY.

Like the accused in *United States v. Loving*, Appellant "makes a broad-based attack on virtually every aspect of the convening authority's role without briefing the issue." 41 M.J. at 296. This Court summarily rejected every one of these claims and Appellant offers no new legal authority or argument in support of these claims. *Id*. at 297 (stating the Fifth Amendment expressly excludes military cases from the grand jury requirement and "the Article 32 investigating officer, not the convening authority, acts as a grand jury"). Furthermore, this Court has "rejected the argument that the role of the convening authority in personally appointing members would violate the right to a fair and impartial trial." *Curtis,* 44 M.J. at

130–33 (citing *Loving*, 41 M.J. at 296–97). Accordingly, Appellant's claim on this issue presented lacks merit.

Issue Presented XI

ARTICLE 18, UCMJ, AND R.C.M. 201(f)(1)(C), WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATES THE GUARANTEE OF DUE PROCESS AND A RELIABLE VERDICT UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

This exact issue was resolved against Appellant in *Loving*. 41 M.J. at 291 (citing *Singer v. United States*, 380 U.S. 24, 26 (1965) (holding that a defendant does not have a constitutional right to waive trial by jury)); *see also United States v. Matthews*, 16 M.J. 354, 363 (C.A.A.F. 1983) (holding that a military accused does not have a constitutional right to waive trial by members in a capital case).

Issue Presented XII

MAJOR HASAN WAS DENIED HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION. DUREN v. MISSOURI, 439 U.S. 357 (1979). But see *UNITED STATES V. CURTIS*, 44 M.J. 106, 130-33 (C.A.A.F. 1996).

"The policy concern for a random selection and a fair cross section essential in selecting a civilian jury is not applicable in the military justice system." *United States v. Dowty*, 60 M.J. 163, 173 (C.A.A.F. 2004) (citing *United States v. Tulloch*,

47 M.J. 283, 285 (C.A.A.F. 1997)); *see also Curtis*, 44 M.J. at 130–33. ("We hold that appellant does not have a right to a civilian jury selected from the civilian community."). Appellant's argument on these grounds merits no relief.

Issue Presented XIII

THE SELECTION OF THE PANEL MEMBERS BY THE CONVENING AUTHORITY IN A CAPITAL CASE DIRECTLY VIOLATES MAJOR HASAN'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ, BY IN EFFECT GIVING THE GOVERNMENT UNLIMITED PEREMPTORY CHALLENGES.

In capital cases, this Court has "rejected the argument that the role of the convening authority in personally appointing members would violate the right to a fair and impartial trial" as it relates to peremptory challenges. *Curtis*, 44 M.J. at 132; *see also Loving*, 41 M.J. at 296–97; *Akbar*, 74 M.J. at 379, 414. Accordingly, Appellant's claim on this issue presented lacks merit.

Issue Presented XIV

THE PRESIDENT EXCEEDED HIS ARTICLE 36 POWERS TO ESTABLISH PROCEDURES FOR COURTS-MARTIAL BY GRANTING TRIAL COUNSEL A PEREMPTORY CHALLENGE AND THEREBY THE POWER TO NULLIFY THE CONVENING AUTHORITY'S ARTICLE 25(d) AUTHORITY TO DETAIL MEMBERS OF THE COURT.

Article 41(b)(1), UCMJ—i.e., Congress, not the president—grants both trial counsel and the accused one peremptory challenge. *See Curtis*, 44 M.J. at 132, n.8. Accordingly, this argument merits no relief for Appellant.

Issue Presented XV

THE DESIGNATION OF THE SENIOR MEMBER AS PRESIDING OFFICER FOR DELIBERATIONS DENIED MAJOR HASAN A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ.

This Court rejected this claim in *United States v. Curtis*, 44 M.J. at 150 (finding this argument "ignores the standard instruction on findings and sentence that 'influence of superiority in rank will not be employed in any manner in an attempt to control the independence of members in the exercise of their own personal judgment'") (internal citations omitted); *see also Gray*, 51 M.J. at 58. Appellant offers no legal authority or factual matter to distinguish his case.

Issue Presented XVI

MAJOR HASAN WAS DENIED HIS CONSTITUTIONAL RIGHT UNDER THE FIFTH AMENDMENT TO A GRAND JURY PRESENTMENT OR INDICTMENT.

This Court rejected this claim in *Loving*, 41 M.J. at 296-97, *Curtis*, 44 M.J. at 130, and *Gray*, 51 M.J. at 50 based on the Fifth Amendment. U.S. Const. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous, crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .)

Issue Presented XVII

COURT-MARTIAL PROCEDURES DENIED MAJOR HASAN HIS ARTICLE III RIGHT TO A JURY TRIAL. SOLORIO v. UNITED STATES, 483 U.S. 435, 453-54, (1987) (MARSHALL, J., DISSENTING). But see *United States v. CURTIS*, 44 M.J. 106, 132 (C.A.A.F. 1996).

This Court rejected this claim in *Curtis.* 44 M.J. at 132 ("[T]he Supreme Court has indicated that servicemembers have never had a right to a trial by jury."); *see also Gray*, 51 M.J. at 48; *Loving*, 41 M.J. at 287. Appellant offers no legal authority or factual matter to distinguish his case.

Issue Presented XVIII

THIS COURT LACKS THE JURISDICTION AND AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS-MARTIAL AND THE UCMJ BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WITH THE POWER TO CHECK THE LEGISLATIVE AND EXECUTIVE BRANCHES UNDER MARBURY v. MADISON, 5 U.S. 137, 2 L. Ed. 60, 1 CRANCH (1803). See also COOPER v. AARON, 358 U.S. 1 (1958) (THE POWER TO STRIKE DOWN UNCONSTITUTIONAL STATUTES OR EXECUTIVE ORDERS IS EXCLUSIVE TO ARTICLE III COURTS). But see *LOVING*, 41 M.J. at 296.

This Court rejected this claim in *United States v. Matthews*. 16 M.J. at 364–68 (finding Congress ordained military courts "[w]ithin their proper sphere . . . [to be] constitutional instruments to carry out congressional and executive will"); *see also United States v. Loving*, 41 M.J. at 296 (reaffirming its finding). Appellant offers no legal authority or factual matter to distinguish his case.

Issue Presented XIX

MAJOR HASAN IS DENIED EQUAL PROTECTION OF LAW IN VIOLATION OF THE FIFTH AMENDMENT AS ALL U.S. CIVILIANS ARE AFFORDED THE OPPORTUNITY TO HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES MILITARY BY VIRTUE OF THEIR STATUS AS SERVICE MEMBERS ARE NOT. But see *United States v. LOVING*, 41 M.J. 213, 295 (C.A.A.F. 1994).

This Court has already rejected this argument. *Loving*, 41 M.J. at 296; *see also Palmore v. United States*, 411 U.S. 389, 359 (1973) (recognizing the authority of Congress to provide for criminal trials in the District of Columbia before Article I courts). Further, Appellant may seek additional review of his case from the Supreme Court under Article 67a, UCMJ, and thus has an opportunity to have his case reviewed by an Article III court.

Issue Presented XX

MAJOR HASAN IS DENIED EQUAL PROTECTION OF LAW UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE [IN ACCORDANCE WITH] ARMY REGULATION 15-130, PARA. 3-1(d)(6), HIS APPROVED DEATH SENTENCE RENDERS HIM INELIGIBLE FOR CLEMENCY BY THE ARMY CLEMENCY AND PAROLE BOARD, WHILE ALL OTHER CASES REVIEWED BY THIS COURT ARE ELIGIBLE FOR SUCH CONSIDERATION. But see *United States v.* THOMAS, 43 M.J. 550, 607 (N-M. CT. CRIM. APP. 1995).

Article 74(a), UCMJ, gives the service secretaries statutory authority to remit or suspend sentences other than those reserved to the President. The Army Clemency and Parole Board (ACPB) was created to advise and assist the Secretary of the Army in reviewing and considering those cases within his statutory authority that he may consider for clemency or parole. U.S. Dep't Army Reg. 15-130, Army Clemency and Parole Board (23 October 1998) [AR 15-130], paras. 1-1 and 1-4. The ACPB does not have an independent grant of authority and it does not confer rights upon those court-martialed. AR 15-130, para. 1-1. It simply exists to serve the Secretary of the Army in his statutory role. The ACPB does not have the independent authority to grant clemency but rather does so only when acting as a Secretary of the Army's designee. Congress reserved the ability to commute or remit a death sentence to the President. Article 71(a), UCMJ.

Because Appellant was sentenced to death, he is eligible to receive clemency from the President rather than the Secretary of Army. *United States v. Thomas*, 43 M.J. 550, 607 (N-M. Ct. Crim. App. 1995) (concluding that this process entitles appellants with death sentences to a greater right of review because of the sentence). Appellant fails to explain how such a statutory scheme denies him equal protection of the law.

Issue Presented XXI

MAJOR HASAN'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE CAPITAL REFERRAL SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER.

This Court specifically rejected this argument in *Loving*, where no evidence of arbitrary or discriminatory exercise of prosecutorial authority was presented. 41 M.J. at 293–94 (relying on *Gregg v. Georgia*, 428 U.S. 153 (1976) ("A convening authority exercises prosecutorial discretion by deciding, with the advice of his or her SJA, whether a case will be prosecuted and whether the death penalty will be authorized for a capital offense")); *see also Akbar*, 74 M.J. at 379. Accordingly, this argument lacks merit.

Issue Presented XXII

THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL AS IT RELATES TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE U.S. But see *UNITED STATES v. LOVING*, 41 M.J. 213, 293 (C.A.A.F. 1994). THE COURT RESOLVED THE ISSUE AGAINST PRIVATE LOVING, ADOPTING THE REASONING OF THE DECISION OF THE ARMY COURT OF MILITARY REVIEW. See *UNITED STATES v. LOVING*, 34 M.J. 956, 967 (A.C.M.R. 1992). HOWEVER, PRIVATE LOVING'S ARGUMENT BEFORE THE COURT RELIED ON THE TENTH AMENDMENT AND NECESSARY AND PROPER CLAUSE OF THE U.S. CONSTITUTION. *Id.* MAJOR HASAN'S ARGUMENT RELIES ON THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

This Court has rejected this claim in multiple previous decisions. *Hennis*, 79 M.J. at 374; *Akbar*, 74 M.J. at 379. The Eighth Amendment does not transform an otherwise meritless Tenth Amendment claim into a meritorious argument. Additionally, this Court has previously reviewed and affirmed Article 118's consistency with the Eighth Amendment. *Curtis*, 32 M.J. at 257–69; *Loving*, 41 M.J. at 293. Accordingly, this issue presented is without merit.

Issue Presented XXIII

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ, AS THE CONVENING AUTHORITY DID NOT DEMONSTRATE HOW THE DEATH PENALTY WOULD ENHANCE GOOD ORDER AND DISCIPLINE.

This Court has rejected this claim in multiple previous decisions. *Hennis*, 79 M.J. at 374; *Akbar*, 74 M.J. at 379. There is nothing in the plain language of Article 55, UCMJ, that requires a showing that any court-martial punishment must enhance good order and discipline to be valid. Appellant fails to provide this Court with any legal support for his proposition. Accordingly, this issue presented is without merit.

Issue Presented XXIV

THE MILITARY CAPITAL SENTENCING PROCEDURE IS UNCONSTITUTIONAL BECAUSE MILITARY JUDGES DO NOT HAVE THE POWER TO ADJUST OR SUSPEND A DEATH SENTENCE IMPROPERLY IMPOSED.

This Court has rejected this claim in multiple previous decisions. *Loving*, 41, M.J. at 297 (finding a military judge's ability to declare a mistrial, the convening authority's ability to set aside and reduce sentences, and the appellate court's ability to set aside unlawful sentences to be constitutionally sufficient in death penalty cases); *Curtis*, 32 M.J. at 257–69 (finding the procedures promulgated by

the President in R.C.M. 1004 to be constitutional); *Hennis*, 79 M.J. at 374; *Akbar*, 74 M.J. at 379. Appellant offers no legal authority or factual matter to distinguish his case. Accordingly, this issue presented is without merit.

Issue Presented XXV

DUE TO THE MILITARY JUSTICE SYSTEM'S INHERENT FLAWS CAPITAL PUNISHMENT AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT UNDER ALL CIRCUMSTANCES.

This Court has consistently upheld the military justice system's death penalty procedures, going so far as to hold that procedures under R.C.M. 1004 go "further than most state statutes in providing safeguards for the accused." *Curtis*, 32 M.J. at 269; *Loving*, 41 M.J. at 293 (affirming the consistency of the military's capital sentencing procedures with the Eighth Amendment). This Court also rejected this claim in *United States v. Akbar*. 74 M.J. at 379. Accordingly, this issue presented is without merit.

Issues Presented XXVI to XXVIII

Issue Presented XXVI

R.C.M. 1001(b)(4) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED TO THE APPELLATE AND CAPITAL SENTENCING PROCEEDINGS BECAUSE IT PERMITS THE INTRODUCTION OF EVIDENCE BEYOND THAT OF DIRECT FAMILY MEMBERS AND THOSE PRESENT AT THE SCENE IN VIOLATION OF THE FIFTH AND EIGTH AMENDMENTS.

Issue Presented XXVII

R.C.M. 1001(b)(4) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED TO THE APPELLATE AND CAPITAL SENTENCING PROCEEDINGS BECAUSE IT PERMITS THE INTRODUCTION OF CIRCUMSTANCES WHICH COULD NOT REASONABLY HAVE BEEN KNOWN BY MAJOR HASAN AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS.

Issue Presented XXVIII

THE MILITARY JUDGE ERRED IN ADMITTING VICTIM-IMPACT EVIDENCE REGARDING THE PERSONAL CHARACTERISTICS OF THE VICTIMS WHICH COULD NOT REASONABLY HAVE BEEN KNOWN BY MAJOR HASAN AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGTH AMENDMENT RIGHTS.

This Court rejected similar claims in *United States v. Akbar*. 74 M.J. at 379. R.C.M. 1001(b)(4) allows for the introduction of evidence in aggravation that is "directly related to or resulting from" the offenses committed. This is an objective standard focusing on the type of evidence and the strength of its connection to the crime. *See United States v. Hardison*, 64 M.J. 279, 281–82 (C.A.A.F. 2007). Aggravating evidence offered by witnesses who are not direct family members of victims are no less subject to this standard. The Eighth Amendment does not limit aggravating evidence to that provided by direct family members. *See United States v. Whitten*, 610 F.3d 168, 188–189 (2nd Cir. 2010) (citing *United States v. Bolden*,

545 F.3d 609, 626 (8th Cir. 2008)); *United States v. Fields*, 516 F.3d 923, 946 (10th Cir. 2008). The Supreme Court has also held that such evidence may refer to the damage done to "society." *Payne*, 501 U.S. at 825.

Furthermore, Appellant's suggestion that victim impact sentencing evidence must be limited to those harms that the accused can foresee is unsupported by any legal theory. Regardless, any reasonable person would know that murdering thirteen innocent people with a firearm, as well as wounding over thirty others, could have far-reaching consequences. Appellant's willful blindness to the devastation his crimes caused to both the victims' families and society as a whole cannot serve as a basis to hide that evidence from the panel. Accordingly, these assignments of error are without merit.

Issue Presented XXIX

THE DEATH SENTENCE IN THIS CASE VIOLATES THE *EX POST FACTO* CLAUSE, FIFTH AND EIGHTH AMENDMENTS, SEPARATION OF POWERS DOCTRINE, PREEMPTION DOCTRINE, AND ARTICLE 55, UCMJ, BECAUSE WHEN IT WAS ADJUDGED NEITHER CONGRESS NOR THE ARMY SPECIFIED A MEANS OR PLACE OF EXECUTION.

This Court has rejected this claim in multiple previous decisions. *Hennis*, 79 M.J. at 374; *Akbar*, 74 M.J. at 379. Appellant offers no citation to any support for the proposition that, at the time of sentencing, the Government is required to

designate the manner and location of Appellant's execution. Accordingly, this issue presented is without merit.

Issue Presented XXX

WHETHER THE PANEL AND THE MILITARY JUDGE WERE BIASED AGAINST APPELLANT.

Appellant offers no citation to the record which demonstrates that all panel members would "not yield to the evidence presented and the judge's instructions," *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F.1997)), or that the "public's perception of fairness in having [this] particular . . . court-martial panel" would be affected. *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). Likewise, Appellant provides no evidence that "a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned.'" *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (quoting *United States v. Sullivan,* 74 M.J. 448, 453 (C.A.A.F. 2015)). Accordingly, Appellant merits no relief on this issue presented.

CONCLUSION

WHEREFORE, the United States prays that this Honorable Court affirm the findings and sentence.

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CERTIFICATE OF COMPLIANCE

1. This brief does not comply with the type-volume limitation of Rule 21(b); however, the Court previously granted a Motion for Leave to File Brief in Excess of Page Limit.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

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October 19, 2022

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel on October 20, 2022.

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APPENDIX

Alazazi v. Anderson

United States Court of Appeals for the Sixth Circuit

May 16, 1983

No. 81-1542

Reporter
1983 U.S. App. LEXIS 13038 *; 711 F.2d 1055

MOHAMED SAID ALAZAZI Petitioner-Appellant vs. CHARLES E. ANDERSON, etc. Respondents-Appellees

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

Core Terms

self-representation, intelligent

Case Summary

Procedural Posture

Petitioner appealed the judgment of the United States District Court, which dismissed his petition for habeas corpus relief under *28 U.S.C.S. § 2254*.

Overview

Petitioner contended that he did not make a knowing, intelligent and voluntary waiver of his right to counsel. He was charged with first degree murder, *M.C.L.A. 750.316*, and possession of a firearm during the commission of a felony, *M.C.L.A. 750.227(b)*. Petitioner hired an attorney, who motioned to withdraw before trial because petitioner was disenchanted with his representation and refused to pay his fee. The trial proceeded with another attorney. Petitioner complained about the second attorney as well, but the trial court refused to allow petitioner to change attorneys. Petitioner decided to represent himself. The trial judge questioned him about his ability and about potential dangers of self-representation. Petitioner was eventually convicted of second degree murder and possession of a firearm during the commission of a felony. He exhausted State remedies. The court agreed with the trial court that petitioner made a knowing and intelligent waiver of legal counsel. Petitioner's refusal to proceed with competent counsel constituted a voluntary waiver. That petitioner felt that he had to proceed pro se was not a sufficient reason to render his choice constitutionally offensive.

Outcome
The court affirmed the judgment of the district court.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Right to Self-Representation

HN1 **Counsel, Right to Self-Representation**

The Michigan Supreme Court acknowledges a defendant's right to self-representation under the *Sixth Amendment of the United States Constitution* and under *Article I, § 13 of the Michigan Constitution*. The court rules, however, that several requirements should be met before a trial court grants a defendant's request to dismiss his counsel and proceed pro se: (1) the defendant's request must be unequivocal; (2) the trial court must determine that the defendant is asserting his right knowingly, intelligently, and voluntarily; (3) the trial court must make the pro se defendant aware of the dangers and disadvantages of self-representation, and (4) the court must determine that the defendant's self-representation will not disrupt, unduly inconvenience and burden the court and the administration of the court's business.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Child Pornography > Employing Minor to Engage in Child Pornography > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Sex Crimes > General Overview

Criminal Law & Procedure > ... > Sex Crimes > Child Pornography > General Overview

Criminal Law & Procedure > Counsel > Right to Self-Representation

HN2[] Criminal Process, Assistance of Counsel

A waiver of legal counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. While a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Although the ultimate finding of knowing and intelligent waiver is a mixed question of fact and law, a state court's factual findings which underlie this ultimate conclusion are presumptively correct under *18 U.S.C.S. § 2254(d)*.

Criminal Law & Procedure > Counsel > Right to Self-Representation

HN3[] Counsel, Right to Self-Representation

While it cannot be disputed that an effective waiver of counsel must be the product of a free and meaningful choice, this does not mean that the decision must be entirely unconstrained. Thus, a criminal defendant may properly be asked, in the interest of orderly procedures, to choose between self-representation and another course of action so long as the alternative to self-representation is not constitutionally offensive.

Opinion

Before: ENGEL and CONTIE, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

ORDER

Petitioner Mohamed Said Alazazi appeals from a district court order dismissing his petition for habeas corpus relief under *28 U.S.C § 2254*. The sole issue on appeal is whether petitioner made a knowing, intelligent and voluntary waiver of his right to counsel.

Petitioner was charged in a Michigan state court with first degree murder, *M.C.L.A. 750.316*, and possession of a firearm during the commission of a felony, *M.C.L.A. 750.227(b)*, in the January 1977 shooting death of Fadhl Othman Abubaker. Prior to trial, petitioner hired an attorney, Charles Campbell, to represent him. Petitioner soon became disenchanted with Campbell's representation and refused to pay part of his fee. Thereafter, the trial court granted Campbell's motion to withdraw on the [*2] condition that petitioner would retain other counsel by the date of trial. When the trial date came, petitioner had not retained other counsel. The trial did proceed, however, when petitioner agreed to let Campbell's partner, Raymond McDonald, represent him.

At trial, there was intermittent friction between petitioner and his attorney. At various points in the trial, petitioner complained that (1) McDonald was not presenting the correct theory of petitioner's case; (2) McDonald did not spend enough time with him; and (3) McDonald had attempted to persuade him to plead guilty. On the morning of the eighth day of trial, McDonald made a motion to withdraw after explaining that petitioner no longer wanted him as his attorney. The judge, however, refused to allow petitioner to change lawyers at this stage of the trial. Petitioner then indicated that he had "no more confidence" in McDonald, and that he would represent himself if the court would not appoint new counsel. After an unsuccessful attempt to persuade petitioner to allow McDonald to continue representing him, the trial judge agreed to conduct a hearing as required by *People v. Anderson, 398 Mich. 361 (1976)* on the issue [*3] of petitioner's request to represent himself. [1]

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[1] In *People v. Anderson, 398 Mich. 361 (1976)*, ***HN1***[] the Michigan Supreme Court acknowledged a defendant's right to self-representation under the *Sixth Amendment of the United States Constitution* and under *Article I, § 13 of the Michigan Constitution*. The court also ruled, however, that several requirements should be met before a trial court grants a defendant's request to dismiss his counsel and proceed pro

During this hearing, the judge questioned petitioner about his ability to represent himself and about the potential dangers of self-representation:

THE COURT: Do you understand that there are dangers in representing yourself? The dangers are that [*4] you are not conversant with the laws of evidence; you're not conversant with the laws and how trials are conducted, do you understand that?

DEFENDANT ALAZAZI: I have explained that to you and the first answer, Your Honor, I am a sailor, I am not a lawyer.

THE COURT: And do you understand that if you go in and try this case yourself, that you're going into it with your eyes open, do you understand that?

DEFENDANT ALAZAZI: Yes, Your Honor.

THE COURT: And do you feel that you intelligently understand what is going on here today?

DEFENDANT ALAZAZI: Yes, Your Honor.

THE COURT: You are?

DEFENDANT ALAZAZI: Yes, Your Honor.

THE COURT: Now you understand that it doesn't matter whether you have any legal knowledge, actual legal knowledge. You have a right to representation but if you do represent yourself, you may be at a disadvantage because you're not conversant in the law?

DEFENDANT ALAZAZI: I understand this due to the difficulties and circumstances that I have faced from the beginning of this case until now. I believe I have no other choice but to accept.

Appendix, p. 46-47.

The judge eventually ruled that petitioner had effectively waived his right to counsel [*5] under *People v. Anderson, supra.* The judge also requested that McDonald remain in the courtroom to advise petitioner. Petitioner represented himself until the twelfth day of trial, at which time he became ill. The court then ordered McDonald to resume his representation of petitioner. Petitioner was eventually convicted of second degree murder and possession of a firearm during the commission of a felony. After exhausting state remedies, petitioner brought this *section 2254* action in federal district court. The district court dismissed his petition in April 1981. Petitioner appeals.

The Supreme Court has indicated that ***HN2***[↑] a waiver of legal counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Edwards v. Arizona, 451 U.S. 477, 482 (1981)*. While a defendant "need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open"". *Faretta v. California, [*6] 422 U.S. 806, 835 (1975)*.

Although the ultimate finding of knowing and intelligent waiver is a mixed question of fact and law, the state court's factual findings which underlie this ultimate conclusion are presumptively correct under *18 U.S.C. § 2254(d)*. *Sumner v. Mata, 455 U.S. 591, 597 (1981)*. In this case, the record indicates that the trial judge engaged in an extended colloquy with petitioner before making his decision. During this discussion, the judge opined that petitioner could not handle his own defense, and thus encouraged petitioner to accept McDonald's services. Moreover, the judge repeatedly asked petitioner if he understood the nature and ramifications of his request. The judge specifically advised petitioner that "there are dangers in representing yourself" and then identified several of them. Under these circumstances, we agree with the trial court that petitioner made a knowing and intelligent waiver of legal counsel.

Petitioner contends, however, that his demand for self-representation was equivocal and thus not completely voluntary. Petitioner argues that he proceeded pro se only after the judge forced him to choose between the representation of an [*7] attorney he did not want (McDonald) and self-representation.

HN3[↑] While it cannot be disputed that an effective waiver must be the product of a free and meaningful choice, this does not mean that the decision must be entirely unconstrained. Thus, a criminal defendant may

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se: (1) the defendant's request must be unequivocal; (2) the trial court must determine that the defendant is asserting his right knowingly, intelligently, and voluntarily; (3) the trial court must make the pro se defendant aware of the dangers and disadvantages of self-representation, and (4) the court must determine that the defendant's self-representation will not disrupt, unduly inconvenience and burden the court and the administration of the court's business. *Id. at 367-68*.

properly be asked, in the interest of orderly procedures, to choose between self-representation and another course of action so long as the alternative to self-representation is not constitutionally offensive. *McKee v. Harris, 649 F.2d 927, 931 (2d Cir. 1981)*, cert. denied, *102 S. Ct. 1772 (1982)*; *Wilks v. Israel, 627 F.2d 32, 35-36 (7th Cir. 1980)*, cert. denied *449 U.S. 1086 (1981)*; *Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976)*. In this case, petitioner does not contend and the record does not indicate that McDonald was not a qualified attorney or that he was not conducting petitioner's defense in a reasonably effective manner. Since petitioner does not advance any argument that proceeding with McDonald was constitutionally offensive, we hold that petitioner's refusal to proceed with competent counsel constitutes a voluntary waiver. [2] That petitioner did not particularly like the choice presented to him [*8] and that he did not particularly want to proceed pro se are not sufficient reasons to render petitioner's choice constitutionally offense. *Wilks v. Israel, 627 F.2d at 36*.

Accordingly, the judgment of the district court is AFFIRMED.

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[2] In light of our holding that petitioner's waiver of counsel was knowing, intelligent and voluntary, we find no merit in petitioner's contention that the district court erred by not holding an evidentiary hearing on this issue. *Townshend v. Sain, 372 U.S. 293 (1963)*.

Hasan v. United States

United States Army Court of Criminal Appeals

March 15, 2021, Decided

ARMY 20130781

Reporter
2021 CCA LEXIS 114 *; 2021 WL 1016416

Major NIDAL M. HASAN, United States Army, Appellant v. United States, Appellee

Subsequent History: Motion granted by United States v. Hasan, 2022 CAAF LEXIS 639 (C.A.A.F., Sept. 8, 2022)

Prior History: United States v. Hasan, 80 M.J. 682, 2020 CCA LEXIS 446, 2020 WL 7310499 (A.C.C.A., Dec. 11, 2020)

Core Terms

military, reconsideration motion, court-martial, entertain, matters

Judges: Before the Court sitting En Banc[1] [*1] .

Opinion

ORDER

WHEREAS:

On 11 December 2020, this Court issued its decision in Appellant's case affirming the findings and sentence in an opinion of the court.[2] On 24 February 2021, Appellant filed a motion for reconsideration, alleging: this Court's review of the military judge's decision was erroneously restrained to LTC KG's "bumper sticker" and did not address the other reasons he should have not sat in judgment of appellant; and the prohibition on guilty pleas under Article 45(b), Uniform Code of Military Justice, 10 U.S.C. § 845(b) (2006 & Supp. II 2009) [UCMJ], violates an accused's autonomy under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) and McCoy v. Louisiana, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018), or alternatively, that Art. 45(b), UCMJ, was incorrectly applied in Appellant's case.

We disagree. This Court fully considered the record before it, which necessarily included those matters cited by appellant in alleging the military judge erred in allowing LTC KG to serve as a member in his court-martial. The additional questionnaire and voir dire responses were raised in appellant's briefs and argument before this Court. Our decision was based on all of the facts and circumstances raised in the record and those matters brought to our attention by the parties. The military judge did not [*2] abuse her discretion in not sua sponte challenging or dismissing LTG KG from panel duty in Appellant's court-martial.

As to the allegations centered on the constitutionality or misapplication of Art. 45(b), UCMJ, we note that appellant did not previously raise these claims in either brief or argument.[3] They are therefore not proper for reconsideration under the rules of this Court and we decline to entertain these untimely arguments in this appeal. *See* Army Court of Criminal Appeals Rules of Appellate Procedure, R. 31.2 (b); *see also* United States v. Muwwakkil, 74 M.J. 187, 191-192 (C.A.A.F. 2015) (citing Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 772 n.9, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994)

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[1] Chief Judge Escallier, Senior Judge Burton, Senior Judge Aldykiewicz, Judge Fleming, and Judge Walker took no part in this case as a result of their disqualification. Chief Judge (IMA) Krimbill designated himself as Chief Judge in this case, and participated in this case while on active duty.

[2] We take this opportunity to note a scrivener's error in the Court's 11 December 2020 opinion, which stated that Appellant's attack killed thirteen individuals and wounded thirty-two. That is hereby corrected to "Appellant's attack killed thirteen individuals and wounded thirty-one."

[3] Appellant initially claimed before this court that the military judge erred in allowing appellant to plead guilty to a capital offense in violation of Article 45, UCMJ, and United States v. McFarlane, 8 C.M.A. 96, 23 C.M.R. 320 (C.M.A. 1957).

("The issue was not raised below, so we do not address it."); *Giordenello v. United States, 357 U.S. 480, 488, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958)* (refusing the entertain government's belated contentions not raised in lower courts).

NOW THEREFORE, IT IS ORDERED:

Appellant's Motion for Reconsideration is DENIED.

DATE: 15 March 2021

End of Document

United States v. Hutchins

United States Navy-Marine Corps Court of Criminal Appeals

January 29, 2018, Decided

No. 200800393

Reporter
2018 CCA LEXIS 31 *

UNITED STATES OF AMERICA, Appellee v. LAWRENCE G. HUTCHINS III, Sergeant (E-5), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by *United States v. Hutchins, 77 M.J. 424, 2018 CAAF LEXIS 307 (C.A.A.F., May 14, 2018)*

Motion granted by *United States v. Hutchins, 78 M.J. 8, 2018 CAAF LEXIS 319 (C.A.A.F., June 1, 2018)*

Motion granted by *United States v. Hutchins, 78 M.J. 31, 2018 CAAF LEXIS 355 (C.A.A.F., June 26, 2018)*

Motion granted by *United States v. Hutchins, 78 M.J. 33, 2018 CAAF LEXIS 361 (C.A.A.F., June 27, 2018)*

Motion granted by *United States v. Hutchins, 78 M.J. 91, 2018 CAAF LEXIS 481 (C.A.A.F., Aug. 2, 2018)*

Review granted by *United States v. Hutchins, 78 M.J. 111, 2018 CAAF LEXIS 568 (C.A.A.F., Aug. 27, 2018)*

Motion granted by *United States v. Hutchins, 78 M.J. 112, 2018 CAAF LEXIS 573 (C.A.A.F., Aug. 28, 2018)*

Motion granted by *United States v. Hutchins, 78 M.J. 189, 2018 CAAF LEXIS 695 (C.A.A.F., Nov. 2, 2018)*

Motion granted by *United States v. Hutchins, 78 M.J. 205, 2018 CAAF LEXIS 723 (C.A.A.F., Nov. 21, 2018)*

Decision reached on appeal by *United States v. Hutchins, 2019 CAAF LEXIS 377 (C.A.A.F., May 29, 2019)*

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Captain A.H. Henderson, JAGC, USN. Convening Authority: Commander, U.S. Marine Corps Forces Central Command, MacDill Air Force Base, FL. Staff Judge Advocate's Recommendation: Colonel John R. Woodworth, USMC.

United States v. Hutchins, 72 M.J. 294, 2013 CAAF LEXIS 642 (C.A.A.F., June 26, 2013)

Core Terms

military, court-martial, sentence, squad, confinement, kill, clemency, site visit, defense counsel, charges, comments, witnesses, kidnapping, circumstances, testimonial, acquitted, alleges, cases, recommendation, hearsay, appearance, conspiracy, housebreaking, unavailable, motive, murder, senior, team, ex parte communication, cross-examination

Case Summary

Overview
HOLDINGS: [1]-Military judge (MJ) did not err in admitting evidence of conduct of which appellant was acquitted at his first trial, including evidence of a conspiracy to kill anyone other than a suspected insurgency leader, as the evidence offered proof of motive, intent, preparation, plan, and an absence of mistake or accident with regard to the charges against him, particularly conspiracy to commit murder and murder; [2]-Probative value of the evidence was not substantially outweighed by danger of unfair prejudice; [3]-MJ did not err in ruling that the prior testimony of four government witness was admissible under Mil. R. Evid. 804(a), Manual Courts-Martial, where, despite being granted testimonial immunity, they indicated their intent to invoke their privilege against self-incrimination, and where appellant's first defense counsel had the opportunity to cross-examine each witness.

Outcome

The findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN1 **Judicial Review, Standards of Review**

A military court of criminal appeals reviews a military judge's ruling on a motion to suppress evidence for an abuse of discretion. The military judge's findings of fact are reviewed for clear error; conclusions of law are reviewed de novo. If the military judge fails to place his findings and analysis on the record, less deference will be accorded.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

HN2 **Procedural Due Process, Double Jeopardy**

When the government retries a criminal case, findings of not guilty from the first trial establish precedents limiting all future prosecutions of the same matter. Once acquitted of an offense, an accused need never run the gantlet again with regard to that specific offense. The *Double Jeopardy clause of the Fifth Amendment to the Constitution* protects the accused from being subject, for the same offence, to be twice put in jeopardy of life or limb. *U.S. Const. amend. V*. Courts have long recognized the civil litigation concept of collateral estoppel. In Ashe, the United States Supreme Court held that criminal collateral estoppel was embodied in the *Fifth Amendment's* guarantee against double jeopardy. After the incorporation of criminal collateral estoppel into double jeopardy protection in Ashe, courts began to refer to it as issue preclusion.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

HN3 **Double Jeopardy, Collateral Estoppel**

When a final and valid verdict resolved an issue of ultimate fact, the government cannot litigate it again in a subsequent prosecution. An issue of fact is ultimate when it is critical to the verdict. Issue preclusion bars successive litigation of an issue of fact or law that is actually litigated and determined by a valid and final judgment, and is essential to the judgment.'"

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

HN4 **Double Jeopardy, Collateral Estoppel**

The burden is on the accused to proffer that a previous set of not guilty findings resolved an issue of ultimate fact and move for dismissal of subsequent charges also dependent on that same issue. The accused must identify the issue in dispute, demonstrate that the verdict in the previous trial definitively resolved the proffered issue, and pray that it be foreclosed from further dispute in court. Once the accused proffers an issue of ultimate fact, the court must then test the accused's proffer. In Ashe, the United States Supreme Court charged trial courts testing for issue preclusion with delving back into prior findings: the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

HN5 **Double Jeopardy, Collateral Estoppel**

When an issue of fact is not essential to both verdicts and thus not ultimate in both cases, preclusion is not automatic. The government need not prove the acquitted issue beyond a reasonable doubt to secure a new conviction, so it can proceed with the new prosecution. But can the government present evidence of that acquitted issue at a pending trial? With varying degrees of success, criminal defendants have invoked issue preclusion to suppress evidence from a prior acquittal in a subsequent trial.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

Military & Veterans Law > ... > Courts Martial > Evidence > Relevance

HN6 **Double Jeopardy, Collateral Estoppel**

In Hicks, the United States Court of Military Appeals explicitly rejected what it characterized as the minority approach of allowing collateral estoppel to determine admissibility of evidence which resulted in acquittal at a prior trial. Opting for the majority approach, the court declared that, otherwise admissible evidence was still admissible, even though it was previously introduced on charges of which an accused has been acquitted. As the court succinctly stated in an opinion nearly 30 years later, the admissibility of other acts evidence is governed by the Military Rules of Evidence, and not by the members' verdict.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Courts Martial > Evidence > Relevance

HN7 **Relevance, Confusion, Prejudice & Waste of Time**

Instead of issue preclusion, three Military Rules of Evidence govern the relevance and admissibility of evidence of conduct already litigated in a prior court-martial. First, evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Mil. R. Evid. 401, Manual Courts-Martial. A military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403, Manual Courts-Martial. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. Mil. R. Evid. 404(b)(1), Manual Courts-Martial. But this evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Rule 404(b)(2).

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN8 **Relevance, Confusion, Prejudice & Waste of Time**

In Reynolds, the United States Court of Military Appeals articulated a three-part test for the admissibility of uncharged misconduct, including prior misconduct of which the accused was acquitted: (1) does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts? (2) what fact of consequence is made more or less probable by the existence of this evidence? (3) is the probative value substantially outweighed by the danger of unfair prejudice?

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Courts Martial > Evidence > Relevance

HN9 **Double Jeopardy, Collateral Estoppel**

Although the Military Rules of Evidence and the United

States Court of Military Appeals' Reynolds test, not issue preclusion, govern the admissibility of uncharged misconduct, the fact of an acquittal is still a factor in the analysis. When an accused has been acquitted of conduct the government seeks to present as evidence in a subsequent case, that acquittal is a factor in the test for admissibility. The fact of the prior acquittal may diminish the probative value of the evidence, however, and should be considered by the military judge when determining whether probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Mil. R. Evid. 403, Manual Courts-Martial. An accused also has the right to prove that he or she was previously acquitted of the acts admitted into evidence under Mil. R. Evid. 404(b), Manual Courts-Martial.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

Military & Veterans Law > ... > Courts Martial > Evidence > Relevance

HN10 **Double Jeopardy, Collateral Estoppel**

Although there appears to be no requirement to mine a prior record of trial for acquittal of an issue of less than ultimate fact, the United States Court of Military Appeals has not prohibited it. The analysis and conclusion of acquittal exemplified by the United States Supreme Court's opinion in Ashe is a preliminary step that may, but need not, result in issue preclusion. Even with issue preclusion off the table, the existence of an acquittal remains relevant to admission of evidence under the Military Rules of Evidence and Reynolds.

Military & Veterans Law > Military Offenses > Housebreaking

HN11 **Military Offenses, Housebreaking**

The elements of housebreaking are: (1) that the accused unlawfully entered a certain building or structure of a certain other person; and (2) that the unlawful entry was made with the intent to commit a criminal offense therein. Manual Courts-Martial pt. IV, para. 56.b (2005).

Military & Veterans Law > Military Offenses > Kidnapping

HN12 **Military Offenses, Kidnapping**

The elements of kidnapping are: (1) that the accused seized, confined, inveigled, decoyed, or carried away a certain person; (2) that the accused then held such person against that person's will; (3) that the accused did so willfully and wrongfully; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Manual Courts-Martial pt. IV, para. 92.b (2005).

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN13 **Particular Presumptions, Regularity**

A military court of criminal appeals presumes the military judge knows the law and correctly applies it, unless the record in this case suggests otherwise.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN14 **Relevance, Confusion, Prejudice & Waste of Time**

The term "unfair prejudice" in the context of Mil. R. Evid. 403, Manual Courts-Martial speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilty on a ground different from proof specific to the offense charged.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN15 **Relevance, Confusion, Prejudice & Waste of Time**

Mil. R. Evid. 403, Manual Courts-Martial provides for the exclusion of evidence if its probative value is substantially outweighed by the danger of confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN16[] **Evidence, Evidentiary Rulings**

A military court of criminal appeals evaluates prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN17[] **Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

So long as a military judge understood and applied the correct law, and the factual findings are not clearly erroneous, neither the military judge's decision to admit evidence, nor his ruling that certain government witnesses were unavailable and their prior testimony was admissible, should be overturned.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

HN18[] **Criminal Process, Right to Confrontation**

An accused's *Sixth Amendment* right to confront witnesses against him normally prevents the government from admitting a witness's former testimony -- testimonial evidence -- without producing the witness for cross-examination. But if the witness is unavailable, and has previously been subject to the accused's cross-examination, such testimonial evidence may be admissible.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN19[] **Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

The test for unavailability focuses on whether the witness is not present in court in spite of good-faith efforts by the government to locate and present the witness. A military court of criminal appeals reviews a military judge's determinations of witness unavailability -- and the government's good faith efforts to produce the witness -- for an abuse of discretion.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Self-Incrimination Privilege

HN20[] **Procedural Due Process, Self-Incrimination Privilege**

Among the reasons for witness unavailability enumerated in Mil. R. Evid. 804(a), Manual Courts-Martial are (1) exemption from testifying about the subject matter of the declarant's statement because the military judge rules that a privilege applies; and (2) refusal to testify about the subject matter despite the military judge's order to do so. A witness may refuse to testify by invoking his privilege against compulsory self-incrimination guaranteed by the *Fifth Amendment* and, where applicable, Unif. Code Mil. Justice art. 31, *10*

U.S.C.S. § 831. U.S. Const. amend V.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Immunities

HN21 **Trial Procedures, Immunities**

To overcome a witness's privilege against self-incrimination and compel his testimony, the government must confer testimonial immunity, as described in Mil. R. Evid. 301(d)(1), Manual Courts-Martial: the minimum grant of immunity adequate to overcome the privilege is that which under either R.C.M. 704, Manual Courts-Martial or other proper authority provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Immunities

HN22 **Trial Procedures, Immunities**

Testimonial immunity does not protect against prosecution for perjury; that protection requires transactional immunity. But the government is not required to seek transactional immunity to demonstrate a good faith effort.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Immunities

HN23 **Trial Procedures, Immunities**

R.C.M. 704, Manual Courts-Martial (2012) provides for grants of immunity to witnesses subject to the Uniform Code of Military Justice.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Immunities

HN24 **Trial Procedures, Immunities**

R.C.M. 704(a)(1), Manual Courts-Martial (2012) provides that a person may be granted transactional immunity from trial by court-martial for one or more offenses under the Uniform Code of Military Justice.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

HN25 **Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

If a witness is unavailable, Mil. R. Evid. 804(b)(1), Manual Courts-Martial provides an exception to the rules against hearsay allowing admission of the unavailable witness's former testimony. The exception applies to testimony that (A) was given by a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN26 **Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

Whether there was a similar motive to cross-examine a witness at a prior proceeding is a question of law that a military court of criminal appeals reviews de novo. The party seeking to admit prior testimony as evidence must demonstrate similarity of motive.

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN27 **Particular Presumptions, Regularity**

A military court of criminal appeals presumes a military judge knows and follows the law unless there is

evidence to the contrary.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

HN28[] Hearsay Rule & Exceptions, Declarants Unavailable to Testify

For purposes of Mil. R. Evid. 804(b)(1), Manual Courts-Martial, a shift in the theory of the case does not defeat admissibility when the underlying liability remains the same, thereby guaranteeing cross-examination with the same purpose.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

HN29[] Hearsay Rule & Exceptions, Declarants Unavailable to Testify

The discovery of new evidence useful to cross-examining a witness does not inject dissimilarity into the comparison of motives. The "similar motive" requirement of Mil. R. Evid. 804(b)(1), Manual Courts-Martial is satisfied if counsel had the opportunity to cross-examine the witness without restriction on the scope of the examination even if counsel subsequently discovers information which was not available at the previous hearing.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

HN30[] Hearsay Rule & Exceptions, Declarants Unavailable to Testify

The purported unreliability of testimonial evidence alone will not prevent its admission, even under Mil. R. Evid. 804(b)(1), Manual Courts-Martial. The United States Court of Military Appeals has declined to suppress testimonial evidence based on credibility concerns alone because factual reliability does not have to be established as a prerequisite for admitting hearsay evidence pursuant to a well-recognized hearsay exceptions.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN31[] Courts Martial, Convening Authority

A military court of criminal appeals reviews allegations of unlawful command influence (UCI) de novo.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN32[] Courts Martial, Convening Authority

Unif. Code Mil. Justice art. 37(a), 10 U.S.C.S. § 837(a), prohibits unlawful influence on the military justice process by someone in a position of authority. It provides that no authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN33[] Courts Martial, Convening Authority

Interpreting Unif. Code Mil. Justice art. 37, 10 U.S.C.S. § 837, in light of case law, something of a formula for facts constituting unlawful command influence (UCI) can be distilled: (1) a government actor (2) takes action which influences or appears to influence (3) a decisionmaker in the court-martial process. The affected decision-maker might be a potential court-martial member, convening authority, or military judge. The following factors have been applied in the context of a government actor making a public statement: the

comments' intended audience, the intended and larger audience's perception of the comments, existence of an intent to influence a proceeding's outcome, the implicit or explicit threat of repercussions for dissent, and regardless of any intent, an effect of influencing outcome or actors. These factors, while admittedly not binding, are instructive. The potential influence is unauthorized or unlawful because through censure, reprimand, or admonishment or something similar, a government actor manipulates, interferes with, or improperly strips the actors in the court-martial process of their independence.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN34[] **Courts Martial, Convening Authority**

To show prejudice or compromise of the military justice process, a complaining party must tie these facts constituting unlawful command influence (UCI) to some effect. In cases involving UCI, the key to the analysis is effect -- not knowledge or intent -- of the government actor. The effect may be actual prejudice to the complainant or the appearance of it. The prejudice may be unforeseen, accidental collateral damage, but it nevertheless results from -- or in the case of apparent UCI, appears to result from -- governmental interference in the military justice process.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN35[] **Burdens of Proof, Defense**

Actual unlawful command influence (UCI) has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. An appellant has the initial burden of raising UCI by showing: (1) facts which, if true, constitute UCI; (2) that the proceedings were unfair; and (3) that UCI was the cause of the unfairness. The evidentiary standard for raising the issue of UCI is some evidence. The appellant's burden of proof is low, but it must be more than mere allegations or speculation. The appearance of evil is not enough to justify action by an appellate court in a particular case or, said another way, proof of command influence in the air will not suffice. If the appellant raises some evidence of UCI, the burden shifts to the government to rebut the allegation by persuading the court, beyond a reasonable doubt, that: (1) the predicate facts do not exist; (2) the facts do not constitute UCI; (3) the UCI did not affect the findings or sentence; or (4) if on appeal, by persuading the appellate court that the UCI had no prejudicial impact on the court-martial.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN36[] **Burdens of Proof, Defense**

Even if there is no actual unlawful command influence (UCI), there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system. Unlike actual UCI, which requires prejudice to the accused, no such showing is required for a meritorious claim of an appearance of UCI. Rather, the prejudice involved is the damage to the public's perception of the fairness of the military justice system as a whole. An appellant raises a claim of apparent UCI by demonstrating (1) facts, which if true, constitute UCI; and (2) that this UCI placed an intolerable strain on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. As with actual UCI, the appellant must show some evidence greater than mere allegation or speculation. Some evidence of UCI will again shift the burden to the government to disprove one prong or the other beyond a reasonable doubt.

Military & Veterans Law > Servicemembers > Administrative Discharge

Military & Veterans Law > Military Justice > Courts

Martial > Sentences

HN37[] Servicemembers, Administrative Discharge

Administrative separation is not an authorized court-martial punishment. R.C.M. 1003(b)(8), Manual Courts-Martial.

Military & Veterans Law > Servicemembers > Administrative Discharge

Military & Veterans Law > ... > Courts Martial > Sentences > Punitive Discharge

Military & Veterans Law > Armed Forces > Service Branches

HN38[] Servicemembers, Administrative Discharge

The Secretary of the Navy is the highest separation authority in the Marine Corps and the Navy.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Armed Forces > Service Branches

HN39[] Courts Martial, Convening Authority

The Secretary of the Navy is neither a convening authority (CA) nor a commanding officer, and is not subject to the Uniform Code of Military Justice; thus Unif. Code Mil. Justice art. 37, 10 U.S.C.S. § 837, does not appear to apply to him. However, a service secretary can be the source of unlawful command influence (UCI).

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN40[] Courts Martial, Convening Authority

To find actual unlawful command influence (UCI), a military court of criminal appeals must find that the proceedings were unfair and that UCI was the cause of the unfairness. To find apparent UCI, the court must find that an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

HN41[] Judicial Review, Clemency & Parole

Clemency is available to service members primarily through three statutory avenues: Unif. Code Mil. Justice arts. 60 and 74, 10 U.S.C.S. §§ 860 and 874; 10 U.S.C.S. § 953. 10 U.S.C.S. § 860 requires a convening authority (CA) to consider matters an accused submits in clemency before taking action on the findings and sentence of a court-martial. Under 10 U.S.C.S. § 874(a), the Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President. Pursuant to 10 U.S.C.S. § 953, the Secretary of the Navy maintains the Naval Clemency and Parole Board (NC&PB) as his system for granting clemency.

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

HN42[] Judicial Review, Clemency & Parole

With a few exceptions, the Secretary of the Navy (SECNAV) has delegated his authority to act in matters of clemency and parole to the Assistant SECNAV for Manpower and Reserve Affairs (ASN(M&RA)). The Naval Clemency and Parole Board (NC&PB is composed of a civilian director and four senior officers representing communities in the Marine Corps and Navy. The board's mission is to act for or provide recommendations or advice to SECNAV in the issuance of decisions regarding clemency or parole matters. Among the board's functions is to submit to SECNAV, with recommendation for final action (a) cases in which SECNAV or a designee has indicated in writing an official interest, (d) any individual whose clemency may be the subject of controversy or substantial congressional or press interest as determined by SECNAV or a designee, (e) cases in which the NC&PB recommends clemency for any offender whose approved unsuspended, sentence to confinement is in

excess of 10 years.

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

HN43[] **Judicial Review, Clemency & Parole**

Clemency and parole are not rights but decisions within the Naval Clemency and Parole Board's and the Secretary of the Navy's discretion. While consideration of clemency is part of the post-trial process, it is considered an executive, not a judicial function.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Judge Advocate General

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN44[] **Judicial Review, Courts of Criminal Appeals**

Pursuant to Unif. Code Mil. Justice art. 67, *10 U.S.C.S. § 867*, and R.C.M. 1203, Manual Courts-Martial (2012), the Judge Advocate General (JAG) may forward the decision of a military court of criminal appeals to the United States Court of Appeals for the Armed Forces for review with respect to any matter of law. Rule 1203(c)(1).

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN45[] **Courts Martial, Convening Authority**

Subordination, a divergence in staff advice, and a certification do not alone amount to some evidence of unlawful command influence. Rather they reflect the ordinary process of review and appeal.

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN46[] **Particular Presumptions, Regularity**

In addition to presenting some evidence of unlawful command influence, an appellant must also overcome the presumption that appellate judges know the law and apply it correctly. Without such evidence, courts will not conclude that a military judge was affected by unlawful command influence.

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN47[] **Particular Presumptions, Regularity**

Staff judge advocates, like military judges, enjoy the presumption of knowledge of and compliance with the law and their independent duties, absent evidence to the contrary.

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN48[] **Particular Presumptions, Regularity**

Absent evidence to the contrary, military judges enjoy a presumption of resistance to unlawful command influence in their decisions.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN49[] **Courts Martial, Convening Authority**

Where the issue of unlawful command influence is litigated on the record, a military judge's findings of fact are reviewed under a clearly-erroneous standard, but

the question of command influence flowing from those facts is a question of law that a military court of criminal appeals reviews de novo.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN50[] **Judges, Challenges to Judges**

A military court of criminal appeals reviews a military judge's decision not to recuse himself for an abuse of discretion.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN51[] **Judges, Challenges to Judges**

R.C.M. 902, Manual Courts-Martial, details the grounds for disqualification of a military judge. It states in part as follows: (a) except as provided in Rule 902(e), a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned; (b) a military judge shall also disqualify himself or herself in the following circumstances: where the military judge has a personal bias or prejudice concerning a party or where the military judge is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN52[] **Judges, Challenges to Judges**

As with unlawful command influence, maintaining public confidence in the independence and impartiality of military judges requires a military court of criminal appeals to consider both actual bias and the appearance of bias as possible bases for disqualification. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b), Manual Courts-Martial. If the answer to that question is no, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN53[] **Judges, Challenges to Judges**

There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings. But any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification. R.C.M. 902(a), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN54[] **Judicial Review, Standards of Review**

In the absence of detailed findings of fact and conclusions of law on the record, a military court of criminal appeals must accord a military judge's ruling less deference.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN55[] **Judges, Challenges to Judges**

A military court of criminal appeals tests for apparent bias in violation of R.C.M. 902(a), Manual Courts-Martial, in essentially the same way the court tests for apparent unlawful command influence. The court focuses upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN56 **Judges, Challenges to Judges**

R.C.M. 902(b)(5), Manual Courts-Martial, targets a military judge's conflicts of interest by demanding disqualification when he or she has a personal interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding. In this context, a personal interest is extra-judicial as opposed to judicial. The Uniform Code of Military Justice (UCMJ) acknowledges and mitigates the personal interest that results from the well-recognized effect of fitness-report evaluations on a military lawyer's service advancement and security. UCMJ art. 26(c), *10 U.S.C.S. § 826(c)*, prohibits a convening authority (CA) or any member of a CA's staff from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. The Navy Performance Evaluation System Manual specifically addresses evaluation of the performance of military justice duties: fitness reports on military judges and appellate judges may properly evaluate their professional and military performance, but may not include marks, comments, or recommendations based on their judicial opinions or rulings, or the results thereof.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN57 **Judges, Challenges to Judges**

With safeguards such as Unif. Code Mil. Justice art. 26(c), *10 U.S.C.S. § 826(c)*, in place, the United States Court of Military Appeals has held that the administration of military justice by judges subject to a military chain of command does not present an inherent conflict of interest. Nor does the military justice system, per se, foster an apparent conflict of interest in violation of R.C.M. 902(a), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN58 **Judges, Challenges to Judges**

An actual or apparent conflict of interest between a military judge's rulings and his or her personal interest in protecting career prospects arises only in extraordinary circumstances. An example is when a supervisory judge deviates from the Uniform Code of Military Justice, regulations, and case precedent and affirmatively questions a subordinate judge's ruling.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN59 **Judges, Challenges to Judges**

A subordinate military judge should disqualify him or herself from ruling on a credible allegation of impropriety by a supervisory judge. The desire to spare a superior such an ordeal does create an apparent, if not an actual, conflict of interest. But a party cannot incite a conflict by raising unsupported and/or irrelevant allegations of judicial misconduct.

Legal Ethics > Judicial Conduct

HN60 **Legal Ethics, Judicial Conduct**

Canon 2.9(A) of the ABA Model Code of Judicial Conduct governs ex parte communications. It provides that judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:(1) when circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided: (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN61 **Judges, Challenges to Judges**

Activity inconsistent with standards of judicial conduct does not mandate recusal unless it rises to the level of a violation of applicable disqualification standards. R.C.M. 902, Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN62[] Judges, Challenges to Judges

When an allegation of ex parte communication forms part of a motion for recusal of a military judge, a decision on disqualification will depend on (1) the nature of the communication; (2) the circumstances under which it was made; (3) what the judge did as a result of the ex parte communication; (4) whether it adversely affected a party who has standing to complain; (5) whether the complaining party may have consented to the communication being made ex parte, and, if so, (6) whether the judge solicited such consent; (7) whether the party who claims to have been adversely affected by the ex parte communication objected in a timely manner; and (8) whether the party seeking disqualification properly preserved its objection.

Military & Veterans Law > Military Justice > Courts Martial > Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN63[] Courts Martial, Judges

A military judge's failure to abate proceedings is reviewed for an abuse of discretion.

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN64[] Military Justice, Counsel

An accused's right to individual military counsel (IMC) is not absolute but subject to the discretion of the convening authority and a determination of the availability of the requested counsel. The ruling of a military judge on an IMC request, including the question whether such a ruling severed an attorney-client relationship, is a mixed question of fact and law. Legal conclusions are subject to de novo review, and findings of fact are reviewed under a clearly erroneous standard.

Military & Veterans Law > Military Justice > Counsel

HN65[] Military Justice, Counsel

Pursuant to Unif. Code Mil. Justice art. 38(b), 10 U.S.C.S. § 838(b), an accused has the right to be represented at court-martial by military counsel of his own selection if that counsel is reasonably available. Art. 38(b)(3)(B). If reasonably available, that military counsel may be appointed to the accused's trial defense team as an individual military counsel (IMC). Reasonable availability is defined by the service secretary but excludes persons serving, inter alia, as trial counsel or appellate defense counsel. Art. 38(b)(7); R.C.M. 506(b)(1)(C)-(D), Manual Courts-Martial. U.S. Navy JAG Manual § 0131b.(4) implements Unif. Code Mil. Justice art. 38(b), 10 U.S.C.S. § 838(b) and R.C.M. 506, Manual Courts-Martial with regard to counsel in the Navy and Marine Corps. First, counsel must be on active duty to be reasonably available. Then a list of disqualifying criteria significantly limits the pool of available counsel. Those disqualifying criteria include, inter alia, performance of duties as trial counsel or appellate defense counsel and permanent assignment to a command outside the Trial Judicial Circuit where the court-martial will be held or beyond 500 miles from the site of the court-martial.

Military & Veterans Law > Military Justice > Counsel

HN66[] Military Justice, Counsel

R.C.M. 506, Manual Courts-Martial provides for exceptions to availability requirements when merited by the existence of an attorney-client relationship regarding matters relating to a charge in question. R.C.M. 506(b)(1). But the exceptions do not apply if the attorney-client relationship arose solely because the counsel represented the accused on review under Unif. Code Mil. Justice art. 70, 10 U.S.C.S. § 870. R.C.M. 506(b)(1), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Judicial Review > Appellate Counsel

Military & Veterans Law > Military Justice > Counsel

HN67[] Judicial Review, Appellate Counsel

Unif. Code Mil. Justice art. 70, 10 U.S.C.S. § 870, governs the detail of appellate counsel. Specifically, a Judge Advocate General (JAG) shall appoint appellate

defense counsel who shall represent the accused before the United States Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, or the United States Supreme Court. Art. 70(c). The authority governing detail of appellate counsel is separate and distinct from Unif. Code Mil. Justice art. 27, *10 U.S.C.S. § 827*, which mandates the detail of trial counsel and defense counsel for each general and special court-martial. Art. 27(a)(1).

Military & Veterans Law > Military Justice > Judicial Review > Appellate Counsel

Military & Veterans Law > Military Justice > Counsel

HN68 **Judicial Review, Appellate Counsel**

Unif. Code Mil. Justice art. 70, *10 U.S.C.S. § 870*, does require that appellate counsel be qualified under Unif. Code Mil. Justice art. 27(b), *10 U.S.C.S. § 827(b)*. Qualifications detailed at Art. 27(b)(1), include being a judge advocate, graduation from an accredited law school, membership in a federal or state bar, and certification as competent to perform duties as trial or defense counsel by the Judge Advocate General.

Military & Veterans Law > Military Justice > Judicial Review > Appellate Counsel

Military & Veterans Law > Military Justice > Counsel

HN69 **Judicial Review, Appellate Counsel**

The distinction between representation at courts-martial arising under Unif. Code Mil. Justice art. 27, *10 U.S.C.S. § 827*, and representation on appeal arising under Unif. Code Mil. Justice art. 70, *10 U.S.C.S. § 870*, appears in the U.S. Navy JAG Manual's relevant definition of an attorney-client relationship. For purposes of § 0131, an attorney-client relationship exists between the accused and requested counsel when counsel and the accused have had a privileged conversation relating to a charge pending before the proceeding, and counsel has engaged in active pretrial preparation and strategy with regard to that charge. § 0131b(3). Among the actions that, in and of themselves, will not be deemed to constitute active pretrial preparation and strategy is representing the accused in appellate review proceedings under Unif. Code Mil. Justice art. 70, *10 U.S.C.S. § 870*. Finally, U.S. Navy JAG Manual § 0131b.(3) references the JAGINST 5803.1 series prohibiting a counsel from establishing an attorney-client relationship until properly detailed, assigned, or otherwise authorized.

Military & Veterans Law > Military Justice > Judicial Review > Appellate Counsel

Military & Veterans Law > Military Justice > Counsel

HN70 **Judicial Review, Appellate Counsel**

Attorney-client relationships formed pursuant to Unif. Code Mil. Justice art. 70, *10 U.S.C.S. § 870*, for appellate representation do not extend to the trial level, even for a rehearing of the same case.

Military & Veterans Law > Military Justice > Judicial Review > Appellate Counsel

Military & Veterans Law > Military Justice > Counsel

HN71 **Judicial Review, Appellate Counsel**

Establishing the kind of attorney-client relationship that cannot be severed and thus compels appointment as an individual military counsel requires demonstrating both a bilateral understanding as to the nature of future representation and active engagement by the attorney in the preparation and pretrial strategy of the case.

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN72 **Sentences, Credits**

The burden is on appellant to establish entitlement to additional sentence credit because of a violation of Unif. Code Mil. Justice art. 13, *10 U.S.C.S. § 813*. R.C.M. 905(c)(2), Manual Courts-Martial. Whether an appellant is entitled to relief for a violation of Unif. Code Mil. Justice art. 13, *10 U.S.C.S. § 813*, is a mixed question of law and fact. A military court of criminal appeals will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. The court will review de novo the ultimate

question whether an appellant is entitled to credit for a violation of Article 13.

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

HN73 **Sentences, Credits**

Unif. Code Mil. Justice art. 13, 10 U.S.C.S. § 813, states that no person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence. In Fischer, the United States Court of Appeals for the Armed Forces interpreted Article 13 to prohibit (1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. Illegal pretrial punishment entails a purpose or intent to punish an accused before guilt or innocence has been adjudicated. A reviewing court applies this standard by examining the intent of detention officials or by examining whether the purposes served by the restriction or condition are reasonably related to a legitimate governmental objective. Similarly, the court considers whether a condition or term of pretrial confinement is imposed for punishment or whether it is but an incident of some other legitimate governmental purpose.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

HN74 **Burdens of Proof, Defense**

The burden of demonstrating a violation of Unif. Code Mil. Justice art. 13, 10 U.S.C.S. § 813, is on the appellant. R.C.M. 905(c)(2), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

HN75 **Sentences, Credits**

R.C.M. 305, Manual Courts-Martial, prescribes requirements and rules to ensure pretrial confinement is not unduly rigorous or otherwise in breach of Unif. Code Mil. Justice art. 13, 10 U.S.C.S. § 813. R.C.M. 305(j)(2), Manual Courts-Martial, directs military judges to order administrative credit under R.C.M. 305(k) for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions affording members command documentation of probable cause for confinement, independent review of probable cause, and access to military counsel. R.C.M. 305(k) credit ordered for noncompliance is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served.

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

HN76 **Military Justice, Counsel**

Pretrial confinement requires probable cause, meaning a reasonable belief that: (1) an offense triable by court-martial has been committed; (2) the person confined committed it; and (3) confinement is required by the circumstances. R.C.M. 305(d), Manual Courts-Martial. Continued confinement requires a documented probable cause determination made by the commander not more than 72 hours after learning a member is in confinement. R.C.M. 305(h)(2)(A). A neutral and detached officer shall review the probable cause determination within seven days of the imposition of confinement and memorialize his or her factual findings and conclusions. R.C.M. 305(i)(2). At the request of the prisoner, military counsel shall be provided before the 72-hour probable cause determination or the seven-day review, whichever occurs first. R.C.M. 305(f).

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

HN77 **Sentences, Credits**

R.C.M. 305, Manual Courts-Martial, applies to restriction tantamount to confinement only when the conditions and constraints of that restriction constitute physical restraint, the essential characteristics of confinement. While restriction tantamount to confinement may entitle an accused to day for-day confinement credit under

Allen or Mason, the accused is not entitled to double that confinement credit under R.C.M. 305(k).

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

HN78 **Sentences, Credits**

R.C.M. 304(f), Manual Courts-Martial, prohibits punitive pretrial restraint such as punitive duty hours or training, punitive labor, or special uniforms prescribed only for post-trial prisoners.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

HN79 **Burdens of Proof, Defense**

In light of confinement officials' responsibility to ensure a detainee's presence for trial and the security of the facility, the burden is on a servicemember to demonstrate that the conditions of his pretrial confinement were unreasonable or arbitrary.

Military & Veterans Law > Military Justice > Disclosure & Discovery

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN80 **Military Justice, Disclosure & Discovery**

A military court of criminal appeals reviews a military judge's discovery rulings for an abuse of discretion.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Government

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

HN81 **Disclosure & Discovery, Disclosure by Government**

Unif. Code Mil. Justice art. 46, *10 U.S.C.S. § 846*, affords trial counsel, trial defense counsel, and the court-martial equal opportunity to obtain witnesses and other evidence. It is implemented in R.C.M. 701 and 703, Manual Courts-Martial. R.C.M. 701 ensures each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence. R.C.M. 701(e). The government must make evidence in the possession, custody, or control of military authorities available if it is material to the preparation of the defense. R.C.M. 701(a)(2). The standard for production of evidence not in a military authority's possession, custody, or control is higher. Parties to a court-martial are entitled to production of evidence that is relevant and necessary. R.C.M. 703(f)(1).

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Military & Veterans Law > Military Justice > Disclosure & Discovery

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN82 **Burdens of Proof, Defense**

When moving for discovery under R.C.M. 701, Manual Courts-Martial, or for production of witnesses or evidence, the burden is on the moving party to prove, by a preponderance of the evidence, any factual issue the resolution of which is necessary to decide a motion. R.C.M. 905(b)(4), (c), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by

Defense

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN83[] Disclosure & Discovery, Disclosure by Government

Unif. Code Mil. Justice art. 46, 10 U.S.C.S. § 846, does not obviate an accused's requirement to demonstrate the necessity of evidence or assistance beyond what is already at hand. R.C.M. 703(f)(1), Manual Courts-Martial (production of evidence); R.C.M. 703(d), Manual Courts-Martial (employment of expert witnesses). Military courts have rejected the notion that the mere prospect of finding relevant and necessary evidence satisfies the requirement for showing relevance and necessity.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

HN84[] Disclosure & Discovery, Disclosure by Government

The right of access to evidence -- or sources of evidence -- is not unlimited. There is usually no obligation to arrange interviews between trial defense counsel and witnesses, but the government may not hinder them. The government may not unreasonably impede the access of another party to a witness or evidence. R.C.M. 701(e), Manual Courts-Martial. Absent special circumstances, the right to a pretrial interview -- guaranteed to the defense under the Manual for Courts-Martial and the Uniform Code of Military Justice -- encompasses the right to an interview free from insistence by the government upon the presence of its representative. A witness cannot be compelled to speak to trial defense counsel, as long as the government did not bring about the refusal. The court may issue subpoenas to compel the attendance of civilian witnesses at trial, but foreign nationals in a foreign country are not subject to subpoena. R.C.M. 703(e)(2) and discussion, Manual Courts-Martial. Subpoenas are available to produce evidence not in government custody, but a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. R.C.M. 703(f)(2), (f)(4)(B).

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

HN85[] Disclosure & Discovery, Disclosure by Government

Unif. Code Mil. Justice art. 46, 10 U.S.C.S. § 846, is a statement of congressional intent to prevent the government from marshaling its resources to gain an unfair advantage over an accused and thus to ensure a more even playing field. But the parity contemplated in Article 46 does not entitle an accused to a blank check.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery Misconduct

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN86[] Disclosure & Discovery, Discovery Misconduct

Violations of a service member's rights under Unif. Code Mil. Justice art. 46, 10 U.S.C.S. § 846, that do not amount to constitutional error under Brady and its progeny must still be tested under the material prejudice standard of Unif. Code Mil. Justice art. 59(a), 10 U.S.C.S. § 859(a). Article 59(a) states that a finding or

sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN87[] Procedural Due Process, Scope of Protection

The United States Supreme Court has long interpreted the *Due Process Clause of the Fourteenth Amendment* to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence. Less clear from the Court's access-to-evidence cases is the extent to which the *Due Process Clause* imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. The *Fourteenth Amendment* does not govern accused at courts-martial. But the United States Court of Appeals for the Armed Forces has found the same right to present a complete defense in the *Fifth Amendment*, applying Trombetta to courts-martial.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN88[] Procedural Due Process, Scope of Protection

Due process does not demand government prescience. The United States Supreme Court has distinguished the government's obligation to recognize and preserve exculpatory evidence from an obligation to predict the exculpatory value of evidence or a source of evidence. A line of Supreme Court cases addressed the application of due process to potentially exculpatory evidence the government lost or destroyed, depriving the accused of the opportunity to extract something exonerative from independent investigation of that evidence. The Trombetta Court found no due process violation when the government acted in good faith and in accord with their normal practice, and the loss or destruction of evidence was not attributable to a conscious effort to suppress exculpatory evidence. The constitutional duty to preserve evidence applies to material evidence, which must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. The Supreme Court subsequently confirmed that a due process violation requires evidence of bad faith on the part of the government when potentially useful evidence -- but not material exculpatory evidence -- is lost or destroyed.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN89[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

Legal representation is deemed ineffective under Strickland when an appellant can demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) the counsel's deficient performance gives rise to a reasonable probability that the result of the proceeding would have been different without counsel's unprofessional errors. Trial defense counsel have a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. The United States Supreme Court has rejected the notion that the same type and breadth of investigation will be required in every case.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Hearsay Within Hearsay

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN90[] Hearsay Rule & Exceptions, Hearsay Within Hearsay

Whether imbedded evidence was testimonial hearsay is a question of law a military court of criminal appeals reviews de novo. The court reviews a military judge's decision to admit evidence that contains testimonial hearsay for an abuse of discretion, considering the evidence in the light most favorable to the prevailing party.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

HN91[] Criminal Process, Right to Confrontation

Admission of testimonial statements of a witness who did not appear at trial violates the Sixth Amendment's Confrontation Clause unless the witness is unavailable to testify, and the accused had a prior opportunity for cross-examination. U.S. Const. amend VI. In Crawford, the United States Supreme Court defined testimony as typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The United States Court of Appeals for the Armed Forces has characterized a statement as testimonial if made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. There are also three factors to guide this objective, but contextual, analysis, often referred to as Rankin factors: (1) the statement was elicited by or made in response to law enforcement or prosecutorial inquiry; (2) the statement involved more than a routine and objective cataloging of unambiguous factual matters; and (3) the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

HN92[] Criminal Process, Right to Confrontation

When testimonial hearsay is presented to a court through an expert witness, a military court of criminal appeals determines whether that expert testimony violates the Confrontation Clause by asking: first, did the expert's testimony rely in some way on out-of-court statements that were themselves testimonial? Second, if so, was the expert's testimony nonetheless admissible because he reached his own conclusions based on knowledge of the underlying data and facts, such that the expert himself, not the out-of-court declarant, was the witness against the appellant under the Sixth Amendment? Put another way, the court asks whether the expert witness had sufficient personal knowledge to reach an independent conclusion as to the object of his testimony and his expert opinion.

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN93[] Motions, Motions for Mistrial

A military court of criminal appeals will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion.

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Self-Incrimination Privilege

HN94[] Motions, Motions for Mistrial

A military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. R.C.M. 915(a), Manual Courts-Martial. But a mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial. A curative

instruction is the preferred remedy, and the granting of a mistrial is an extreme remedy which should only be done when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members. Inadmissible matters include mention that an accused exercised his or her rights under the *Fifth Amendment to the Constitution* or Unif. Code Mil. Justice art. 31(b), *10 U.S.C.S. § 831(b)*, by remaining silent, refusing to answer a question, requesting counsel, or requesting to terminate an interview. Mil. R. Evid. 301(f)(2), Manual Courts-Martial. The erroneous presentation of such evidence to members implicates constitutional rights; therefore, to be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. The inadmissible evidence must not have contributed to the verdict.

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

HN95 **Motions, Motions for Mistrial**

To determine that an error did not contribute to the verdict for purposes of a motion for mistrial under R.C.M. 915(a), Manual Courts-Martial, is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN96 **Particular Presumptions, Regularity**

Absent evidence to the contrary, court members are presumed to comply with a military judge's instructions.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN97 **Judicial Review, Standards of Review**

The cumulative effect of all plain errors and preserved errors is reviewed de novo. When the accumulation of errors deprived an appellant of a fair trial, Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*, compels a military court of criminal appeals to reverse it.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN98 **Courts Martial, Sentences**

Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, requires a military court of criminal appeals to approve a court-martial sentence only if the court finds it correct in law and fact and determines, on the basis of the entire record, that it should be approved. The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions. Uniformity in sentencing is typically subsumed in the discretionary assessment of appropriateness encompassed in the court's art. 66 review authority. But in certain circumstances, sentence disparity can rise to a question of law.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN99 **Burdens of Proof, Defense**

Assessing sentence appropriateness by comparison to other cases under Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, has long been disfavored, except in specific circumstances. The burden falls on the appellant to demonstrate those exceptional circumstances: (1) the cases the appellant cites for comparison are closely related to his or her case, and (2) the sentences are highly disparate. If the appellant succeeds on both prongs, then the burden shifts to the government to show that there is a rational basis for the disparity. Cases may be closely related by virtue of coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other

direct nexus between the servicemembers whose sentences are sought to be compared.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN100 **Courts Martial, Sentences**

A military court of criminal appeals gauges disparity among closely related cases based on adjudged sentences, not approved sentences. Disparity is also relative to the maximum punishment an accused faces.

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN101 **Judicial Review, Clemency & Parole**

Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, obliges a military court of criminal appeals to evaluate an appellant's sentence independently for appropriateness. The court reviews sentence appropriateness de novo. Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. This requires the court's individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender. In making this assessment, the court analyzes the record as a whole. Notwithstanding the court's significant discretion to determine appropriateness, it may not engage in acts of clemency, which is the prerogative of the convening authority.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN102 **Judicial Review, Courts of Criminal Appeals**

A military court of criminal appeals may consider approved as well as adjudged sentences in companion cases when assessing sentence appropriateness. But even Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, does not grant military courts of criminal appeals CCAs the same unfettered discretion convening authorities enjoyed under Unif. Code Mil. Justice art. 60, *10 U.S.C.S. § 860*, or command prerogative. While the court clearly has the authority to disapprove part or all of the sentence and findings, nothing suggests that Congress intended to provide the courts with unfettered discretion to do so for any reason, for no reason, or on equitable grounds. Uniformity of sentence is but one consideration when evaluating appropriateness, and equity is not a proper basis for disapproving a sentence.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN103 **Judicial Review, Standards of Review**

A military court of criminal appeals reviews the legal and factual sufficiency of evidence de novo. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The test for the legal sufficiency of evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of

Evidence

HN104[] **Judicial Review, Standards of Review**

For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the appellate court are themselves convinced of the accused's guilt beyond a reasonable doubt. Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, to take into account the fact that the trial court saw and heard the witnesses. By "reasonable doubt" is not intended a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in this case. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt.

Counsel: For Appellant: Christopher Oprison, Esq.; Lieutenant Colonel S. Babu Kaza, USMCR; Lieutenant Doug Ottenwess, JAGC, USN.

For Appellee: Major Cory A. Carver, USMC; Lieutenant James M. Belforti, JAGC, USN.

Judges: Before GLASER-ALLEN, MARKS, and HUTCHISON, Appellate Military Judges. Chief Judge GLASER-ALLEN and Senior Judge HUTCHISON concur.

Opinion by: MARKS

Opinion

MARKS, Senior Judge:

A general court-martial comprised of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification each of conspiracy,[1] unpremeditated murder, and larceny in violation of *Articles 81*, *118*, and *121, Uniform Code of Military Justice (UCMJ)*, *10 U.S.C. §§ 881*, *918*, and *921 (2005)*.[2] The members sentenced the appellant to 2,627 days' confinement[3] and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The appellant raises 13 assignments of error (AOE): (1) the military judge's denial of the defense motion to suppress evidence of conduct for which the appellant was acquitted at his first trial; (2) admission of former testimony where the declarants were not unavailable and there was no similar motive for cross-examination; (3) unlawful command influence (UCI) from the Secretary of the Navy; (4) the military judge's finding that apparent UCI stemming from the prosecution's search of defense counsel's office in another case was harmless beyond a reasonable doubt; (5) denial of the defense motion for recusal; (6) denial of the defense request to abate proceedings until the appellant's attorney-client relationship was restored; (7) denial [*3] of the defense motion to dismiss based on the government's violation of the appellant's *Article 13, UCMJ*, rights; (8) denial of the defense request for a site visit; (9) admission of an exhibit founded on hearsay; (10) denial of the defense request for a mistrial after the members heard a government witness testify that the appellant asserted his right to remain silent; (11) the impact of the significant accumulation of errors on the outcome of the case; (12) the appellant's excessive and disproportionate sentence to roughly six years'

> m. The said Sergeant Hutchins [*2] did, on or about 28 April 2006, at or near Patrol Base Bushido, Iraq, submit a false written report regarding the facts and circumstances related to the unknown Iraqi man's death;
>
> . . . .
>
> o. The said Private First Class Jodka did, on or about 9 May 2006, at or near Hamdaniyah, Iraq, make a false statement to Special Agents [J.C.] and [S.L.], Naval Criminal Investigative Service, regarding the facts and circumstances related to the unknown Iraqi man's death;

Charge Sheet; Appellate Exhibit (AE) CXCIII at 3; Record at 2358.

[2] The members also acquitted the appellant of a single specification of making a false official statement.

[3] The adjudged confinement amounted to time the appellant had served pursuant to a sentence awarded at a prior court-martial for the same allegations.

confinement in light of companion cases; and (13) the legal and factual insufficiency of the findings.

After carefully considering the pleadings, oral arguments, and the record of trial, we find no error materially prejudicial to the substantial rights of the appellant and affirm the findings and sentence. *Arts. 59(a)* and *66(c), UCMJ*.

I. Background

First, a procedural orientation may be helpful. The appellant was originally convicted in August 2007 for his role in the shooting death of an unknown Iraqi man in Hamdaniyah, Iraq, the morning of 26 April 2006. This court set aside the findings and sentence for an improper severance of attorney-client relationship [*4] in April 2010. *United States v. Hutchins, 68 M.J. 623, 631 (N-M. Ct. Crim. App. 2010)* (*Hutchins I*). The Court of Appeals for the Armed Forces (CAAF) reversed that decision and remanded the case to this court to complete its review under *Article 66, UCMJ*, in January 2011. *United States v. Hutchins, 69 M.J. 282, 293 (C.A.A.F. 2011)* (*Hutchins II*). This court completed that review and affirmed the findings and sentence of the first court-martial in March 2012. *United States v. Hutchins, No. 200800393, 2012 CCA LEXIS 93, *32, unpublished op. (N-M. Ct. Crim. App. 20 Mar 2012)* (*Hutchins III*). Finding a violation of the appellant's *Fifth Amendment* rights against self-incrimination, the CAAF reversed our 2012 decision, set aside the findings and sentence of the 2007 court-martial, and remanded the case with authorization for a rehearing. *United States v. Hutchins, 72 M.J. 294, 301 (C.A.A.F. 2013)* (*Hutchins IV*). The results of that rehearing are before us here.

As for the events of the night and early morning of 25-26 April 2006, we revisit our summary from *Hutchins III*, which the CAAF republished in *Hutchins IV*:

> The appellant was assigned as squad leader for 1st Squad, 2nd Platoon, Kilo Company, 3rd Battalion, 5th Marines, assigned to Task Force Chromite, conducting counterinsurgency operations in the Hamdaniyah area of Iraq in April 2006. In the evening hours of 25 April 2006, the appellant led a combat patrol to conduct a deliberate [*5] ambush aimed at interdicting insurgent emplacement of improvised explosive devices (IEDs). The court-martial received testimony from several members of the squad that indicated the intended ambush mission morphed into a conspiracy to deliberately capture and kill a high value individual (HVI), believed to be a leader of the insurgency. The witnesses gave varying testimony as to the depth of their understanding of alternative targets, such as family members of the HVI or another random military-aged Iraqi male.
>
> Considerable effort and preparation went into the execution of this conspiracy. Tasks were accomplished by various Marines and their corpsman, including the theft of a shovel and AK-47 from an Iraqi dwelling to be used as props to manufacture a scene where it appeared that an armed insurgent was digging to emplace an IED. Some squad members advanced to the ambush site while others captured an unknown Iraqi man, bound and gagged him, and brought him to the would-be IED emplacement.
>
> The stage set, the squad informed higher headquarters by radio that they had come upon an insurgent planting an IED and received approval to engage. The squad opened fire, mortally wounding the man. The [*6] appellant approached the victim and fired multiple rifle rounds into the man's face at point blank range.
>
> The scene was then manipulated to appear consistent with the insurgent/IED story. The squad removed the bindings from the victim's hands and feet and positioned the victim's body with the shovel and AK-47 rifle they had stolen from local Iraqis. To simulate that the victim fired on the squad, the Marines fired the AK-47 rifle into the air and collected the discharged casings. When questioned about the action, the appellant, like other members of the squad, made false official statements, describing the situation as a legitimate ambush and a "good shoot." The death was brought to the appellant's battalion commander's attention by a local sheikh and the ensuing investigation led to the case before us.

Hutchins IV, 72 M.J. at 296 (quoting *Hutchins III, 2012 CCA LEXIS 93 at *4-6)*.

For ease of understanding the hierarchy within the appellant's squad, his squad members and co-conspirators will be identified by the ranks they held on 26 April 2006. They were Corporal (Cpl) Magincalda, Cpl Thomas, Lance Corporal (LCpl) Jackson, LCpl Pennington, LCpl Shumate, Private First Class (PFC) Jodka, and Navy corpsman, Hospitalman Third Class (HM3) Bacos. Other witnesses [*7] will also be identified by ranks they held in 2006.

We will incorporate additional facts as we address the AOEs.

II. Discussion

A. Admissibility of evidence and issue preclusion

In his first AOE, the appellant avers that the military judge erred in admitting evidence of conduct of which the appellant had been acquitted at his first trial. Specifically, the evidence of acquitted misconduct included "evidence of 'housebreaking,' 'kidnapping,' the alternate plan to seize a random Iraqi, and the alleged seizure of a random Iraqi by the snatch team."[4]

HN1[↑] We review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Harrell, 75 M.J. 359, 362 (C.A.A.F. 2016)*. The military judge's findings of fact are reviewed for clear error; conclusions of law are reviewed *de novo. Id.* "If the military judge fails to place his findings and analysis on the record, less deference will be accorded." *United States v. Flesher, 73 M.J. 303, 312 (C.A.A.F. 2014)*.

Intertwined with the appellant's AOE regarding the admission of evidence are two related issues—collateral estoppel (also known as issue preclusion) and the appellant's purported acquittal of conspiring to kill anyone other than high value individual and suspected insurgency leader, S.G.[5] We must address these two issues and their [*8] relationships to admissibility of evidence before reviewing the military judge's ruling. It is helpful to keep in mind that the case before us is a rehearing.

1. Collateral estoppel / issue preclusion

HN2[↑] When, as here, the government retries a criminal case, findings of not guilty from the first trial establish precedents limiting all future prosecutions of the same matter. Once acquitted of an offense, an accused need never "'run the gantlet'" again with regard to that specific offense. *Ashe v. Swenson, 397 U.S. 436, 446, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)* (quoting *Green v. United States, 355 U.S. 184, 190, 78 S. Ct. 221, 2 L. Ed. 2d 199, 77 Ohio Law Abs. 202 (1957))*. The *Double Jeopardy clause of the Fifth Amendment to the Constitution* protects the accused from being "subject, for the same offence, to be twice put in jeopardy of life or limb[.]" *U.S. CONST., amend. V*. Courts have long recognized the civil litigation concept of collateral estoppel. *See Hoag v. New Jersey, 356 U.S. 464, 470, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958)* ("'[W]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.'") (quoting RESTATEMENT, JUDGMENTS, § 68(1) (1942)). In *Ashe*, the Supreme Court held that criminal collateral estoppel was embodied in the *Fifth Amendment's* guarantee against double jeopardy. *397 U.S. at 445*. After the incorporation of criminal collateral estoppel into double jeopardy protection in *Ashe*, courts began to refer [*9] to it as issue preclusion. *See Schiro v. Farley, 510 U.S. 222, 232, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)*.

The *Ashe* Court concluded that ***HN3***[↑] when a final and valid verdict resolved an issue of ultimate fact, the government could not litigate it again in a subsequent prosecution. *Ashe, 397 U.S. at 446*. An issue of fact is ultimate when it is critical to the verdict. "Issue preclusion bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . *is essential to the judgment*.'" *Bobby v. Bies, 556 U.S. 825, 834, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009)* (citation omitted) (emphasis added).

The issue of ultimate fact in Ashe's case was whether he was among the band of robbers who broke into a poker game in a private home and stole money and a car from the six players around the table. *Id. at 437*. Ashe had been arrested in connection with the robbery and charged with robbing one of the players. *Id. at 437-38*. There was no question that the poker player had been robbed; the only issue in dispute was whether Ashe was one of the robbers. *Id. at 438-39*. Despite a jury's acquittal at this first trial, Ashe was later charged and convicted of robbing a different player at the same game. *Id. at 439-440*. On a petition for habeas corpus, the *Ashe* Court honed in on the "issue in dispute," finding:

> [T]he record is utterly devoid of any indication [*10] that the first jury could rationally have found that an armed robbery had not occurred, or that [the victim

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[4] Appellant's Brief of 28 Jun 2016 at 30-31 (citation omitted).

[5] S.G. was a suspected Iraqi insurgency leader and an HVI in the Hamdaniyah area, believed to be responsible for a number of IED attacks on American forces. He was also the intended target of the conspiracy and killing at issue in this case.

> in the first trial] had not been a victim of that robbery. The single rationally conceivable *issue in dispute* before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of [the victim in the second trial] wholly impermissible.

Id. at 445 (emphasis added). The issue in dispute, Ashe's presence at the robbery, was an issue of ultimate fact as it was essential to charges of robbery at his first and second trials. With reasonable doubt as to this essential ultimate fact, the government could not proceed with it at a second trial that also depended on it. *Id. at 446*. *See also Dowling v. United States, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)* (rejecting the claim of collateral estoppel because "the prior acquittal did not determine an ultimate issue in the present case"); *see also id. at 356* (Brennan, J., dissenting) ("Thus, in addition to being protected against retrial for the 'same offense,' the defendant is protected against prosecution for an offense that *requires* proof of a fact found in his favor in a prior proceeding." (emphasis [*11] added)).

HN4[↑] The burden is on the accused to proffer that a previous set of not guilty findings resolved an issue of ultimate fact and move for dismissal of subsequent charges also dependent on that same issue. The accused must identify the issue in dispute, demonstrate that the verdict in the previous trial definitively resolved the proffered issue, and pray that it be foreclosed from further dispute in court. *Dowling, 493 U.S. at 350*. Once the accused proffers an issue of ultimate fact, the court must then test the accused's proffer. *Ashe, 397 U.S. at 444*. The *Ashe* Court charged trial courts testing for issue preclusion with delving back into prior findings:

> [T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from [*12] consideration."

Id. (citations omitted). *See also Bravo-Fernandez v. United States, 580 U.S. , 137 S. Ct. 352, 359, 196 L. Ed. 2d 242 (2016)* (noting that "[t]o identify what a jury in a previous trial necessarily decided . . . a court 'must examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter'" (quoting *Ashe, 397 U.S. at 444*)). *Cf Dowling, 493 U.S. at 352* (finding "any number of possible explanations for the jury's acquittal verdict at Dowling's first trial[,]" the Court concluded that "the petitioner has failed to satisfy his burden of demonstrating" the proffered issue had been resolved in his favor). Having established that issue preclusion protects an issue of ultimate fact that is essential to both prior trial and trial at hand, we now consider issues of less than ultimate fact—relevant but not essential to pending charges.

2. Extension of issue preclusion to evidence suppression

HN5[↑] When an issue of fact is not essential to *both* verdicts and thus not ultimate in *both* cases, preclusion is not automatic. The government need not prove the acquitted issue beyond a reasonable doubt to secure a new conviction, so it can proceed with the new prosecution. But can the government present evidence of that acquitted issue at a pending trial? With varying degrees [*13] of success, criminal defendants have invoked issue preclusion to suppress evidence from a prior acquittal in a subsequent trial. *See Dowling, 493 U.S. at 348* (declining to extend *Ashe*'s bar on relitigation "to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted"); *see also United States v. Hicks, 24 M.J. 3, 8 (C.M.A. 1987)* (noting "disagreement among the courts about the extent of the application of the doctrine of collateral estoppel to the evidentiary use of prior acts of which an accused has been acquitted.")

The appellant urges us to follow case precedent from the Second and Fifth Circuits and extend issue preclusion beyond issues of ultimate fact to evidence of prior bad acts subject to acquittal. *See United States v. Mespoulede, 597 F.2d 329, 334 (2d Cir. 1979)* (challenging the notion that collateral estoppel only applies to facts essential to conviction); *Wingate v. Wainwright, 464 F.2d 209, 213 (5th Cir. 1972)* (finding no "meaningful difference in the quality of 'jeopardy' to which a defendant is again subjected when the state

attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of 'ultimate' fact or merely an 'evidentiary' fact in [*14] the second prosecution").

HN6[] In *Hicks*, our superior court explicitly rejected what it characterized as the minority approach of allowing collateral estoppel "to determine admissibility of evidence which resulted in acquittal at a prior trial." 24 M.J. at 8.[6] Opting for the majority approach, the court declared that, "otherwise admissible evidence" was still admissible, "even though it was previously introduced on charges of which an accused has been acquitted." *Id.* (citations omitted). As the court succinctly stated in an opinion nearly thirty years later, "the admissibility of other acts evidence is governed by the Military Rules of Evidence . . . , and not by the members' verdict." United States v. Washington, 63 M.J. 418, 422 (C.A.A.F. 2006). *See also* United States v. Miller, 46 M.J. 63, 66 (C.A.A.F. 1997) (affirming a military judge's application of Military Rule of Evidence 404(b), SUPPLEMENT TO MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) (MIL. R. EVID.) and the *Reynolds* test[7] in admitting evidence of prior misconduct for which the appellant was acquitted).

In *Hicks*, trial defense counsel (TDC) sought to suppress the testimony of four women who would describe Sergeant (Sgt) Hicks extorting them. 24 M.J. at 6-7. Sgt Hicks was charged with demanding sex from a woman in return [*15] for not reporting her boyfriend's misconduct. Id. at 5. The trial court found the evidence of uncharged misconduct "highly probative of a certain method or scheme employed by appellant to use his position of authority 'to orchestrate events' to obtain sexual or monetary favors from vulnerable females." Id. at 7 (citation omitted). Hicks argued that collateral estoppel should prevent two of the women from testifying because he had been acquitted of their allegations at courts-martial. *Id.* In rejecting Hicks' argument to apply collateral estoppel and suppress some of the evidence in his case, the Court of Military Appeals distinguished his case from *Ashe*. "In *Ashe v. Swenson*, . . . the fact underlying the issue of identity—that is, whether the accused was present at the robbery—was an ultimate fact and essential for conviction in both proceedings. On the other hand, the other-acts evidence here was totally separate from the instant offenses in time and place; was used for a limited evidentiary point; did not require proof beyond a reasonable doubt; and, although probative, was unnecessary to support a conviction of the instant charges." Id. at 8-9.

*3. Admissibility of evidence from an acquittal at court-martial [*16]*

HN7[] Instead of issue preclusion, three Military Rules of Evidence govern the relevance and admissibility of evidence of conduct already litigated in a prior court-martial. Miller, 46 M.J. at 66; Hicks, 24 M.J. at 8. First, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." MIL. R. EVID. 401. "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." MIL. R. EVID. 403. "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." MIL. R. EVID. 404(b)(1). But "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" MIL. R. EVID. 404(b)(2).

HN8[] In United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989), the Court of Military Appeals articulated a three-part test for the admissibility of uncharged misconduct, including prior misconduct of which the accused was acquitted: [*17]

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts?
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

Id. at 109 (internal citations omitted, alterations in

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[6] *Citing* E. Imwinkelried, *Uncharged Misconduct Evidence* §§ 10:03 through 10:07 (1984); Annot., 25 A.L.R.4th 934 (1983); 2 *Weinstein's Evidence*, ¶ 404[10] at 404-58 (1982); 22 Wright and Graham, *Federal Practice and Procedure: Evidence* § 5249 at 535-56 (1978).

[7] United States v. Reynolds, 25 M.J. 105, 109 (C.M.A. 1989).

original).

HN9[↑] Although the Military Rules of Evidence and the Reynolds test, not issue preclusion, govern the admissibility of uncharged misconduct, the fact of an acquittal is still a factor in the analysis. When an accused has been acquitted of conduct the government seeks to present as evidence in a subsequent case, that acquittal is a factor in the test for admissibility. "The fact of the prior acquittal may diminish the probative value of the evidence, however, and should be considered by the military judge when determining whether 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" Hicks, 24 M.J. at 9 (quoting MIL. R. EVID. 403). An accused also has the right to prove that he [*18] or she was previously acquitted of the acts admitted into evidence under MIL. R. EVID. 404(b). *United States v. Cuellar, 27 M.J. 50, 56 (C.M.A. 1988)*. While issue preclusion is not a sword at the appellant's disposal in this case, does he nonetheless deserve the benefit of his purported acquittal of an issue of ultimate fact at his first court-martial? Our superior court has not prohibited us from querying whether we can extrapolate an acquittal from prior findings. To begin to answer whether that purported acquittal affects the admissibility of related evidence, we must consider the proffered acquittal.

4. Proffered acquittal of conspiring to kill anyone other than S.G.

As part of his motion in *limine* to suppress evidence of uncharged misconduct, the appellant asserted that the findings of his first court-martial indicated an acquittal of an issue of ultimate fact. Based on specific instructions to the members and their not guilty findings to housebreaking, kidnapping, and conspiring to commit them, the appellant asserted that the members must have concluded that (1) the appellant did not order his Marines to seize anyone other than suspected insurgency leader and HVI, S.G.; (2) the appellant believed that the individual seized was S.G.; and (3) the appellant [*19] was not responsible for his squad members going to a house and seizing an unknown Iraqi man (who was not S.G.).[8] TDC exhorted the military judge to examine the findings and exceptions made by the members at his first trial to confirm that they resolved this issue in the appellant's favor. Citing collateral estoppel, the appellant sought to exclude evidence that the appellant conspired to kill anyone other than S.G.

a. Not an issue of ultimate fact in the case before us

Whom the appellant conspired to kill was central to the government's theme and theory at both trials but was not an issue of ultimate fact at his second court-martial. The conspiracy specification did not name the victim the appellant and his co-conspirators agreed to murder. Whether the man shot by the IED crater was the same man the appellant intended to kill was not critical to a finding of guilty for murder. As the military judge instructed the members, in cases of mistake or carelessness, "the intent to kill or inflict bodily harm is transferred in the intended victim of [the accused's] action to the actual victim."[9] And for the same reasons, the identity of the appellant's intended victim was not essential to the [*20] other charges referred to his second court-martial. With no pending charges dependent upon whom the appellant agreed to kidnap and kill, there is no issue of ultimate fact.

Without the required issue of ultimate fact at the pending court-martial,[10] we can find no abuse of discretion in the military judge's apparent decision not to explore the findings and record of the first court-martial for the purported acquittal. The military judge made no written findings of fact or conclusions of law in response to the appellant's request that he examine the first record of trial but said "[t]here is no requirement to speculate on the rationale on the last panel of members. In fact it's folly to try to do that."[11]

HN10[↑] Though there appears to be no requirement to mine a prior record of trial for acquittal of an issue of less than ultimate fact, our superior court has not prohibited it. The analysis and conclusion of acquittal exemplified in Ashe is a preliminary step that may, but need not, result in issue preclusion. Even with issue preclusion off the table, the existence of an acquittal remains relevant to admission of evidence under the Military Rules of Evidence and Reynolds. For that reason, [*21] we believe the appellant's proffered acquittal deserves our consideration.

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[8] AE XCVIII at 6-7.

[9] Record at 2276.

[10] *See* Ashe, 397 U.S. at 443; Dowling, 493 U.S. at 348, discussed *supra*.

[11] Record at 778.

b. Findings of the appellant's first court-martial

The first panel of members returned mixed, and to some extent inconsistent,[12] findings. Those findings are summarized below:

Charge I: Conspiracy - Guilty of one specification of conspiracy to commit larceny, false official statements, murder, and obstruction of justice; but not guilty of conspiracy to commit housebreaking and kidnapping and excepting four of 21 overt acts effecting the conspiracy.[13]

Charge II: False Official Statement - Guilty of one specification of false official statement for a written statement made on 28 April 2006; but not guilty of a second false official statement for the 8 May 2006 interview with the NCIS Special Agents.

Charge III: Premeditated Murder - Not guilty of premeditated murder, but guilty of the lesser included offense of unpremeditated murder of an unknown Iraqi man;

Charge IV: Larceny - Guilty of one specification of larceny;

Charges V, VI, and VII - Not guilty of assault consummated by battery, housebreaking, kidnapping, and obstruction of justice.[14]

The appellant contends, "[t]he removal of housebreaking and kidnapping as predicate [*22] offenses to the conspiracy charge indicate that the members found, as ultimate facts, that the conspiracy was only to kill [S.G.], and did not include any plans for alternate victims."[15]

c. Examination of the record of the prior proceeding

Our review of the record of the appellant's first court-martial aligns substantially with the appellant's account and conclusions regarding the meaning of the appellant's prior acquittal of housebreaking and kidnapping.

From their opening statements, trial counsel (TC) and TDC at the first court-martial presented conflicting theories of whom the appellant and his squad members conspired to kill on 25 and 26 April 2006. The government previewed their three-pronged conspiracy theory—"plan 'A', get [S.G.], plan 'B', get a brother, or plan 'C', get somebody[.]"[16] According to the government, the evidence would show that the appellant, Cpls Magincalda and Thomas, and LCpl Pennington spent an hour and a half deliberating and developing a plan for four squad members to walk to the home of S.G., seize him, bring him about a kilometer to a crater formed by an IED, disturb the dirt with a stolen shovel so it appeared S.G. was trying to plant a new IED, stage a firefight [*23] with a stolen AK-47, and kill S.G. That was Plan A.

> Plan "B" is, Hey, if we can't get [S.G.], let's get one of his brothers, grab somebody from his house because we want to send a message. And as they talk about plan "B", then they say, What if we can't get into the house?
>
> Sergeant Hutchins tells them, Get someone else. Bring somebody back here tonight. We need to send a message. So they move from plan "B" to plan "C" to get somebody. Get somebody.[17]

In response to the government's opening statement, the appellant's TDC focused the members on command pressure to eliminate S.G., a "high value target,"[18] and challenged the existence of a three-prong conspiracy. TDC asserted that the appellant believed the man he shot at the IED crater was S.G.

Five members of the appellant's squad testified at his first court-martial. The refrain of a single plan repeated throughout their testimony—"To get [S.G.], bring him

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[12] As previously stated, the appellant's acquittal of premeditated murder and conviction of conspiracy to commit murder are irreconcilably inconsistent.

[13] The four excepted overt acts were: (1) Cpl Magincalda, Cpl Thomas, LCpl Pennington, and HM3 Bacos walking from S.G.'s house to the home of an unknown Iraqi and Cpl Magincalda and Cpl Thomas entering the house; (2) Cpl Magincalda and Cpl Thomas taking an unknown Iraqi man from his house against his will; (3) the appellant's false statements to Staff Sergeant O.B. on 26 April 2006 regarding the facts and circumstances of the unknown Iraqi man's death; and (4) the appellant's false statements to Special Agents J.C. and S.L., Naval Criminal Investigative Service, on 8 May 2006 regarding the facts and circumstances of the unknown Iraqi man's death.

[14] First trial record, charge sheet and findings worksheet (AE CXXIV).

[15] Appellant's Brief at 27.

[16] First trial record at 1015.

[17] *Id.* at 1014.

[18] *Id.* at 1031.

down to the IED hole, and shoot and kill him, sir."[19] According to LCpl Pennington and HM3 Bacos, the only two of the original planners to testify, they originally discussed storming S.G.'s house and killing him there, in what would look like a mujahedeen attack. Then they considered commandeering [*24] a car and using that to drive S.G. from his home to the IED crater. But they discarded these ideas in favor of a four-man "snatch team" seizing S.G. from his home and bringing him, on foot, to the IED crater.

Testimony about a substitute for S.G. was not consistent. When TC asked LCpl Jackson what would happen if the snatch team could not seize S.G., he responded, "[t]hey would get a relative of his or any other male in the house, sir."[20] TC did not pose the question to PFC Jodka, but in response to a question from a member, PFC Jodka specifically refuted any suggestion that the appellant planned to seize one of S.G.'s family members. PFC Jodka testified, "The plan was to get [S.G.] personally because he was the insurgent, and that he was the one that we were going to put in this IED hole, that it wasn't just anybody, sir."[21] On cross-examination, TDC asked LCpl Shumate if the plan involved killing anyone other than S.G., and LCpl Shumate replied, "Not that I can think of, sir."[22]

LCpl Pennington and HM3 Bacos testified differently. According to LCpl Pennington, "[i]f we were compromised at the [S.G.] house and couldn't go inside without everyone knowing we were there, we would move on to [*25] another house where we would get another military age male."[23] LCpl Pennington conceded to TDC that "it would have been a significant departure . . . to grab somebody else" and "[i]t would have defeated the whole purpose not to grab [S.G.]."[24] HM3 Bacos also testified to Plans B and C:

> [W]e were tasked out to go retrieve an AK-47 and shovel from a nearby house, stash it somewhere, go patrol to [S.G.]'s house.
>
> If not—if we couldn't get [S.G.] because someone saw us in the family, we would go try getting someone else, anyone, and then walk that military-aged male—it was going to be a male—down to the IED hole with the AK-47 and shovel, disturb the dirt, make it look like he was digging and make it look like he is doing a terrorist act.[25]

HM3 Bacos remembered hearing the appellant say, "someone was going to die tonight[.]"[26]

The appellant did not testify on the merits at his first court-martial, but the statement he gave to Naval Criminal Investigative Service (NCIS) on 19 May 2006 went to the members as Prosecution Exhibit (PE) 1.[27] In his statement, the appellant acknowledged a back-up plan to seize and kill one of S.G.'s brothers if S.G. were not home. Amidst all the discussion, he remembered Cpl [*26] Thomas singing lyrics from a rap song "Somebody's gonna die tonight." According to the plan, the snatch team would bind S.G.'s hands with flexible handcuffs, gag him, and walk him to the IED crater. When Cpl Thomas and Cpl Magincalda called the appellant on his personal radio receiver and told him they had "him," the appellant thought they were referring to S.G.[28] Not until after the shooting, when he approached the body, did the appellant realize they had killed another Iraqi man, not S.G. HM3 Bacos's testimony corroborated a radio exchange between the snatch team and the appellant as the snatch team approached the IED crater. "I remember Corporal Thomas saying that Sergeant Hutchins wanted to see the man, to bring the man to the tree. But Corporal Magincalda disagreed and said, 'No, we're not going to do that, let's just stick with the plan.'"[29] On cross-examination, TDC confirmed with HM3 Bacos that the appellant wanted to see the man with them, but Cpl Magincalda objected.[30]

In his closing argument, TC acknowledged the discrepancies in the testimony about plans A, B, and C

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[19] *Id.* at 1127.

[20] *Id.* at 1125.

[21] *Id.* at 1203.

[22] *Id.* at 1265.

[23] *Id.* at 1337.

[24] *Id.* at 1379.

[25] *Id.* at 1406.

[26] *Id.* at 1410.

[27] The CAAF subsequently held that NCIS obtained this statement from the appellant in violation of his *Fifth Amendment* rights against self-incrimination and, accordingly, set aside his convictions. *Hutchins IV, 72 M.J. at 299-300*.

[28] First trial record, PE 1 at 7.

[29] *Id.* at 1422.

[30] *Id.* at 1449.

but argued that the appellant planned to kidnap and kill not S.G., but somebody. "They couldn't get [S.G.] or one [*27] of his brothers, so they got somebody. They got somebody, because somebody was going to die tonight."[31] TDC closed by inviting the members' attention to what HM3 Bacos overheard on the radio between the appellant and the two corporals to dispute the government's assertion that he planned to kidnap and kill anyone other than S.G. Throughout the trial, the government and TDC advocated conflicting positions about whom the appellant conspired to kill by the IED crater on 26 April 2006.

As the appellant was not a member of the snatch team, the government relied on both principal and co-conspirator liability[32] to prosecute him for many of the offenses charged—larceny, housebreaking, kidnapping, and assault consummated by battery actually carried out by the snatch team members. TC ended his closing argument with a preview of the legal concept for members. The military judge instructed the members on principal liability of those who aid, abet, command, counsel, or procure an offense, and co-conspirator liability, when the offense is committed in furtherance of the conspiracy.

Prompted by evidence presented during the court-martial, the military judge also [*28] instructed the members about a possible mistake of fact defense with regard to the appellant's authority to detain S.G., a high value target. "If the accused at the time of the offense was under the mistaken belief that he was authorized to detain [S.G.] at any time, then he cannot be found guilty of the offense of housebreaking."[33] "Now, the accused is not guilty of the offense of kidnapping if: First, he mistakenly believed he had the authority to detain [S.G.] at any time, and; Second, if such belief on his part was reasonable."[34]

In light of these instructions, the evidence, and counsel's arguments, the findings of not guilty of housebreaking, kidnapping, and conspiracy to commit them along with the exception of the overt acts of walking to an unknown Iraqi man's house, entering the house, and taking the man from his home against his will, support the appellant's proffered acquittal. We are not persuaded by the government's argument that the appellant could have reasonably expected an Iraqi to open his home to a knock in the middle of the night and voluntarily accompany American troops. But for the squad's legal authority to arrest and detain high value targets such as S.G., the [*29] plan required housebreaking and kidnapping.[35] The mistake of fact defense regarding the authority to detain applied only to S.G.; no one else was identified as a high value target. To borrow language from *Ashe*, "the record is utterly devoid of any indication that the first jury could rationally have found that" housebreaking and kidnapping of an unknown Iraqi man "had not occurred, or that" the unknown Iraqi man "had not been a victim of" housebreaking and kidnapping. *397 U.S. at 445*.

With regard to the appellant's liability for committing housebreaking and kidnapping, "[t]he single rationally conceivable issue in dispute before the jury was whether" the appellant had conspired to enter the home of S.G. and seize him or to break into the home of someone else to kidnap someone other than S.G. *Id.* "And the jury by its verdict found" that the appellant had not conspired to break into the home of anyone other than S.G. or kidnap anyone other than S.G. *Id.* The members demonstrated they understood both theories of liability by convicting the appellant of stealing an AK-47 and shovel he never touched. Their decision to acquit the appellant of housebreaking and kidnapping [*30] demonstrates that the members believed the mistake of fact defense applied, and the conspiracy was to get and kill S.G.

Again, we find no abuse of discretion in the military judge's failure to conclude that the appellant was acquitted of conspiring to kill anyone but S.G., but we will include this among the acquitted acts of misconduct

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[31] *Id.* at 1726.

[32] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶¶ 77(b)(2)(b) and 81(c)(5).

[33] First trial record at 1789.

[34] *Id.*

[35] *HN11*[↑] The elements of housebreaking are: "(1) That the accused unlawfully entered a certain building or structure of a certain other person; and (2) That the unlawful entry was made with the intent to commit a criminal offense therein." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 56.b. *HN12*[↑] The elements of kidnapping are: (1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person; (2) That the accused then held such person against that person's will; (3) That the accused did so willfully and wrongfully; and (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *Id.*, Part IV, ¶ 92.b.

as we proceed with analysis of the ruling on admission of evidence.

5. Military judge's ruling on motion to suppress evidence

In advance of his second trial, the appellant moved "to exclude evidence and testimony regarding conduct that was the subject of the members' 'not guilty' findings" at his first trial.[36] Specifically, the appellant sought to exclude evidence of premeditated murder, housebreaking, kidnapping, and a false official statement to NCIS agents regarding the placement of a shovel or AK-47 near the deceased.[37] The evidence to be suppressed was presented categorically and not delineated as physical exhibits, statements, or excerpts of statements. At the time of the motion, both parties anticipated that the appellant's former squad mates might testify to much of this evidence. Ultimately and unexpectedly, the government relied on transcripts of [*31] the prior court-martial testimony of four of the squad members, and the appellant objected to numerous excerpts of that prior testimony relating to acquitted offenses.

In a ruling from the bench, the military judge denied the appellant's motion to suppress evidence.

> The motion to suppress is denied. There is no requirement to speculate on the rationale of the last panel of members. In fact, it's folly to try to do that. The real risk of confusing them is if we try to parse the facts as proposed by the defense counsel. Misconduct can violate more than one article of the UCMJ and the conduct alleged in Paragraphs (a), (b), and (c) of the defense motion are not mutually exclusive to the charges of which the accused was acquitted.[38]

This statement of the military judge issued contemporaneously with his denial of the appellant's motion to suppress constitutes the sum total of the record reflective of the military judge's reasoning in support of his ruling. The record includes no explicit findings of fact or conclusions of law or any other explanation or justification in support of the military judge's ruling. In the context of the pleadings and argument during the surrounding *Article 39(a), UCMJ*, hearing, we can [*32] glean two findings of fact from the military judge's ruling and simultaneous comments.

First, the military judge apparently found that the evidence of which the appellant had been acquitted applied to other charges pending before the court. Early in the *Article 39(a), UCMJ*, session, the military judge posed to civilian defense counsel that conduct "can cut across more than one article of the UCMJ."[39] And "[w]hy can't the underlying conduct, if it applies to other charges, still come in?"[40] Neither the TC nor the military judge specified the pending charges to which the underlying misconduct applied. But in their response to the motion to suppress, the government "opine[d] that these acts demonstrate the accused's preparation, intent, lack of mistake or accident, and plan to execute the offense for which he is charged and escape culpability and suspicion for the charged offenses."[41]

In his second finding of fact, the military judge concluded that suppression of evidence of housebreaking, kidnapping, and the detour to the home of the unknown Iraqi man would leave the members confused. TC, in their response to the defense motion, asserted that, "[c]ourts should decline any invitation [to] create an artificial [*33] gap in the witness's narrative that will leave the fact-finder confused and uninformed."[42] The prospect of confused members resonated with the military judge, who then challenged the civilian defense counsel on censoring from witnesses' testimony how they transported the Iraqi man from his home to the IED crater and "how he got in—allegedly got into the IED hole."[43] TC then invoked the MIL. R. EVID. 403 balancing test and warned that "to simply omit those facts of the housebreaking and the kidnapping, to simply omit those facts, that is what

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[36] AE XCVIII at 1.

[37] *Id.* at 5-7.

[38] Record at 778. Paragraphs (a), (b), and (c) referred, respectively, to "Evidence of 'Premeditation,'" "Evidence of Kidnapping and Housebreaking," and "Evidence of False Statements to NCIS About Underlying Facts." AE XCVIII at 5-7. As previously stated, the appellant's AOE focuses, almost exclusively, on the evidence in paragraph (b), housebreaking and kidnapping. We will confine our analysis to housebreaking and kidnapping and the underlying facts necessarily resolved by acquittal of those two charges.

[39] Record at 768.

[40] *Id.*

[41] AE XCIX at 10.

[42] *Id.* at 8.

[43] Record at 770.

would confuse the members."[44] From the argument on the record, we can conclude that the military judge found that excising uncharged misconduct of which the appellant had been acquitted from testimony would confuse the members, and admitting it was necessary to prevent that confusion.

HN13[↑] We presume the military judge knows the law and correctly applies it, unless the record in this case suggests otherwise. *See United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)* (holding that "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary"). However, if the military judge analyzed the evidence of prior misconduct in accordance with MIL. R. EVID. 401, 403, or 404(b) or the three-part *Reynolds* test,[45] he did not [*34] so articulate on the record. Aside from the necessity for a coherent narrative, TC did not volunteer and the military judge did not solicit the probative value of the evidence. The military judge did not acknowledge how the appellant's prior acquittal impacted its probative value, and he was silent as to any potential prejudice.

In his instructions to the members, the military judge provided the standard MIL. R. EVID. 404(b) instruction regarding acquitted offenses and added:

> I remind you again that the accused was acquitted at a prior proceeding of the offenses of kidnapping, housebreaking, assault, obstruction of justice, premeditated murder, and false official statement on or about 8 May, as well as conspiracy to commit kidnapping and housebreaking. You may therefore consider evidence that the accused may have been involved in plans or acts involving entering the alleged victim's home, moving him to another location, involvement in a shooting, and providing a statement to NCIS on or about 8 May for the limited purpose of its tendency, if any, to prove a plan or design of the accused to commit the charged acts.[46]

Given the absence of any substantive findings or analysis by the military judge, we will conduct [*35] our own *Reynolds* analysis.

6. Application of the Reynolds test

The appellant moved to suppress evidence of the offenses of which he had been acquitted: conspiracy to commit housebreaking and kidnapping, false official statement for the 8 May 2006 interview with NCIS, premeditated murder, obstruction of justice, assault consummated by battery, housebreaking, and kidnapping. In addition, we analyze the admissibility of evidence to conspire to kill anyone other than S.G.

a. Support of prior crimes, wrongs, or acts

Evidence in the form of direct testimony from multiple former squad mates reasonably supports findings that the appellant instigated, advised, counseled, encouraged, and conspired to commit the offenses of which he was acquitted, including, as a contingency, conspiring to kill someone other than S.G. *See Reynolds, 29 M.J. at 109*. In particular, through their testimony at the first court-martial, snatch team members LCpl Pennington and HM3 Bacos recounted the carefully considered and crafted plan to enter a home, seize S.G. or a substitute, transport him to the IED crater, kill him, and stage the incident to look like a legitimate firefight. They both testified to the contingency plan to seize one of S.G.'s [*36] relatives or any Iraqi man if they could not get S.G. LCpl Pennington and HM3 Bacos then provided consistent, step-by-step accounts of the execution of that plan, including the actual housebreaking, kidnapping, and assault consummated by battery. The other junior squad members corroborated the plan to obstruct justice with details of the carefully staged scene. All of this testimony contradicted the appellant's initial accounts of discovering and engaging an insurgent digging a hole in which to bury an IED and suggests deceit and false official statement. This first factor inures to the admission of the evidence.

b. Probability of facts of consequence

Evidence that the appellant instigated, advised, encouraged, and conspired to commit the acquitted offenses and that they were committed in furtherance of that conspiracy makes it more probable that the death of an unknown Iraqi man in Hamdaniyah on 26 April 2006 was the result of a conspiracy the appellant hatched and led. *Id.* The granularity of detail evident in the testimony about conspiring to enter the home of S.G. and seize him—or someone else, to kill S.G., and to cover it up made it more probable that the larceny and murder were [*37] also products of the same deliberate and comprehensive planning process. Evidence of all the actions taken to carry out the plan made it more probable that the squad members and the appellant had

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[44] *Id.* at 776.

[45] *29 M.J. at 109*.

[46] Record at 2285-86.

committed to the plan's goal of a killing in an IED crater. Finally, evidence that the appellant and the snatch team members considered a contingency such as S.G.'s absence from his home and the identification of a substitute victim made it more probable that the fatal shooting was both intentional and wrongful.

c. Does the danger of unfair prejudice substantially outweigh the probative value?

First, we consider the probative value of evidence of the acquitted offenses. *Id.* As the government argued, the primary probative value was narrative cohesion. A cohesive narrative revealed a well-thought out plan indicating preparation, intent, and lack of mistake or accident.

As for unfair prejudice that might substantially outweigh probative value, the appellant submits very little. Relying on suppression by issue preclusion, TDC did not address the *Reynolds* factors or Military Rules of Evidence in their motion. The parties discussed the MIL. R. EVID. 403 balancing test only with regard to evidence of housebreaking and [*38] kidnapping and the confusion of extracting part of the narrative. To complete our analysis, we consider the potential prejudice of evidence of acquitted misconduct.

Prejudice from evidence of premeditated murder, obstruction of justice, and the 8 May 2006 false official statement was minimal. The appellant had been acquitted of committing those offenses but convicted of conspiring to commit them. Evidence of the completed offenses was essentially indistinguishable from evidence of conspiracy to commit them and thus presented little, if any, danger of unfair prejudice.

As for evidence of housebreaking, kidnapping, and the conspiracy to commit them, their absence would have likely been conspicuous to members. Some members may have independently understood the authority to seize and detain high value targets, but there might not have been an instruction explaining the legal distinction. Faced with a logical gap in the narrative, the members may have assumed details similar to, or more aggravating than, what the evidence revealed. Suppressing the evidence may have done little to reduce prejudice.

More important, the evidence of housebreaking and kidnapping was embedded in the larger narrative. [*39] The consistent eyewitness testimony of one co-conspirator after another compounded the evidence of both conspiracy to commit murder and murder itself. There was little danger of conviction based on character evidence stemming from the housebreaking and kidnapping that preceded the murder. Inclusion of evidence explaining how the unknown Iraqi civilian arrived at the IED crater was therefore not unduly prejudicial.

With regard to the appellant's agreement to kill anyone other than S.G., the appellant fell short of articulating unfair prejudice that might have outweighed probative value. Evidence of Plans B and C, conspiracy to commit someone other than S.G., is undeniably probative of a conspiracy to commit murder and the ultimate murder of an unknown Iraqi man. The appellant's acquittal of these two plans does diminish their probative value but likely not in an appreciable way.

Nevertheless, the *potential* prejudice loomed large. The counsel prosecuting the appellant's second court-martial resurrected and recycled the conspiracy to kill a random Iraqi as the government's "theory of prosecution."[47] Sounding remarkably like his predecessor seven years earlier, TC in the appellant's second [*40] trial began his opening statement with: "Sergeant Hutchins had a perfect plan, a perfect plan to commit a murder and send a message. Sergeant Hutchins was the mastermind of the plan, and his squad executed."[48] The prosecutor quickly referred to "a plan to drag someone out of their bed in the middle of the night and kill them."[49] Then he laid out "Plan A, get [S.G.]. Plan B, get [S.G.'s] brothers . . . Plan C, you get any Iraqi male . . . you get any Iraqi male because this town is going to get the message."[50] TC then repeated Plan A, Plan B, Plan C. As he wrapped up his opening statement, the TC again referred to the appellant's "perfect plan to send a message."[51] The three-prong conspiracy theory debunked at the first trial reappeared as a central theory of the second trial, and the intent to kill someone and send a message was its theme. Although the charge sheet was silent as to a victim of the conspiracy, the members might have been forgiven for assuming the appellant was charged with conspiring to kill a random Iraqi man.

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[47] Appellant's Brief at 17, 24.

[48] Record at 1255.

[49] *Id.*

[50] *Id.* at 1259.

[51] *Id.* at 1265.

Unlike in *Hicks*, where "the other-acts evidence was totally separate from the instant offenses in time and place; was used for a limited evidentiary point; did not [*41] require proof beyond a reasonable doubt; and, although probative, was unnecessary to support a conviction of the instant charges[,]" here, although the other-acts evidence did not require proof beyond a reasonable doubt and was unnecessary to conviction, it was part and parcel of the instant offenses and prominently presented as the theme and theory of the case. *24 M.J. at 9*.

The government's depiction of the appellant as someone who conspired to kill an innocent Iraqi civilian at random was at least arguably aggravating, but it did not ultimately amount to unfair prejudice in this case. ***HN14***[⬆] "[T]he term 'unfair prejudice' in the context of [MIL. R. EVID.] 403 'speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilty on a ground different from proof specific to the offense charged.'" *United States v. Collier, 67 M.J. 347, 354 (C.A.A.F. 2009)* (quoting *Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)*). In light of the substantial and less controverted evidence that the appellant conspired to kill S.G., the members would not have needed to rely on evidence of a conspiracy to kill anyone else to prove the charge itself. Although Plans B and C were a contingency on which the snatch team needed to rely, evidence of Plans B and C was a contingency of proof the government [*42] did not need.

Finally, had the appellant exercised his right to prove his acquittal of conspiracy to murder anyone other than S.G.,[52] the diversion necessary for doing so might have tipped the scales of the MIL. R. EVID. 403 balancing test. ***HN15***[⬆] MIL. R. EVID. 403 (providing for the exclusion of evidence "if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.") But this prejudice is purely speculative. The appellant did not attempt to prove his acquittal to the members of the second court-martial, and thus this potential prejudice never became an issue.

Despite the potential for unfair prejudice in the admission of evidence of a conspiracy to kill anyone other than S.G., that prejudice was not before the military judge at the time he admitted the evidence. The actual prejudice did not substantially outweigh the evidence's probative value.

Having progressed through the three factors of the *Reynolds* test and finding them all in favor of admission, we can find no abuse of discretion in the military judge's decision to admit the evidence of acquitted misconduct, [*43] including evidence of a conspiracy to kill anyone other than S.G. The evidence offered proof of motive, intent, preparation, plan, and an absence of mistake or accident with regard to the charges against the appellant, particularly conspiracy to commit murder and murder. MIL. R. EVID. 404. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice or other unjustified distraction from the court-martial. MIL. R. EVID. 403.

7. Prejudice

Even if we had found abuse of discretion on the military judge's part in admitting evidence of a conspiracy to commit Plans B and C, there was no actual prejudice to the appellant. ***HN16***[⬆] "We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Barnett, 63 M.J. 388, 397 (C.A.A.F. 2006)* (citations and internal quotation marks omitted).

Even though the appellant's second trial defense team did not concede his plan to kill S.G., the evidence of a conspiracy to kill him was overwhelming. The appellant's primary defense was that the account of the night's events was fabricated and forced upon his squad during [*44] coercive interrogations. The vivid, granular details the co-conspirators recounted with calm, confident certainty ring with credibility. Evidence of a conspiracy to kill anyone other than S.G. was material to the government's case but of inferior quality to the evidence of an agreement to kill S.G. Despite the prominence the government gave the evidence of Plans B and C and the murderous callousness the government presumably sought to depict in the appellant, the evidence of Plan A was sufficient to assuage any concerns that members needed to fall back on evidence of Plans B and C. With those concerns assuaged, there is no prejudice.

B. Former testimony of co-conspirators

[52] *See* ***Cuellar, 27 M.J. at 56***, discussed *supra*.

The appellant challenges the military judge's ruling that certain government witnesses were unavailable and their prior testimony was admissible.

HN17[] "So long as the military judge understood and applied the correct law, and the factual findings are not clearly erroneous, neither the military judge's decision to admit evidence, nor his unavailability ruling, should be overturned." United States v. Cabrera-Frattini, 65 M.J. 241, 245 (C.A.A.F. 2007).

HN18[] An accused's Sixth Amendment right to confront witnesses against him normally prevents the government from admitting a witness's former testimony—testimonial [*45] evidence—without producing the witness for cross-examination. *See* Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But if the witness is unavailable, and has previously been subject to the accused's cross-examination, such testimonial evidence may be admissible. *Id. at 59* (concluding that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine"); *see also* Cabrera-Frattini, 65 M.J. at 245.

1. Unavailability of witnesses

HN19[] "The test for unavailability focuses on 'whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness.'" Cabrera-Frattini, 65 M.J. at 245 (quoting United States v. Cokeley, 22 M.J. 225, 228 (C.M.A. 1986)). We review a military judge's *United States v. Hutchins*, No. 200800393 determinations of witness unavailability—and the government's good faith efforts to produce the witness—for an abuse of discretion. *Id.*

HN20[] Among the reasons for witness unavailability enumerated in MIL. R. EVID. 804(a) are "(1) exempt[ion] from testifying about the subject matter of the declarant's statement because the military judge rules that a privilege applies;" and "(2) refus[al] to testify about the subject matter despite the military judge's order to do so[.]" A witness may refuse to testify [*46] by invoking his privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and, where applicable, Article 31, UCMJ. U.S. Const. amend V. HN21[] To overcome a witness's privilege against self-incrimination and compel his testimony, the government must confer testimonial immunity, as described in MIL. R. EVID. 301(d)(1):

> The minimum grant of immunity adequate to overcome the privilege is that which under either R.C.M. 704[53] or other proper authority provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial *other than in a prosecution for perjury, false swearing, the making of a false official statement*, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(emphasis added). HN22[] Testimonial immunity does not protect against prosecution for perjury, United States v. Swan, 45 M.J. 672, 679 (N-M. Ct. Crim. App. 1996); that protection requires transactional immunity.[54] But "[t]he government is not required to seek transactional immunity to demonstrate a good faith effort." United States v. Trank, No. 20130742, 2013 CCA LEXIS 985, at *16 (A. Ct. Crim. App. 2013) (citing Kastigar v. United States, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)).

In *Trank*, the alleged victim—a civilian—testified under oath at an *Article 32, UCMJ*, [*47] preliminary hearing about sexual abuse and was subject to cross-examination. *Id. at *5-*6*. Later, she indicated through counsel that she intended to recant her allegation and would invoke her Fifth Amendment right against self-incrimination rather than testify at court-martial. *Id. at *6*. The government obtained a grant of testimonial immunity for the alleged victim from an Assistant United States Attorney and unsuccessfully sought transactional immunity from the state government, but prosecutors declined to return to the United States Attorney for a grant of transactional immunity. *Id. at *7*. The military judge found the alleged victim to be unavailable, and the Army Court of Criminal Appeals agreed that a grant of transactional immunity was not required before finding a witness unavailable. *Id. at *16*.

In *Swan*, a witness testified at an Article 39(a), UCMJ, session that his statement to NCIS implicating Swan

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[53] HN23[] Rule For Courts-Martial (R.C.M.) 704, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) provides for grants of immunity to witnesses subject to the UCMJ.

[54] *See* HN24[] R.C.M. 704(a)(1). "A person may be granted transactional immunity from trial by court-martial for one or more offenses under the [UCMJ]."

was a fabrication. *45 M.J. at 679*. The government offered the witness testimonial immunity, but not transactional immunity, and instead pursued perjury charges against him for his *Article 39(a), UCMJ*, testimony. *Id.* The military judge questioned the witness about his refusal to testify, determined that he had invoked his *Article 31(b), UCMJ*, rights, [*48] and declared him unavailable. *Id. at 679-80*. This court affirmed the military judge's ruling of unavailability, finding that he "made sufficient inquiries to establish that [the witness] would exercise his privilege against compelled self-incrimination despite the purported grant of immunity." *Id. at 680*.

In the case before us, the government subpoenaed the appellant's former squad mates, all civilians by the time of trial, to testify for the prosecution. HM3 Bacos, PFC Jodka, LCpl Pennington, and LCpl Shumate took the stand in *Article 39(a), UCMJ*, sessions. Despite receiving grants of testimonial immunity,[55] they each invoked their *Fifth Amendment* privilege against self-incrimination, cited a fear of prosecution for perjury, and declined to comply with the military judge's order to testify. Based on this *Article 39(a), UCMJ*, testimony, the military judge found HM3 Bacos, PFC Jodka, and LCpl Pennington unavailable. LCpl Shumate's *Article 39(a), UCMJ*, session followed the military judge's verbal ruling that the three preceding witnesses were unavailable, and he neglected to explicitly declare LCpl Shumate unavailable. This oversight elicited no objection from the appellant, and the military judge simply dismissed LCpl Shumate after his [*49] *Article 39, UCMJ*, testimony and proceeded with the admission of his prior testimony based on his refusal to testify.

The military judge made no specific findings of fact, but he elicited from each of the four witnesses testimony that met the MIL. R. EVID. 804(b)(1) criteria for unavailability—their intent to invoke their privilege against self-incrimination to avoid testifying that they had committed perjury at the first court-martial and their refusal to testify despite being ordered to do so. Although the military judge did not elaborate on the good faith efforts of the government to produce the witnesses, all witnesses were present and took the stand to confirm the circumstances that made them unavailable. The government had procured the required grants of testimonial immunity. Despite the appellant's argument that good faith required TC's application for transactional immunity, our military case law precedent is clear that only testimonial immunity is necessary. The military judge's rulings were in accordance with MIL. R. EVID. 804(b)(1) and *Swan*, which he cited as authority, as well as *Trank*. We find no abuse of discretion with regard to the unavailability of HM3 Bacos, PFC Jodka, LCpl Pennington, and LCpl Shumate.

Having found the [*50] four witnesses unavailable, the military judge invited the government to seek admission of their testimony from the prior court-martial. To determine if admission of that prior testimony were an abuse of discretion, we next look at the appellant's opportunity to cross-examine the witnesses.

2. Opportunity and similar motive for cross-examination

HN25[↑] If a witness is unavailable, MIL. R. EVID. 804(b)(1) provides an exception to the rules against hearsay allowing admission of the unavailable witness's former testimony. The exception applies to testimony that "(A) was given by a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination." MIL. R. EVID. 804(b)(1).

The appellant argues he did not have a similar motive to cross-examine the four unavailable co-conspirators at his first trial.

HN26[↑] Whether there was a similar motive to cross-examine a witness at a prior proceeding is a question of law we review *de novo*. *Trank, 2013 CCA LEXIS 985, at *15*. The party seeking to admit prior testimony as evidence must demonstrate similarity of motive. *United States v. Salerno, 505 U.S. 317, 322, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992)* (finding no exception to MIL. R. EVID. 804(b)(1)'s "similar motive" [*51] requirement for admitting prior testimony). The appellant steers us to *United States v. DiNapoli, 8 F.3d 909 (2nd Cir. 1993)*, for the meaning of similar motive to develop testimony. In *DiNapoli*, the Second Circuit composed a test for what constitutes a similar motive at two proceedings: "whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an

[55] AE CXXX, CXXXII-CXXXIV. HM3 Bacos, PFC Jodka, LCpl Pennington, and LCpl Shumate each received a "Grant of Testimonial Immunity and Order to Testify" from the CA under authority from the Justice Department. In return for testifying truthfully, each had "immunity from the use of [his] testimony or other information given by [him] . . . except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in these matters."

interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue." 8 F.3d at 914-15. The "relevant though not conclusive" factors for comparing relative intensity of interest are "[t]he nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone . . . ." Id. at 915.

The context of this analysis in DiNapoli is revealing. The party resisting admission of the offered testimony was the government. Id. at 911. The two proceedings were a grand jury and a trial. *Id.* A prosecutor declined to cross-examine a witness at a grand jury "in order not to reveal the identity of then undisclosed cooperating witnesses or the existence of then undisclosed wiretapped conversations that refuted [the witness's] [*52] denials . . . ." *Id.* It is logical to conclude that the lower stakes and burden of proof at the grand jury prompted the prosecutor to forego that line of cross-examination. On the other hand, when the nature of the two proceedings is the same—for example, testimony on findings at a court-martial—the prospect of conviction or acquittal is the same, and the government's burden of proof is the same. A shift in cross-examination strategy does little to change the intensity of the accused's interest in avoiding conviction. In fact, the *DiNapoli* court noted that "[w]here both proceedings are trials and the same matter is seriously disputed at both trials, it will normally be the case that the side opposing the version of a witness at the first trial had a motive to develop that witness's testimony similar to the motive at the second trial." Id. at 912.

In this case, the military judge found "that the exception [MIL. R. EVID.] 804(b)1 [sic] regarding former testimony would apply, making the former testimony in this prior trial, not the other cases we've heard about, would become [sic] admissible if so desired by the government to introduce them."[56] This ruling immediately followed the military judge's [*53] declaration that three of the appellant's squad members were unavailable as witnesses. TC did not file a written motion in limine to admit the prior testimony, nor did they proffer the appellant's similar motives to develop the testimony at the first and second courts-martial on the record. As the appellant points out, the military judge made no findings of fact or conclusions of law regarding similarity of motive, from the bench or in writing.

But again, HN27[↑] we presume the military judge knows and follows the law unless there is evidence to the contrary. *See* Erickson, 65 M.J. at 225 (holding that "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary"). And here we find no evidence to the contrary, particularly in light of our *de novo* review of the similarity of motives. The government sought to introduce the prior testimony of witnesses to prove the same charges against the same accused in the same forum—a contested general court-martial. Even the *DiNapoli* court would agree that the motive to develop that testimony would normally be the same. 8 F.3d at 912. The appellant fails to rebut that expectation of similarity.

On the record, TDC argued that the defense team at the first [*54] trial was ineffective. TDC further contended that "different charges pending, different theories of the government and defense, and different motivations and strategic decisions made by both counsel" negated the appellant's prior confrontation of the witnesses.[57] In his brief, the appellant alleged that his first trial defense counsel team "explicitly conceded nearly all of the charged offenses."[58] But all of the charges referred to the appellant's second court-martial were also referred to his first court-martial. Housebreaking and kidnapping fell off the charge sheet, and premeditated murder became unpremeditated murder, but the appellant was still accused of murder and conspiracy to commit murder. The appellant pleaded not guilty to all charges on both occasions. TDC offered no evidence that the intensity of the appellant's interest in fighting for his life against murder charges differed from one trial to the next. HN28[↑] "A shift in the theory of the case does not defeat admissibility when the underlying liability remains the same, thereby guaranteeing cross-examination with the same purpose . . . ." 5-804 Weinstein's Federal Evidence § 804.04 (2017); *see also* United States v. Avants, 367 F.3d 433, 444 (5th Cir. 2004) (finding that, in a case where the appellant's "motive was to discredit [*55] a witness . . . whose testimony could, if believed, convict him," a change in trial strategy did not create dissimilarity in motive).

Much of the appellant's strategy for attacking his squad mates' testimony rests on their freshly sworn affidavits renouncing their previous statements to NCIS and earlier testimony as coerced and false. Nevertheless, HN29[↑] the discovery of new evidence useful to cross-

[56] Record at 1528.

[57] *Id.* at 1642.

[58] Appellant's Brief at 46.

examining a witness does not inject dissimilarity into the comparison of motives. "The 'similar motive' requirement is satisfied if counsel had the opportunity to cross-examine the witness without restriction on the scope of the examination even if counsel subsequently discovers information which was not available at the [previous] hearing." *Trank, 2013 CCA LEXIS 985, *13-14* (citation omitted); *see also United States v. Hubbard, 28 M.J. 27, 32 (C.M.A. 1989)* (reiterating that "admissibility of former testimony is not precluded because, after the giving of that testimony, material information is obtained as to which the defense had no opportunity to cross-examine the absent witness"). Nothing prevented the appellant's first trial defense counsel team from exploring the circumstances under which the squad members made their statements to NCIS then negotiated immunity and favorable [*56] pretrial agreements in return for testifying at other courts-martial, including the appellant's.

Comparing his two trial defense teams in hyperbolic terms, the appellant tries to elevate difference in strategy to a difference in motive. The difference in strategy manifested in the zeal with which the trial defense teams sought to discredit the squad members' testimony. But ***HN30***[↑] the purported unreliability of testimonial evidence alone will not prevent its admission, even under MIL. R. EVID. 804(b)(1). Our superior court has declined to suppress testimonial evidence based on credibility concerns alone because "factual reliability does not have to be established as a prerequisite for admitting hearsay evidence pursuant to a well-recognized hearsay exceptions." *See Hubbard, 28 M.J. at 33*.

While we have no findings of fact from the military judge, the appellant does not dispute that his first defense counsel team had the opportunity to cross-examine all four witnesses later declared unavailable. The charges the appellant faced at his first court-martial and his not guilty pleas are not subject to debate. The appellant has not introduced evidence sufficient to overcome those undisputed facts. The military judge also cited the correct rule, [*57] MIL. R. EVID. 804(b)(1), in admitting the testimonial evidence, and his ruling does not run afoul of the appellant's preferred legal standard in *DiNapoli*: "whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue." *8 F.3d at 914-15*. Finding interests of substantially similar intensity at both courts-martial to dispute a substantially similar set of testimony and disprove a substantially similar set of charges, we find no abuse of discretion in the military judge's admission of the four unavailable squad members' former testimony.

C. UCI

The appellant alleges that public statements made by then-Secretary of the Navy (SECNAV) Ray Mabus constituted UCI on the appellant's clemency proceedings, appellate review, and second court-martial.

HN31[↑] We review allegations of UCI *de novo*. *United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013)*.

HN32[↑] *Article 37(a), UCMJ*, prohibits unlawful influence on the military justice process by someone in a position of authority:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, [*58] or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

10 U.S.C. § 837(a) (2012).

HN33[↑] Interpreting *Article 37, UCMJ*, in light of case law explored *infra*, we can distill something of a formula for facts constituting UCI: (1) a government actor (2) takes action which influences or appears to influence (3) a decisionmaker in the court-martial process. The affected decision-maker might be a potential court-martial member, CA, or military judge. In his analysis of alleged UCI in this very case, former Chief Judge Baker of the CAAF set out the following factors in the context of a government actor making a public statement: the comments' intended audience, the intended and larger audience's perception of the comments, existence of an intent to influence a proceeding's outcome, [*59] the implicit or explicit threat of repercussions for dissent,

and regardless of any intent, an effect of influencing outcome or actors. *Hutchins IV, 72 M.J. at 313* (Baker, C.J., dissenting). These factors, while admittedly not binding, are instructive. The potential influence is unauthorized or unlawful because through "censure, reprimand, or admonish[ment]"[59] or something similar, a government actor manipulates, interferes with, or improperly strips the actors in the court-martial process of their independence.

HN34[↑] To show prejudice or compromise of the military justice process, a complaining party must tie these facts constituting UCI to some effect. "In cases involving [UCI], the key to our analysis is effect—not knowledge or intent" of the government actor. *United States v. Boyce, 76 M.J. 242, 251 (C.A.A.F. 2017)*. The effect may be actual prejudice to the complainant or the appearance of it. The prejudice may be unforeseen, accidental collateral damage, but it nevertheless results from—or in the case of apparent UCI, appears to result from—governmental interference in the military justice process. *See United States v. Stombaugh, 40 M.J. 208, 211 (C.A.A.F. 1994)* (focusing on "interference with the substantial rights of the accused" in analyzing allegations of UCI).

1. Actual UCI

HN35[↑] "[A]ctual [UCI] has commonly been recognized as occurring [*60] when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Boyce, 76 M.J. at 247* (citations omitted). An appellant has the initial burden of raising UCI by showing: (1) "facts which, if true, constitute [UCI];" (2) "that the proceedings were unfair;" and (3) "that UCI was the cause of the unfairness." *United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999)*. The evidentiary standard for raising the issue of UCI is "some evidence." *United States v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. 2002)*; *United States v. Ayala, 43 M.J. 296, 300 (C.A.A.F. 1995)*. The appellant's burden of proof is low, but it must be more than mere allegations or speculation. *Stoneman, 57 M.J. at 41*. The appearance of evil is not enough to justify action by an appellate court in a particular case or, said another way, "[p]roof of command influence in the air" will not suffice. *Stombaugh, 40 M.J. at 213* (internal quotation marks omitted) (alteration in original).

If the appellant raises some evidence of UCI the burden shifts to the government to rebut the allegation by persuading the court, beyond a reasonable doubt, that: (1) the predicate facts do not exist; (2) the facts do not constitute UCI; (3) the UCI did not affect the findings or sentence; or (4) if on appeal, by persuading the appellate court that the UCI had no prejudicial impact on the court-martial. *Salyer, 72 M.J. at 423*; *Biagase, 50 M.J. at 151*.

*[*61] 2. Apparent UCI*

HN36[↑] "Even if there [is] no actual [UCI], there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *Stoneman, 57 M.J. at 42-43* (quoting *United States v. Wiesen, 56 M.J. 172, 175 (C.A.A.F. 2001))*. Unlike actual UCI, which requires prejudice to the accused, "no such showing is required for a meritorious claim of an appearance of [UCI]. Rather, the prejudice involved . . . is the damage to the public's perception of the fairness of the military justice system as a whole[.]" *Boyce, 76 M.J. at 248*. An appellant raises a claim of apparent UCI by demonstrating (1) "facts, which if true, constitute [UCI];" and (2) that "this [UCI] placed an 'intolerable strain' on the public's perception of the military justice system because 'an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" *Id. at 249* (quoting *United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006))*. As with actual UCI, the appellant must show "some evidence" greater than "mere allegation or speculation." *Biagase, 50 M.J. at 150*. Some evidence of UCI will again shift the burden to the government to disprove one prong or the other beyond a reasonable doubt. *Boyce, 76 M.J. at 249-250*.

With this framework for analyzing UCI in mind, we turn to the facts of [*62] the case before us.

3. SECNAV's statements to the media

The appellant identifies SECNAV as the singular source of the UCI allegedly impacting him. It appears SECNAV became personally involved in the appellant's case two years after his first court-martial. The appellant approached some of his congressional representatives and requested they solicit clemency from SECNAV on

[59] *Art. 37(a), UCMJ*.

his behalf.[60] As later reported in the media, SECNAV reviewed the records of the Hamdaniyah courts-martial, denied the appellant's request for clemency, and ordered that his four most junior squad members be administratively separated from the Marine Corps and Navy and that the squad lieutenant be ordered to show cause why he should remain in the Marine Corps.

These were acts outside the court-martial process and within SECNAV's authority. ***HN37***[⬆] Administrative separation is not an authorized court-martial punishment.[61] ***HN38***[⬆] SECNAV was and is the highest separation authority in the Marine Corps and the Navy.[62] We will discuss SECNAV's role and authority in granting clemency *below*. But it is SECNAV's public announcement of these administrative actions and his reasons for them that form the basis of the appellant's UCI claims.

In November [*63] 2009, SECNAV gave interviews about his recent administrative actions regarding the appellant and other members of his squad implicated in the killing at Hamdaniyah. The appellant attached two of the resulting news articles to his Motion to Dismiss for UCI: one printed in The Marine Corps Times and one printed in The North County Times, a San Diego regional newspaper.[63] From the newspaper articles, we can conclude that SECNAV's audience was Marines, the Marine Corps community, and specifically, the community surrounding Camp Pendleton, California.

One article quoted SECNAV on his reasons for denying the appellant's clemency request: "'I thought that it was a sentence commensurate with the crime,'" and "a senior Marine Corps commander's" reduction of the appellant sentence from 15 years to 11 years "'shows greatly substantial clemency already.'"[64] The reporter later identified that senior Marine Corps commander as then-Lieutenant General James Mattis, the CA. The article went on to share SECNAV's impression of the case:

> Mabus said he was surprised to learn that the killing was "so completely [*64] premeditated, that it was not in the heat of battle that not only was the action planned but the cover-up was planned, and that they picked somebody at random, just because he happened to be in a house that was convenient. He was murdered."
> "It wasn't somebody coming apart under pressure. It wasn't in the middle of action, in the middle of battle," the [SECNAV] said. "It was completely planned and completely executed. . . . That was disconcerting."[65]

The remainder of the article addressed SECNAV's concurrent decision to order the administrative separations of LCpl Jackson, LCpl Shumate, PFC Jodka, and HM3 Bacos, and his order that the squad lieutenant show cause why he should remain in the Marine Corps.

The second article led with SECNAV's orders that the four junior squad members be administratively separated and that the lieutenant show cause.[66] While the second article reported SECNAV's decision to deny clemency to the appellant, it contained no comments from SECNAV about the appellant's clemency request. The reporter quoted SECNAV about the squad members more generally:

> "None of their actions lived up to the [*65] core values of the Marine Corps and the Navy . . . . This was not a 'fog of war' case occurring in the heat of battle. This was carefully planned and executed, as was the cover-up. The plan was carried out exactly as it had been conceived."[67]

The second reporter then quoted military law experts and two of the junior squad members' defense counsel on their reaction to the ordered administrative separations.

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[60] AE LXXXVIII at 78.

[61] R.C.M. 1003(b)(8).

[62] *See* Marine Corps Separation and Retirement Manual at ¶¶ 1002.51, 6002.17, 6214.1 (Ch-2, 6 Jun 2007); Naval Military Personnel Manual, Art. 1910-704 (22 Aug 2002).

[63] AE LXXXVIII at 74-78 (Gidget Fuentes, *SecNav: No Clemency in Iraqi murder plot*, THE MARINE CORPS TIMES, Nov. 17, 2009; Mark Walker, *Navy Secretary boots 4 Pendleton troops involved in Iraqi's killing*, THE NORTH COUNTY TIMES, Nov. 17, 2009).

[64] *Id.* at 74 (Fuentes, *SecNav: No Clemency in Iraqi murder plot*).

[65] *Id.* at 75 (Fuentes, *SecNav: No Clemency in Iraqi murder plot*).

[66] *Id.* at 77 (Walker, *Navy Secretary boots 4 Pendleton troops involved in Iraqi's killing*).

[67] *Id.* at 77 (Walker, *Navy Secretary boots 4 Pendleton troops involved in Iraqi's killing*).

SECNAV, a government actor capable of UCI,[68] informed the Marine Corps community and the general public of administrative actions he had taken toward Marines and a Sailor implicated in the killing at Hamdaniyah, all but one of whom had previously been convicted at court-martial. The question before this court, then, is whether SECNAV's public pronouncements amount to "censure, reprimand, admonish[ment]" of, or an attempt to threaten, coerce, or influence, another player in the court-martial process.[69] As this is not the first case in which a senior official has spoken out about a high visibility issue, we look at two earlier cases resulting in similar allegations [*66] of UCI.

In 1998, a Marine Corps aircraft struck cables supporting an alpine gondola near Aviano, Italy; all 20 people in the gondola died. *See* United States v. Ashby, 68 M.J. 108, 112 (C.A.A.F. 2009). While a Marine Corps Command Investigation Board (CIB) conducted a preliminary investigation, "there was intense international media coverage of the gondola incident and unsettled political relations between the United States and Italy." *Id. at 126*. Upon completion of the preliminary investigation, the general officer who led the CIB held a press conference announcing their findings. *Id. at 127*. The general officer who ordered the investigation and would later refer charges against Ashby issued a press release announcing his agreement with the CIB's conclusions. *Id.* One day after the *Article 32, UCMJ*, hearing in the case, the Commandant of the Marine Corps (CMC) told one of Ashby's peers that the "mishap crew would be disciplined if they did anything wrong and that 'if someone is guilty, they need to be punished.'" *Id.* Behind the scenes, the CMC, CA, the CIB, and other senior officials exchanged multiple phone calls about the status of the investigation and its findings. *Id. at 126*.

Citing pressure on the CIB and multiple public statements about his case from senior [*67] Marine Corps officials, Ashby raised a claim of UCI. Finding no actual UCI, the CAAF focused on Ashby's speculation vice presentation of actual evidence:

> His claims regarding the CIB are predicated on communications between the members of the CIB and various senior military officers. However, he has failed to show facts which, if true, would demonstrate that the CIB members were wrongfully influenced.
>
> . . . .
>
> With regard to Ashby's claim of [UCI] arising from the other actions by senior military officials, including the Commandant, Ashby has not pointed to any . . . specific facts that the court-martial process was tainted by unlawful command influence. Because of the highly publicized international nature of the incident, it is understandable that many senior military officials became publicly involved in the aftermath and investigation of the accident. However, there is no direct evidence that the actions of any of those officials improperly influenced Ashby's court-martial.

Id. at 128-29. Nor did the CAAF find some evidence of apparent UCI in the public statements. *Id. at 129*.

While not necessarily an international incident, the issue of sexual assault was one of the highest visibility issues in the military [*68] in 2012. The CMC embarked on a four-month tour of Marine Corps installations, delivering what was coined the "Heritage Brief" to as many Marine officers and staff noncommissioned officers as he could reach. *United States v. Howell, 2014 CCA LEXIS 321, at *3 (N-M. Ct. Crim. App. 22 May 2014)*. In the brief, the CMC stressed the legitimacy of 80% of sexual assault claims and the underreporting of sexual assaults. *Id. at *6-*7*. He expressed his deep disappointment in Marine Corps court-martial members, among others, for becoming soft and retaining Marines who commit misconduct instead of holding them accountable and getting rid of them. *Id. at *7-*8*. Howell's court-martial for sexual assault was pending at Parris Island, South Carolina, when the CMC delivered the Heritage Brief there, *id. at *3-*4*, and the Heritage Brief was the subject of national media coverage the week before the members reported for the trial. *Id. at *11*.

On appeal, this court found some evidence of UCI in the CMC's remarks about sexual assault in the Marine Corps and the need to hold those who commit sexual assault accountable. *Id. at *28*. *Voir dire* of the members revealed that:

> eight of the eleven members attended the Heritage Brief; many had also either read White Letter

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[68] ***HN39***[↑] SECNAV is neither a CA nor a commanding officer, and is not subject to the UCMJ, thus *Article 37, UCMJ*, does not appear to apply to him. The CAAF's opinion in *Boyce*, however, clearly holds that a service secretary can be the source of UCI. *76 M.J. at 252*.

[69] *Art. 37, UCMJ*.

> 2-12[70] or the media coverage; virtually all acknowledged [*69] a high degree of deference to the CMC, particularly when he holds a strong opinion on a topic; they recalled the Heritage Brief primarily focusing on two things - sexual assault and accountability; almost all remembered and accepted as true the CMC's statement that 80% of sexual assault allegations are legitimate; and, most would characterize the CMC as unhappy, frustrated, or disappointed in his officers and senior enlisted for their failure to hold Marines accountable.

*Id. at *14*. This court concluded that the three military judges presiding over the case had failed to cure the appearance of UCI by not excusing more of the members or rehabilitating them through curative instruction. *Id. at *35-37*. A more carefully vetted panel of members, instructed on their independence as fact finders, could have tried the case with an objective outsider's confidence in the integrity of the process. But this court did not believe the Heritage Brief in and of itself was fatal and necessitated dismissal of the charges with prejudice. *Id. at *37-38*; *see also id. at *39* (Ward, S.J. concurring) (agreeing with the majority that the Heritage Brief does not create an appearance of UCI *per se*).

Returning to the case at bar, we look for evidence of actual [*70] influence or some effect that suggests influence on military justice proceedings. In this case, SECNAV publicized administrative actions he had already taken or ordered while the appellant's court-martial was still pending appeal before this court in November 2009. But SECNAV made no mention of a pending appeal. He cited the findings of the courts-martial as justification for the administrative actions he had already taken.

The appellant accuses SECNAV of deliberately misrepresenting the facts and findings of his case in the articles. SECNAV described the killing as premeditated, contrary to the appellant's acquittal of premeditated murder. But in light of the appellant's concurrent conviction for conspiracy to commit murder, we cannot impugn intentional misrepresentation to his use of the word "premeditated." SECNAV also appeared not to have interpreted the appellant's acquittal of housebreaking and kidnapping as an acquittal of a conspiracy to murder a random Iraqi man. In light of our analysis of that issue above, we also decline to find SECNAV's lack of precision intentionally deceptive.

SECNAV's words of "censure, reprimand, or admonish[ment]"[71] were reserved for the appellant, his [*71] squad members, and the squad lieutenant. To the extent SECNAV rebuked earlier decisions to retain the three junior Marines and the Sailor, he indirectly criticized administrative separation decisions separate and distinct from the court-martial process. But there were no expressions of disappointment or frustration with CAs, members, or anyone else referring or adjudicating charges at courts-martial.

Although SECNAV's comments, excerpted from the November 2009 articles, have been repeatedly reproduced in numerous publicly available print and online articles, the record reveals no new comments or actions from SECNAV regarding the appellant since the interviews in November 2009. Other than a vague reference to requests for information about the status of the appellant's second court-martial from "the Secretariat" in a staff judge advocate's routine email correspondence,[72] there is no evidence of SECNAV, or anyone acting on his behalf, directly contacting anyone, in or out of the Department of the Navy, about the appellant or this case. In fact, the appellant alleges that SECNAV's subordinates were influenced by nothing more than their awareness of their superior's opinions from these articles. [*72] In his brief, the appellant repeatedly alleges that subordinates bowed to SECNAV's influence because they "*were aware of Secretary Mabus' comments*."[73]

4. Decision-makers allegedly influenced

We turn now to government actors and entities who subsequently made a recommendation, a decision, a ruling, or took some action related to the appellant's first or second court-martial. Assuming without deciding that the appellant has alleged facts constituting UCI in SECNAV's words alone, we proceed with the *Biagase* and *Boyce* tests. ***HN40***[⬆] To find actual UCI, we must

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[70] In conjunction with the Heritage Brief tour, the CMC issued White Letter 2-12, addressed to all Marines, announcing a Marine Corps-wide campaign to address sexual assault and his expectation that leadership be engaged in addressing it. *Howell, 2014 CCA LEXIS 321, at *9*.

[71] *Art. 37, UCMJ*.

[72] AE LXXXIII.

[73] Appellant's Brief at 63.

find "that the proceedings were unfair" and "that [UCI] was the cause of the unfairness." *Biagase, 50 M.J. at 150*. To find apparent UCI, we must find that "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce, 76 M.J. at 249* (citation and internal quotation marks omitted).

a. Naval Clemency and Parole Board (NC&PB)

The appellant cites "denied clemency/parole in Jan 2010" as the first of the "unfair actions" resulting from SECNAV's comments.[74]

HN41[] Clemency is available to service members primarily through three statutory avenues: *Article 60, UCMJ*; *Article 74, UCMJ*; and *10 U.S.C. § 953*. *Article 60, UCMJ*, requires a [*73] CA to consider matters an accused submits in clemency before taking action on the findings and sentence of a court-martial. At the time of the appellant's first court-martial, the CA had unfettered authority under *Article 60, UCMJ*, to "disapprove, commute, or suspend the sentence in whole or in part."[75] Under *Article 74(a), UCMJ*: "The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President." Pursuant to *10 U.S.C. § 953*, SECNAV maintains the NC&PB as his system for granting clemency.[76]

HN42[] With a few inapplicable exceptions, SECNAV has delegated his authority to act in matters of clemency and parole to the Assistant SECNAV for Manpower and Reserve Affairs (ASN(M&RA)).[77] The NC&PB is composed of a civilian director and four senior officers representing communities in the Marine Corps and Navy.[78] The board's mission is to "act for or provide recommendations or advice to SECNAV in the issuance of decisions regarding clemency or parole matters[.]"[79] Among the board's functions [*74] is to "submit to SECNAV, with recommendation for final action . . .

> (a) Cases in which SECNAV or a designee has indicated in writing an official interest. . . .
> (d) Any individual whose clemency may be the subject of controversy or substantial congressional or press interest as determined by SECNAV or a designee . . .
> (e) Cases in which the NC&PB recommends clemency for any offender whose approved unsuspended, [sic] sentence to confinement is in excess of 10 years . . . ."[80]

HN43[] Clemency and parole are not rights but decisions within the NC&PB's and SECNAV's discretion.[81] While consideration of clemency is part of the post-trial process, it is considered an executive, not a judicial function. *See United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988)*.

Given SECNAV's statutory authority to grant or deny clemency, we are skeptical that his influence over the process, assuming he had any, was inappropriate, much less unlawful. As Chief Judge Baker wrote in his dissent in *Hutchins IV*, "[SECNAV] would be hard pressed to exercise unlawful command influence over the NC&PB clemency decision over which he retains sole discretion with the sort of public comments attributed to him in this case." *72 M.J. at 317* (Baker, C.J., dissenting). Judge Ryan, in her concurring [*75] opinion in *Hutchins IV*, acknowledged that "SECNAVINST 5815.3J limits the NC&PB's role in Appellant's clemency process to one that merely advises the Secretary on a matter committed, by statute, to his discretion." *Id. at 303* (Ryan, J. concurring in the result). The appellant accuses SECNAV of interfering in his own process by revealing his opinion to his own advisers. If SECNAV's public comments are the source of UCI, the revelation of the opinion, not the manner in which SECNAV reached it, is the issue. Assuming without deciding that SECNAV could inappropriately influence his own advisers by communicating a decision to them, we evaluate the evidence in light of the tests in *Biagase* and *Boyce*.

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[74] *Id.* at 61.

[75] *Art. 60(c)(2), UCMJ*. The appellant's CA reduced his sentence to confinement from 15 years to 11 years pursuant to his *Article 60, UCMJ*, authority.

[76] Secretary of the Navy Instruction (SECNAVINST) 5815.3J (12 Jun 2003).

[77] *Id.* at ¶ 205 (emphasis omitted).

[78] *Id.* at ¶ 307.

[79] *Id.* at ¶ 306.

[80] *Id.* at ¶ 308.a.(6) (emphasis omitted).

[81] *Id.* at ¶ 308.a and b.

The appellant offers no evidence as to why a decision to deny him clemency or parole was unfair. He simply includes it in a list of unfavorable actions and decisions made since November 2009 that he characterizes as "unfair."[82]

Moving to the third *Biagase* factor, causation, the appellant alleges that the NC&PB reversed course and recommended no clemency—when they had previously recommended a six-year reduction in confinement—because they were "aware" of SECNAV's opinion.[83] First, that argument rests on the unsupported [*76] assumption that board membership was constant from 2009 to 2010. But more important, the government presented evidence undermining the purported effect of SECNAV's statement. TC presented the acting ASN(M&RA)'s 10 March 2009 memorandum notifying the President of the NC&PB of his disagreement with the board's recommendation and denial of *any* clemency for the appellant.[84]

In his Motion to Dismiss for UCI, the appellant detailed his further requests for clemency and the results. In June 2010, the appellant was released from confinement following this court's decision to set aside his conviction. After being ordered back into confinement in February 2011, the appellant filed a special request for clemency with the NC&PB. The board recommended reducing the appellant's sentence by 251 days, and the acting ASN(M&RA) approved.[85] The NC&PB subsequently recommended parole in June 2011, but the new ASN(M&RA) disapproved. A year later, the NC&PB recommended *against* clemency and parole, but then in 2013, the board recommended granting parole. ASN(M&RA) rejected the recommendation.[86] This fluctuation further undermines any reasonable expectation of consistency in recommendations from year to year.

Looking [*77] at the facts presented by both the appellant and the government, we do not see "some evidence" that the appellant's proceedings for requesting clemency were unfair or that the appellant was denied additional clemency because of SECNAV's public statements. ASN(M&RA) rejected NC&PB's recommendation for clemency in March 2009 and communicated his decision directly to the President of the NC&PB. The appellant has failed to demonstrate how SECNAV subsequently interfered with the process or inappropriately influenced the NC&PB by reaching the identical decision eight months later and indirectly communicating it to the NC&PB via the media.

Turning to apparent UCI of the NC&PB, we note that a member of the CAAF previously concluded that "[n]o member of the public, aware of the remarks made and the change in clemency recommendation that occurred, could fail to harbor grave concerns that the change in the NC&PB's clemency recommendation was directly related to the Secretary's intemperate remarks about Appellant[.]" *Hutchins IV, 72 M.J. at 302-03* (Ryan, J. concurring in the result). However, it appears Judge Ryan reached her conclusion without the benefit of ASN(M&RA)'s March 2009 memorandum, which the government subsequently [*78] submitted during the appellant's second court-martial. In light of that evidence, we are convinced, beyond a reasonable doubt, that the government has dispelled any notion that "[UCI] placed an intolerable strain on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce, 76 M.J. at 249*.

When the appellant raised the effect of UCI on the NC&PB before his second court-martial, the government presented ASN(M&RA)'s 10 March 2009 memorandum to the President of NC&PB. In it, he declined to approve the board's recommendation to reduce the appellant's confinement by six years and denied any clemency for the appellant. In the routine correspondence documenting his decision, ASN(M&RA) went on to respond to the NC&PB's recommendation with the following:

> Having thoroughly reviewed Private Hutchins' case, specifically including the evidence presented on his behalf, I found the adjudged sentence to be appropriate for the murder of an innocent Iraqi national and the subsequent attempts to fraudulently cast the incident as an attack upon United States [*79] forces. These acts represented a significant departure from the conduct expected of a Marine, no matter how dire the situation or

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[82] Appellant's Brief at 61.

[83] *Id.* at 63.

[84] AE LXXXIX at 23.

[85] AE LXXXVIII at 8.

[86] *Id.* at 8-9.

> circumstances.[87]

The decision and the comments supporting it predated SECNAV's comments by eight months, and there is no evidence that SECNAV was aware of the exchange or in any way influenced ASN(M&RA). In fact, the record suggests that SECNAV only became involved in the appellant's case when congressional members approached him personally on the appellant's behalf. Any consultation between SECNAV and ASN(M&RA) in advance of ASN(M&RA)'s decision to deny the clemency recommendation would have defeated the purpose of SECNAV's delegation of authority.

Although apparent UCI does not require evidence of causation, it is the appearance that SECNAV abruptly derailed the appellant's prospects for clemency with his comments that constitutes the evidence of apparent UCI in this case. ASN(M&RA)'s unequivocal denial of the appellant's clemency in remarkably similar terms, addressed directly to the board eight months earlier, negates that appearance. No observer aware of that March 2009 denial can believe that, but for SECNAV's comments, the appellant would have received [*80] the NC&PB's recommended clemency. To the extent subsequent NC&PB board members felt chilled against recommending clemency for the appellant, a reasonable observer would be hard pressed to attribute that chilling effect to SECNAV instead of the senior official who had already disapproved the recommendation as a matter of due course.

This evidence undermining the appearance that NC&PB reversed course in response to SECNAV's comments also addresses the first of three points Judge Ryan found bolstered her concerns about the fairness of the clemency process:

> (1) the NC&PB's dramatic change following the Secretary's comments that Appellant receive no clemency or parole; (2) the subordinate status of all NC&PB members to the Secretary, and (3) the fact that any NC&PB clemency or parole recommendation would have to be approved by the [ASN(M&RA)], who was presumably aware of the Secretary's position on this matter.

Hutchins IV, 72 M.J. at 302 (Ryan, J. concurring in the result) (internal citations omitted). We respectfully submit that awareness of ASN(M&RA)'s March 2009 memorandum significantly weakens any apparent causal link between SECNAV's comments and NC&PB's change in recommendation. Second, members of NC&PB are also [*81] subordinate to ASN(M&RA), and they understand their role is to submit cases like the appellant's with recommendations for final action by ASN(M&RA) or SECNAV. Third, the memorandum reveals that ASN(M&RA) communicated a disinclination to award the appellant clemency eight months before he presumably learned of SECNAV's position on the matter. Thus, for NC&PB, SECNAV's comments were less of an influence than an echo.

Finally, someone aware that NC&PB membership and recommendations are not consistent from year to year would not expect consistency in the board's recommendations. We are convinced beyond a reasonable doubt that a reasonable observer, cognizant of all of the facts and circumstances, would find SECNAV's comments far less consequential to subsequent NC&PB recommendations, if consequential at all. We find that, at the appellant's second court-martial, the government successfully rebutted the appearance of UCI infecting the NC&PB's consideration of the appellant's clemency requests.

b. The Judge Advocate General

Next, the appellant claims that, following this court's decision in *Hutchins I*, the Judge Advocate General (JAG) of the Navy succumbed to UCI and felt compelled to certify [*82] the case to the CAAF for further review.

HN44[] Pursuant to *Article 67, UCMJ*, and RULE FOR COURTS-MARTIAL (R.C.M.) 1203, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), the JAG may "forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to any matter of law." R.C.M. 1203(c)(1).

On 22 April 2010, this court set aside the findings and sentence of the appellant's first court-martial, citing an improper severance of the appellant's attorney-client relationship with one of his detailed defense counsel. *Hutchins I, 68 M.J. at 631*. The record was returned to the JAG for remand to an appropriate CA with authority to order a rehearing. *Id.* Instead, the JAG exercised his authority to certify issues related to the severance of counsel to the CAAF. *Hutchins II, 69 M.J. at 283-84*. The CAAF found that severance of the appellant's relationship with one of his detailed defense counsel did not materially prejudice his rights and remanded the case to this court for a new review under *Article 66, UCMJ*. *Id. at 293*.

Citing the JAG's occupation of his billet in November

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[87] AE LXXXIX at 23.

2009—a billet in which he was SECNAV's direct subordinate—the appellant assumes the JAG was aware of SECNAV's comments. The appellant also offers media reports that the JAG's advisors recommended against certification [*83] of the case, presumably to suggest that the JAG acted in accordance with something other than sound legal judgment.[88] He alleges that "certification of *Hutchins I* to CAAF ultimately led to the reinstatement of Sgt Hutchins' convictions, and led to Sgt Hutchins serving an additional 29 months of confinement."[89]

Assuming, *arguendo*, that the JAG was familiar with the newspaper articles, the appellant fails to demonstrate that the decision to certify his case was prejudicial, much less unfair. Had the JAG not certified the appellant's case to CAAF, he would have remanded it to a CA with the authority to order a rehearing. Ultimately, that happened, after the CAAF's decision to set aside the findings and sentence in *Hutchins IV*. Attributing an additional 29 months of confinement to that delay is baseless, as there is no way to know how the appellant's rehearing and subsequent appeals might have unfolded without the certification. Instead, the JAG acted within his authority, and the appellant cannot show some evidence of an unfair proceeding or prejudice resulting from the JAG's decision, much less from UCI.

We agree with Chief Judge Baker's observation that ***HN45***[↑] "subordination, a divergence in staff [*84] advice, and a certification do not alone amount to some evidence of [UCI]. Rather they reflect the ordinary process of review and appeal." *Hutchins IV, 72 M.J. at 315* (Baker, C.J., dissenting). There is no cause for an "objective, disinterested observer, fully informed of all the facts and circumstances," to "harbor a significant doubt about the fairness of the proceeding." *Boyce, 76 M.J. at 249*.

Accordingly, we find that the appellant has failed to satisfy his initial burden of providing some evidence of UCI of the JAG.

c. Navy-Marine Corps Court of Criminal Appeals (NMCCA)

The appellant speculates that three former judges of this court "desire[d] to validate the Secretary of the Navy" when they "failed to diligently review the record and the pleadings, and were predisposed to affirm the conviction and find that Secretary Mabus did not engage in [UCI]" in *Hutchins III, 2012 CCA LEXIS 93*.[90]

When the newspaper articles appeared in November 2009, the appellant's case was still pending its first review before this court. Although not appearing to address the appellate court, SECNAV publicly shared that, after reading the record of the appellant's court-martial, he was convinced the appellant led his squad in planning, executing, and covering up the premeditated murder [*85] of an Iraqi civilian. According to SECNAV, the appellant had received the sentence he deserved. Five months later, this court set aside the findings and sentence from the appellant's court-martial and remanded the case for rehearing. The CAAF, comprised entirely of judges outside the Department of the Navy, reversed and remanded to this court for a new review. Two of the three appellate judges on the panel deciding *Hutchins III* had concurred in the *en banc* decision to set aside in Hutchins I. *Hutchins III, 2012 CCA LEXIS 93, at *1* (opinion by Perlak, S.J. with Carberry, S.J. and Modzelewski, J. concurring); *Hutchins I, 68 M.J. at 631* (Carberry, S.J. and Perlak, J., concurring in the majority opinion). In *Hutchins III*, this court affirmed the findings and sentence, finding no merit in an allegation of UCI or other AOEs. *2012 CCA LEXIS 93, at *11, *32*.

HN46[↑] In addition to presenting some evidence of UCI, the appellant must also overcome the presumption that appellate judges "know the law and apply it correctly." *United States v. Clark, 75 M.J. 298, 300 (C.A.A.F. 2016)* (citations omitted). "Without such evidence, courts will not conclude that a military judge was affected by unlawful command influence." *Hutchins IV, 72 M.J. at 314* (Baker, C.J., dissenting) (citing *United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. 1998)*).

To rebut "the presumption of regularity that applies to the acts of the appellate military judges"[91] and demonstrate some [*86] unfairness in the appellate review of his case, the appellant focuses on the content of the opinion. According to the appellant, the opinion's author failed to recite the charges, specifications, or language of which the appellant was acquitted, he

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[88] Regardless of what advice the JAG might have received, his judgment was sound. The CAAF overturned this court's decision based on one of the issues the JAG certified. *Hutchins II, 69 M.J. at 292-93*.

[89] Appellant's Brief at 65.

[90] *Id.* at 69.

[91] *Clark, 75 M.J. at 300*.

summarized, instead of quoted, SECNAV's statements as published in the articles, and he "falsely claimed to have granted all the defense motions to attach UCI-related documents to the record."[92] From this third, readily provable oversight, the appellant concludes the panel either failed to read the record of trial or the pleadings, or knowingly made a false statement.[93] Reading the *Hutchins III* opinion, and particularly the UCI analysis, we find no merit in the appellant's allegations of impropriety, or unfairness, at the appellate court level.

The appellant also falls short of demonstrating some evidence of causation. To tie *Hutchins III* to SECNAV's UCI, the appellant characterizes the opinion as "a complete validation of Secretary Mabus' actions and an adoption of his view of the case"[94] instead of the full or partial dismissal the appellant requested.[95] Striving to explain how Senior Judges Perlak and Carberry suddenly abdicated their judicial [*87] responsibility under pressure from SECNAV in *Hutchins III*, when they had been comfortable reversing the convictions in *Hutchins I*, the appellant speculates that in April 2010 this court was not yet aware of SECNAV's comments. The appellant's tangled explanation of whom the UCI affected and when is nothing more than "mere allegation or speculation." *Stoneman, 57 M.J. at 41*; *see also Hutchins, 72 M.J. at 314* (Baker, C.J., dissenting) (concluding that the "Appellant has not moved beyond mere allegation or speculation in demonstrating 'some evidence' that the CCA proceedings were unfair or affected by unlawful command influence.").

Finally, the CAAF's subsequent decision setting aside the appellant's findings and sentence and authorizing a new trial in *Hutchins IV* nullifies this court's holdings in *Hutchins III* and any negative effect the appellant might have suffered therefrom. He received a new trial. The appellant disputes mootness by insisting this court shirked its *Article 66, UCMJ*, duty to dismiss the charges with prejudice for factual insufficiency. But the evidence against the appellant simply did not support a finding of factual insufficiency. Despite the harmless misstatement regarding motions to attach in *Hutchins III*, the [*88] appellant has failed to demonstrate some evidence that his appeal was unfair or that the appellant judges ceded their judicial independence in an effort to please SECNAV. For the same reasons, the appellant has also failed to demonstrate some evidence that an objective disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

d. CAs and their staff judge advocates

The appellant avers that the two CAs who referred charges to his second general court-martial and rejected his requests for administrative separation in lieu of trial (SILT) and offers to plead guilty were compromised by UCI. He asserts that UCI affected the staff judge advocates (SJAs) who advised them as well.

To demonstrate the impact of UCI on his CAs in this case, the appellant proffers evidence that the CAs were aware of SECNAV's published statement as they made decisions propelling the appellant toward court-martial.

The first of the two CAs, Lieutenant General (LtGen) Robert Neller, USMC, referred the charges to the appellant's second court-martial. In his role as CA, he also received and ultimately denied appellant's requests for [*89] release from pretrial confinement, assignment to desired duties, SILT, and acceptance of a proposed pretrial agreement.

In an affidavit signed 14 August 2014, LtGen Neller wrote:

> I was generally aware of [sic] the Secretary of the Navy made some comment to the press and others in 2009 about the case, but do not know any of the specifics. This had no influence on my referral decision. I did not receive any direct or indirect influences from any senior officer or official regarding the handling of this case.[96]

At an *Article 39(a), UCMJ*, session on 5 March 2015, LtGen Neller testified that SECNAV's comments "had no bearing on anything that [he] did in relation to this case."[97] According to his testimony and his electronic correspondence, he consulted only with his legal counsel about this case. LtGen Neller referred charges based on his personal knowledge of the charged events, having been in Iraq at the time, and his review of statements.[98] Excerpts of LtGen Neller's electronic

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[92] Appellant's Brief at 68 (citation omitted).

[93] *Id.* at 69.

[94] Appellant's Reply of 6 Mar 2017 at 44.

[95] Appellant's Brief at 70.

[96] AE LIV.

[97] Record at 698.

[98] *Id.* at 701.

correspondence contain no evidence that SECNAV or anyone else in LtGen Neller's chain of command communicated with him regarding his decisions.

The appellant alleges that UCI tainted advice the SJA, Colonel (Col) G, gave [*90] LtGen Neller. ***HN47***[↑] SJAs, like military judges, enjoy the presumption of knowledge of and compliance with the law and their independent duties, absent evidence to the contrary. *See* *Ashby, 68 M.J. at 130 (C.A.A.F. 2009)* (presuming that "legal officers properly performed their professional duties which included independent review of the evidence and preparation of only those charges for which they determined probable cause existed."). Relying on support from Col G's electronic correspondence, the appellant proffers that Col G was cognizant of SECNAV's comments, the motion to dismiss for UCI, requests for information "originating from the 'Secretariat,'" and LtGen Neller's desire for input from the SJA to the CMC following the reversal of convictions.

The appellant also alleges that the SJA's office and the prosecution "were on the same 'team'" because Col G addressed his deputy and the trial counsel as "Team" in an email asking that defense counsel route their requests for the CA through trial counsel.[99] This does not amount to evidence that Col G assumed a prosecutorial role. Nor did the email require Col G to disqualify himself as the SJA. *See* *United States v. Chessani, 2009 CCA LEXIS 84, *5-6, *21 (N-M. Ct. Crim. App. 17 Mar 2009)* (affirming apparent UCI based on the presence of [*91] a disqualified SJA—who had interviewed Chessani, elicited incriminating statements from him, and was "intimately involved in drafting findings and conclusions" about him—when subordinate SJAs briefed the CA about the case). The appellant has not presented sufficient evidence to overcome the presumption of Col G's compliance with the law or to demonstrate that Col G or any of the other SJAs acted as an investigator, military judge, or counsel in this case and thus should be disqualified.

The appellant also alludes to a memorandum to the Justice Department requesting testimonial immunity for one of the appellant's squad members. It was likely drafted by TC, reviewed by Col G, and bore LtGen Neller's signature. Citing concerns about the armed forces' image abroad and difficulties in renewing the Status of Forces Agreement with Iraq, the memorandum sought assistance "to reinstate Sergeant Hutchins' convictions."[100] LtGen Neller testified that the wrong words were used in that statement and clarified his intent was to seek retrial, not reinstatement of convictions.[101] Regardless of the propriety of references to political concerns or Status of Forces Agreements, the memorandum provides no evidence [*92] of SECNAV's influence.

LtGen Neller was relieved by LtGen Kenneth McKenzie, USMC, who then became the appellant's CA. As evidence of the impact of UCI on LtGen McKenzie, the appellant cites his denial of a SILT request. The appellant's SILT request "specifically highlighted Secretary Mabus' comments in detail, along with referencing Air Force cases of political retaliation against convening authorities, as justification for the SILT, in order to restore public confidence in the independence of convening authorities."[102] LtGen McKenzie also refused to meet with the appellant's civilian defense counsel or to negotiate a pretrial agreement with him.

In an affidavit, LtGen McKenzie wrote, "I do not recall any prior specific comments made about this case by any particular individual, including the Secretary of the Navy, the Honorable Ray Mabus, General Hagee and General Conway."[103] Based on his "independent review of this matter post-referral," LtGen McKenzie concurred with the SJA's *Article 34, UCMJ*, advice.[104] LtGen McKenzie declared his independence as a CA, denied any attempts to influence him, and affirmed his presumption of the appellant's innocence and right to a fair trial.[105]

At the *Article 39(a), UCMJ*, hearing, LtGen [*93] McKenzie testified to having no recollection of SECNAV's comments at the time of their publication and to learning about them only through the appellant's motion to dismiss for UCI. When asked for his "immediate reaction" to SECNAV's comments, LtGen McKenzie testified, "I'm dealing in, you know, 2014, 2015 and they don't seem to have any bearing on what I'm going to do and what actions I'm going [to] take as

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[99] Appellant's Brief at 72.

[100] AE LXXXVIII at 151.

[101] Record at 704.

[102] Appellant's Brief at 81 (citation omitted).

[103] AE LVIII at 3.

[104] *Id.* at 4.

[105] *Id.*

the [CA] in the case. So, no, they did not particularly concern me."[106] LtGen McKenzie confirmed that he had conducted his own independent review of the appellant's case upon assuming command from LtGen Neller and concurred with the decision to refer charges.[107]

With regard to LtGen Neller, Col G, and LtGen McKenzie, the appellant submits that their unwillingness to grant his requests for a more favorable disposition, coupled with their full knowledge of SECNAV's opinions in 2009, constitutes at least some evidence of UCI. Their electronic correspondence reveals no evidence of influence from SECNAV or a lack of independence in pursuing the case.[108] But for the briefings and publicity surrounding the appellant's motion to dismiss for UCI, it is unclear whether the CAs would have even known [*94] what SECNAV said. Neither LtGen Neller nor LtGen McKenzie could have testified more emphatically about the irrelevance of SECNAV's comments to their deliberative process or their independence of judgment. The appellant has again fallen short of presenting some evidence of either unfairness or causation.

Finally, there is not some evidence of apparent UCI. This case has none of the hallmarks of apparent UCI identified in *Boyce*. In *Boyce*, the CA had drawn considerable public criticism from Congress and the media for setting aside sexual assault convictions in the court-martial of a lieutenant colonel and direct but quiet criticism from the JAG of the Air Force for declining to refer charges of sexual assault against an airman. *76 M.J. at 244-45*. The newly confirmed Secretary of the Air Force directed the Air Force Chief of Staff to call the CA and present him with two choices—"voluntarily retire from the Air Force at the lower grade of major general, or wait for the Secretary to remove him from his command in the immediate future." *Id. at 251-52*. Within three hours of the call, the CA decided to retire early. *Id. at 252*. In formally requesting retirement, the CA wrote, "[m]y decisions as a General Court Martial [sic] [CA] . [*95] . . have come under great public scrutiny, and media attention . . . will likely occur on subsequent sexual assault cases I deal with." *Id. at 245-46* (internal quotation marks omitted). The effect on Boyce came ten days later when the CA referred charges of sexual assault against him. *Id.* The CAAF found the appearance of UCI in the facts preceding the CA's decision. *Id. at 251*. They "conclude[d] that members of the public would understandably question whether the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force improperly inhibited [the CA] from exercising his court-martial convening authority in a truly independent and impartial manner as is required to ensure the integrity of the referral process." *Id. at 252-253*; *see also United States v. Gerlich, 45 M.J. 309, 314 (C.A.A.F. 1996)* (setting aside findings and sentence because a general court-martial CA wrote a letter to his subordinate special court-martial CA questioning his resolution of a sexual assault allegation with nonjudicial punishment and "request[ing]" that the special court-martial CA consider further investigation).

In contrast, there is no evidence of implicit or explicit threats of retaliation, congressional chastisement, or even a phone call to any of the CAs in this case at [*96] the behest of SECNAV or anyone else. SECNAV's disapproval of decisions to retain some of the appellant's most junior squad mates, expressed five years earlier, does not amount to the kind of "censure, reprimand, or admonish[ment]"[109] that creates an appearance of UCI. Unlike the CA in *Boyce*, who was forced to retire for his actions, both LtGen Neller and LtGen McKenzie affirmed their unhindered independence and the absence of SECNAV's influence from their decisions. Again, the appellant has offered nothing more than speculation and allegation. Unfavorable decisions made with awareness of a five-year-old SECNAV article and nothing more do not create an appearance of UCI.

e. Military judge

Finally, the appellant alleges that the military judge, with full awareness of SECNAV's statements, made legally unsupported rulings on motions related to UCI to protect SECNAV and his own post-retirement employment in the Department of Defense.

HN48[↑] Absent evidence to the contrary, military judges enjoy a presumption of resistance to UCI in their decisions. *Rivers, 49 M.J. at 443*; *see also Stombaugh, 40 M.J. at 213* (holding that the court would "not presume that a military judge has been influenced simply by the proximity of events which give the appearance [*97] of command influence in the absence

[106] Record at 785.

[107] *Id.* at 790-91.

[108] AE LXXXIII.

[109] *Art. 37, UCMJ*.

of a connection to the result of a particular trial." (citations omitted)).

It is worth examining a case of unlawful influence of a military judge for perspective. In *Salyer*, prosecutors and a supervisory circuit judge took action toward the military judge presiding over Salyer's court-martial. "Perplexed" by one of the military judge's rulings on a pretrial motion, trial counsel accessed the military judge's personnel record looking for evidence of a potential personal bias. Salyer, 72 M.J. at 420. Trial counsel then questioned the military judge about personal information from his file in *voir dire* and challenged him for actual and implied bias. *Id.* Eager to warn the military judge's supervisory judge about this unusual turn of events, one of the senior prosecutors shared the discovered personal information and plans for *voir dire* with the supervisory judge as a courtesy. *Id.* In a subsequent conversation between the two judges, the supervisory judge mentioned the phone call from the prosecutor, the perplexing ruling, the reaction to it, and the government's intent to seek the military judge's recusal. Id. at 421. Recusing himself from the case, the military judge cited "an inappropriate [*98] method for addressing a disagreement with [his] ruling" as cause for a reasonable person to question his impartiality on future decisions in the case. Id. at 421-422. The CAAF agreed with the military judge, finding that "[a]n objective, disinterested observer, fully informed of these facts and circumstances, might well be left with the impression that the prosecution in a military trial has the power to manipulate which military judge presides in a given case . . . ." Id. at 427; *see also* Lewis, 63 M.J. at 414, 416 (finding actual UCI in the command's "unlawful effort to unseat an otherwise properly detailed and qualified military judge" and ordering dismissal with prejudice because the government could not render its error harmless). In Salyer's case, the government successfully replaced the military judge.

The appellant offers no evidence of prosecutorial skullduggery, government efforts to embarrass, manipulate, or replace the military judge in this case, or criticism or questions from anyone in the military judge's chain of command. Instead, the appellant attempts to demonstrate unlawful influence with the military judge's subordinate position to SECNAV, his knowledge of SECNAV's statements five years earlier, and the rulings [*99] he made. Once again, the appellant's differing interpretation of the law and the facts is not evidence of an unfair proceeding. SECNAV's position at the top of the military judge's chain of command and the theoretical prospect of downward pressure alone are not evidence of causation. The appellant implies that the military judge's post-retirement employment aspirations with the Department of Defense and possibly the Department of the Navy are evidence of UCI. Without evidence that SECNAV retaliated against—or rewarded—anyone for their actions resolving the Hamdaniyah cases, such an implication is bare allegation and speculation.

While this court does not condone senior officials making public comments about courts-martial pending appeal, the appellant has, with one exception, failed to present some evidence of actual or apparent UCI on his court-martial proceedings. In the case of apparent UCI affecting the NC&PB, the government rebutted the appearance of UCI, and we are convinced, beyond a reasonable doubt, that an objective observer, cognizant of all the facts and circumstances, would not harbor a significant doubt about the fairness of the clemency process.

D. Apparent UCI from the [*100] **search of defense counsel's office**

The appellant argues that apparent UCI arising from a government search of one of his detailed defense counsel's office necessitates setting aside his findings and sentence and ordering the government to pay reasonable attorney fees for his civilian defense counsel.

HN49[↑] "'Where the issue of unlawful command influence is litigated on the record, the military judge's findings of fact are reviewed under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law that this Court reviews *de novo*.'" United States v. Reed, 65 M.J. 487, 488 (C.A.A.F 2008) (quoting United States v. Wallace, 39 M.J. 284, 286 (C.M.A. 1994)).

The command-authorized search at issue arose and was litigated in a separate case this court has reviewed and affirmed. United States v. Betancourt, No. 201500400, 2017 CCA LEXIS 386, unpublished op. (N-M. Ct. Crim. App. 6 Jun 2017), *rev. denied*, *77 M.J. 122, 2017 CAAF LEXIS 1118 (C.A.A.F. Dec. 4, 2017)*. On 2 May 2014, Criminal Investigative Division (CID) agents executed a command search authorization and searched multiple defense counsel offices within Legal Support Services Section (LSSS)-West spaces aboard Marine Corps Base Camp Pendleton, California. Agents suspected a cell phone belonging to Sgt Betancourt was

in the office of one of his defense attorneys. *Id. at *9-*10*. With the cooperation of the senior trial counsel, three [*101] CID agents searched defense counsel offices, and a fourth agent recorded video of the search. *Id. at *11*. "The agents were professional but extremely thorough, searching through desk drawers, file cabinets, lockers, garbage cans, and ceiling tiles. The agents opened case files, but quickly flipped through the files without pausing to read documents within the files." *Id. at *12*.

This court found some evidence of apparent UCI in *Betancourt* but was "convinced beyond reasonable doubt that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt as to the fairness of [Betancourt's] court-martial[.]" *Id. at *27*. "[T]he government took significant corrective action after the search to limit disclosure of any information obtained by CID agents during the search. This included removing the [senior trial counsel], the trial counsel, and the investigators from further involvement with the investigation or court-martial. . . . The video recording of the search was secured by order until a special investigating officer was appointed to review it for potential leakage of privileged information. Subsequently, the recording was sealed by the military judge who [*102] reviewed it *in camera*." *Id. at *27-*28*.

Unbeknownst to prosecutors, the command search authorization was not limited to Sgt Betancourt's counsels' offices, and the search extended to the offices of five other defense counsel not associated with Sgt Betancourt's case. *Id. at *11-*12*. One of the offices searched belonged to Captain (Capt) S.L., one of the detailed defense counsel in the case before us. The appellant's TDC filed a motion to disqualify members of LSSS-West and any CID personnel involved in the 2 May 2014 search, and the parties litigated the impact of the search on the appellant's case.

In his written ruling on the motion, the military judge reached findings of fact supported by the record that are not clearly erroneous. Returning to his office after it was searched, Capt S.L. "noticed 'many books and binders out of place on the bookshelf' where his kept his *Hutchins* case file, [but] he could not say whether documents therein were searched."[110] The four CID agents who participated in the search testified to only flipping through file folders in search of the cell phone and not reading the files' contents. Review of the video recording of the search of Capt S.L.'s office[111] by the military judge and this [*103] court corroborates the agents' testimony. The video indicates that the search of Capt S.L.'s office lasted about five minutes. The agents also testified that they knew nothing about the appellant's case.

TC who prosecuted the appellant at his second court-martial were also not involved in the search authorization or the search. As documented in an affidavit, Capt P.M. "played no role in the planning or execution of the Betancourt Command Authorization for Search and Seizure."[112] Almost six weeks after the search, he was assigned to the trial team in the Betancourt case because the original trial counsel were disqualified. Despite litigating issues related to the search in multiple courts-martial, Capt P.M. never viewed video of the search or discussed it with the senior trial counsel who facilitated the search, any of the investigators, or the judge advocate who conducted the taint review.[113] Capt P.M. stated in his affidavit, "I have not heard, reviewed, seen, learned, read, or gleaned anything related to Sgt Hutchins as a result of the search."[114] The other trial counsel, Major (Maj) A.W., also swore in an affidavit, "I have not heard, reviewed, seen, learned, read, or gleaned anything related [*104] to Sgt Hutchins as a result of the search."[115] Maj A.W. was stationed in Austin, Texas, on the day of the search.

The military judge concluded that the circumstances of the search of defense counsel offices raised some evidence of apparent UCI in this case. We do not dispute that finding, particularly in light of our similar conclusion in *Betancourt*. While the military judge found the government could not disprove the "predicate facts on which the allegation of UCI is based[,]" he determined the government had proven beyond a reasonable doubt that a reasonable person with

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[110] AE LIX at 2 (quoting AE XXXI at 33)

[111] AE LVII.

[112] AE LIX at 15.

[113] *Id.* at 15-17. Capt P.M. acknowledged receiving a call from one of the CID agents after the agent received a call from the appellant's civilian defense counsel. The agent did not disclose any information about the search with Capt P.M. during that call.

[114] *Id.* at 15.

[115] *Id.* at 18.

knowledge of the relevant facts would not perceive that the deck is unfairly stacked against the accused.[116]

Reviewing the military judge's legal conclusion *de novo*, we also find the government has rebutted, beyond a reasonable doubt, any notion that "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding" against the appellant. *Boyce, 76 M.J. at 249* (citation and internal quotation marks omitted). Despite the government's troubling intrusion into defense counsel spaces, the testimony and the video recording of the search of Capt S.L.'s [*105] office provide overwhelming evidence that any exposure to privileged information about the appellant's case, if it occurred, was momentary, at most. The CID agents who executed the search were wholly uninvolved with the appellant's investigation and therefore would not have recognized the significance of any information they might have glimpsed. The agents were subject to a gag order, prohibiting them from discussing what they might have seen with anyone. There is no evidence to suggest any agent violated that gag order or that any privileged information about the appellant's defense reached the prosecution in his case. The government has also dispelled, beyond a reasonable doubt, any suspicion that prosecutors directed, knew, or even anticipated that CID agents would gain access to privileged files about the appellant.

Corrective measures we deemed adequate to prevent apparent UCI in *Betancourt* are more than adequate to protect against apparent UCI in this case, where the appellant was subject to substantially less exposure. We find no apparent UCI in this case stemming from the brief search of Capt S.L.'s office.

E. Recusal of the military judge

The appellant avers that the military [*106] judge erred in refusing to recuse himself based upon actual and/or apparent bias stemming from (1) UCI, (2) a conflict of interest with supervisory judges in his chain of command, and (3) his independent investigation and *ex parte* communications.

HN50[↑] We review a military judge's decision not to recuse himself for an abuse of discretion. *United States v. McIlwain, 66 M.J. 312, 314 (C.A.A.F. 2008)* (citing *United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001))*.

HN51[↑] R.C.M. 902 details the grounds for disqualification of a military judge:

> (a) *In general*. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.
>
> (b) *Specific grounds*. A military judge shall also disqualify himself or herself in the following circumstances:
>
> (1) Where the military judge has a personal bias or prejudice concerning a party . . . .
>
> . . . .
>
> (5) Where the military judge . . . :
>
> (B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding . . . .

HN52[↑] As with UCI, maintaining public confidence in the independence and impartiality of military judges requires us to consider both actual bias and the appearance of bias as possible bases for disqualification. [*107] *See United States v. Quintanilla, 56 M.J. 37, 44-45 (C.A.A.F. 2001)*. "The first step asks whether disqualification is required under the specific circumstances listed in [R.C.M.] 902(b). If the answer to that question is no, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias." *Id. at 45*.

HN53[↑] "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Quintanilla, 56 M.J. at 44* (citation omitted). But "'[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification.'" *Id. at 78* (quoting *United States v. Kincheloe, 14 M.J. 40, 50 (CMA 1982)* (additional citation and internal quotation marks omitted); *see also* R.C.M. 902(a).

The appellant filed a pretrial motion seeking recusal of the military judge and the entire Navy-Marine Corps

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[116] *Id.* at 13-14; *see United States v. Morrison, 66 M.J. 508, 510-11 (N-M. Ct. Crim. App. 2008)*.

Trial Judiciary.[117] The military judge denied the motion for recusal without making a written ruling. HN54[] In the absence of detailed findings of fact and conclusions of law on the record, we must accord his ruling less deference. *See* Flesher, 73 M.J. at 312. With the exception of one subsequently mooted [*108] basis for judicial recusal, the appellant has raised the same purported sources of judicial bias on appeal. We now parse those allegations for reasonable questions about the military judge's impartiality.

1. UCI

The appellant argues that SECNAV's UCI and evidence of its effect on members of this court create and confirm an actual, or at least apparent, bias against the appellant in the military judge.

Our superior court has recognized that HN55[] we test for apparent bias in violation of R.C.M. 902(a) in essentially the same way we test for apparent UCI. *See* Lewis, 63 M.J. at 415. "We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *Id.* Accordingly, the appellant reiterates his arguments for finding actual and apparent UCI—SECNAV's 2009 comments poisoned the military justice system adjudicating the appellant, whether that adulteration manifested as UCI or apparent bias. Only the requested remedies are different. Instead of arguing for dismissal of the charges, the appellant challenges the military judge's decision not to recuse himself.

In section C of this opinion, we exhaustively analyzed the appellant's allegations of actual and apparent [*109] UCI. Having found no actual or apparent UCI impacting the appellate court or the military judge, we necessarily conclude that neither the military judge, nor the former appellate court judges who participated in *Hutchins I* or *Hutchins III*, labored under an actual or apparent bias born of SECNAV's 2009 comments about this case.

2. Conflict of interest with the judicial chain of command

The appellant also asserts that the military judge suffered from a conflict of interest with supervisory judges in his chain of command.

HN56[] R.C.M. 902(b)(5) targets a military judge's conflicts of interest by demanding disqualification when he or she "has a personal interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." In this context, a personal interest is "extra-judicial" as opposed to judicial. Quintanilla, 56 M.J. at 43 (citing Liteky v. United States, 510 U.S. 540, 549, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 964 (5th Cir. 1980); In re Boston's Children First, 244 F.3d 164, 168 (1st Cir. 2001)). The UCMJ acknowledges and mitigates the personal interest that "results from the well-recognized effect of fitness-report evaluations on a military lawyer's service advancement and security." United States v. Mabe, 33 M.J. 200, 205 (C.M.A. 1991) (citations omitted). Article 26(c), UCMJ, prohibits a CA or any member of a CA's staff from "prepar[ing] or review[ing] any report concerning the effectiveness, fitness, or [*110] efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." The Navy Performance Evaluation System Manual specifically addresses evaluation of the performance of military justice duties: "[Fitness reports] on military judges and appellate judges may properly evaluate their professional and military performance, but may not include marks, comments, or recommendations sbased on their judicial opinions or rulings, or the results thereof."[118]

HN57[] With safeguards such as these in place, our superior court has held that the administration of military justice by judges subject to a military chain of command does not present an inherent conflict of interest. *See* United States v. Mitchell, 39 M.J. 131, 142 (C.M.A. 1994) (rejecting Mitchell's argument that the naval officer fitness report system creates "a reasonable possibility of a perceived pecuniary interest of his judges in deciding his case unfairly" as "simply too speculative and remote to violate the Constitutional norm" against an appearance of unfairness). *See also United States v. Graf, 35 M.J. 450, 466 (C.M.A. 1992)* (affirming the effectiveness of the UCMJ and Court of Military Appeals in protecting military judges from conflicts with their own "security of tenure" and "financial security" in the [*111] context of the military chain of command and performance evaluation system). Nor does the military justice system, *per se*, foster an apparent conflict of interest in violation of R.C.M. 902(a). *See* United States v. Norfleet, 53 M.J. 262, 269 (C.A.A.F. 2000) (holding

[117] AE C.

[118] Bureau of Personnel Instruction 1610.10D, Encl (2) at I-3 (1 May 2015).

"that preparation of fitness reports for appellate military judges by senior judge advocates does not create a circumstance in which the impartiality of a judge might reasonably be questioned under [R.C.M.] 902(a)" (citation omitted)).

HN58[] An actual or apparent conflict of interest between a military judge's rulings and his or her personal interest in protecting career prospects arises only in extraordinary circumstances. An example is when a supervisory judge deviates from the UCMJ, regulations, and case precedent and affirmatively questions a subordinate judge's ruling. *See* *Mabe, 33 M.J. at 205-06* (referring to a memorandum from a Chief of the Trial Judiciary to a military judge about the subordinate judge's sentences as a "military justice taboo" and concurring that removal of the offending chief trial judge from the military judge's chain of command restored the appellant's right to a fair trial and the integrity of the military justice system). The appellant offers no evidence of supervisory intrusion on subordinate discretion [*112] in this case.

a. Conflict regarding SECNAV's alleged UCI and former appellate judges in the chain of command

In support of their motion to recuse the military judge, the appellant conducted *voir dire*. First, TDC asked the military judge to detail his chain of command within the trial judiciary. The military judge identified Col M.R., the Circuit Judge of the Western Judicial District, as his immediate superior and confirmed Col M.R. would sign his next fitness report. Col M.R. reported directly to the Chief Trial Judge, who in turn reported to the Chief Judge of the Department of the Navy. All of the military judges, as members of the Department of the Navy, were subordinate to SECNAV.

In response to the basis for the challenge—SECNAV's 2009 comments about this case—the military judge disavowed any memory of them prior to reading the appellant's pleadings regarding UCI. Then he stated:

> I profoundly and deeply don't care what the Secretary of the Navy thinks as far as this case goes. . . .
>
> As how it effects [sic] my career, a post-command senior O-6 who is retiring next summer, don't care. Deeply, profoundly don't care. Deeply, profoundly don't care what [the Chief Trial Judge] or [the Chief [*113] Judge of the Department of the Navy] would think about it as well.
> They are professional colleagues and I think they would be profoundly disappointed in me . . . if I took any action, whatsoever, of speculating about what they might think. That would be abdicating my role as a military judge, as an officer of the Navy, and a member of the Judge Advocate General [sic] Corps, and certainly of the California Bar.
> . . . I just want to make it clear on the record that, something that Secretary Mabus may have said in 2009 has beyond no bearing on anything that I might do or might not do in this case.[119]

To overcome the presumption against a conflict of interest in the military justice system and the military judge's emphatic denial of any personal interest susceptible to his rulings in this case, the appellant asserts that the military judge had a personal interest in not embarrassing his supervisory judges with adverse findings about them. According to the appellant, the prospective damage to these senior judges' reputations necessitated the military judge's recusal. *See* *Norfleet, 53 M.J. at 271* (acknowledging "[t]here may be cases in which the ruling by a military judge on an issue would have such a significant and [*114] lasting adverse direct impact on the professional reputation of a superior for competence and integrity that recusal should be considered.").

Motions filed on behalf of the appellant solicited the military judge to make findings about his chain of command. The Chief Trial Judge and the Chief Judge of the Department of the Navy were both former members of this court and concurred in the majority opinions in *Hutchins III* and *Hutchins I*, respectively. In his motion to dismiss for UCI, the appellant asked the military judge "to make potentially adverse findings against the [Chief Judge of the Department of the Navy] and [the Chief Trial Judge] [.]"[120] Specifically, the military judge might have to determine that they "were unlawfully influenced by Secretary Mabus, and/or had made/adopted materially false statements."[121] As previously discussed *infra* in section C, we do not impute mendacity to the Chief Judge of the Department of the Navy and the Chief Trial Judge from immaterial discrepancies in prior appellate opinions. Nor do we fault the military judge for failing to do so.

b. Conflicts involving the military judge's immediate supervisor

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[119] Record at 96.

[120] Appellant's Brief at 120.

[121] *Id.*

Col M.R., the military judge's immediate supervisor, [*115] was the original military judge in this case before recusing himself during pretrial motions. He had a personal relationship with another senior Marine judge advocate likely to testify as a witness in litigation of a motion. Nonetheless, the appellant argued that Col M.R. remained a witness to contested facts in this case.[122] First, in his position as the circuit judge, Col M.R. possessed investigative materials and notes relevant to the CID search of defense counsel spaces in *Betancourt*, discussed, *supra*, in section D. Second, the appellant alleged that Col M.R., after learning of the appellant's continued instructor role at the Marksmanship Training Unit (MTU) aboard Camp Pendleton, notified the senior Marine judge advocate with whom he had a personal relationship. Shortly thereafter, that senior Marine judge advocate advised his commander to remove the appellant from the MTU—a transfer the appellant asserts violated *Article 13, UCMJ*.

According to the appellant's motion for recusal, these allegations necessitate the military judge's recusal because (1) a trial judge's interference in the duty assignment of an accused appearing before him "would cause significant damage to the public [*116] perception of the integrity of the military justice system"[123] and must be fully vetted "through witness testimony at open hearing."[124] But (2) that trial judge, Col M.R., could not testify if he must appear before his subordinate military judge. So the subordinate military judge must recuse himself. Like the military judge, we decline the appellant's invitation to resolve these allegations. Once Col M.R. recused himself from this court-martial, his own possible bias against the appellant became irrelevant. The court could and did adjudicate the CID search of defense counsel spaces and the appellant's *Article 13, UCMJ*, motion without further inquiring into Col M.R.'s possible involvement. Our review of these two issues, submitted to us as AOEs, confirms they were susceptible to resolution without the need to call Col M.R. to the stand.

HN59[↑] A subordinate military judge should disqualify him or herself from ruling on a credible allegation of impropriety by a supervisory judge. The desire to spare a superior such an ordeal does create an apparent, if not an actual, conflict of interest. But a party cannot incite a conflict by raising unsupported and/or irrelevant allegations of judicial misconduct. [*117]

In this case, the appellant has not presented evidence of a credible extrajudicial threat to the military judge that overcomes the presumption that his supervisors will follow the law. The prospect of a conflict of interest in presiding over this case remains far too speculative and remote to constitute an actual or apparent conflict of interest necessitating recusal.

3. Independent investigation / ex parte communications

The appellant accuses the military judge of violating the judicial canon prohibiting *ex parte* communications and submits this violation as evidence of bias against the appellant necessitating his recusal.

In pursuit of the military judge's recusal, the appellant levies a serious charge against the military judge and at least three other current and former Navy judge advocates. Pursuant to instruction,[125] the military judge's conduct was governed by the American Bar Association (ABA) Model Code of Judicial Conduct. ***HN60***[↑] Canon 2.9 of the ABA Model Code governs *ex parte* communications:

> (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending [*118] or impending matter, except as follows:
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

ABA, Model Code of Judicial Conduct, Canon 2.9: Ex

[122] AE C at 16.

[123] *Id.* at 17.

[124] *Id.*

[125] Judge Advocate General's Instruction 5803.1D at ¶ 7 (1 May 2012).

Parte Communications (2011 ed.) (internal asterisks omitted). While the facts of the military judge's alleged breach of this canon are necessary to our analysis of this AOE, we need not determine whether he actually breached it. ***HN61***[] "[A]ctivity inconsistent with standards of judicial conduct does not mandate recusal unless it rises to the level of a violation of applicable disqualification standards." *Butcher, 56 M.J. at 92* (citing R.C.M. 902). Thus we need only focus on whether the military judge's *ex parte* communications required his disqualification and recusal.

HN62[] When an allegation of *ex parte* communication forms part of a motion for recusal, [*119]

> [a] decision on disqualification will "depend on [1] the nature of the communication; [2] the circumstances under which it was made; [3] what the judge did as a result of the ex parte communication; [4] whether it adversely affected a party who has standing to complain; [5] whether the complaining party may have consented to the communication being made ex parte, and, if so, [6] whether the judge solicited such consent; [7] whether the party who claims to have been adversely affected by the ex parte communication objected in a timely manner; and [8] whether the party seeking disqualification properly preserved its objection."

Quintanilla, 56 M.J. at 44 (quoting RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 14.3.1 at 411-12 (1996) (footnotes omitted)). Our analysis will focus primarily on the first four of the eight factors above, as the last four all inure to the appellant. For clarity, we will begin with factor 2, the circumstances under which the communication was made, and then proceed to the nature of the communication, factor 1.

a. Circumstances under which communications were made

On 24 September 2014, the appellant's trial defense counsel requested the CA approve and provide logistical support for a site visit to Iraq.[126] Upon denial of this request, [*120] the appellant filed a motion to compel a site visit.[127] Both the appellant and the government acknowledged that the appellant's previous trial defense team traveled to Iraq and briefly visited the alleged crime scene in January 2007. In his written ruling denying the motion to compel a site visit, the military judge noted that "the current Defense team has access to the files from the former team which visited the situs—and may consult with former counsel Lt.Col. [J.S.] who has been made available by his supervisor."[128]

Lieutenant Colonel (LtCol) J.S. was one of the appellant's detailed defense counsel at his first court-martial, and he traveled to Iraq with the appellant's original civilian defense counsel in January 2007. By the time of the second court-martial and the motion to compel, LtCol J.S. had transitioned from active duty to the Marine Corps Reserve. He was an Assistant U.S. Attorney in his civilian capacity and a Reserve appellate military judge on this court. LtCol J.S. was the subject of the *ex parte* communication.

The appellant's current civilian defense counsel asked the military judge about LtCol J.S.'s availability in a telephonic R.C.M. 802 conference on 25 November 2014.[129] The military [*121] judge explained that he contacted the Chief Trial Judge to inquire of this court whether LtCol J.S. could be made available "to assist the defense based on his prior representation of Sgt Hutchins."[130] He went on to confirm that he and the Chief Trial Judge "agreed to make sure LtCol [J.S.] is available to assist the defense."[131]

b. Nature of the communications

Proceeding to the nature of the communication, it was a single telephone call from the military judge to the Chief Trial Judge. On the record, the military judge explained that he "contacted [the Chief Trial Judge] to ensure [the NMCCA] would be sure to wall [LtCol J.S.] off from any Hutchins matters should the defense desire to consult with him on their own, (a); and (b), should the case reach that venue again."[132] LtCol J.S. later testified at an *Article 39, UCMJ*, session about his knowledge of

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[126] AE LXIX at 4, 12.

[127] AE LXIX.

[128] AE CXXV at 6.

[129] AE C at 40. Details of that R.C.M. 802 conference come from an affidavit by one of the appellant's detailed defense counsel, who was also on the conference call. The appellant submitted the affidavit in support of his motion for the military judge's recusal.

[130] *Id.*

[131] *Id.* at 41.

[132] Record at 655.

the *ex parte* communications. The then-Chief Judge of this appellate court called him "and indicated that there would be an order coming out on this case and that the trial counsel had reached out to the Chief Judge of the [Department of the] Navy . . . to confirm that [LtCol J.S.] could—the level of [LtCol J.S.'s] participation, and they had [*122] some sort of conversation."[133] LtCol J.S. understood that he was authorized to "provide information from [his] previous representation" of the appellant.[134] He summarized the scope of this authority as follows: "So basically I can sort of dump every single bit of information that I have regarding the site visit . . . it's a one-way flow of communication." LtCol J.S. understood that the Chief Judge of the Department of the Navy was the source of this authority, and the then-Chief Judge of this appellate court conveyed it to LtCol J.S.

c. What the judge did as a result of the ex parte communication

Next we consider what the military judge did as a result of this *ex parte* communication. From his written ruling on the appellant's motion to compel a site visit, it appears the military judge communicated to the appellant's counsel that they could consult with LtCol J.S. regarding his 2007 site visit. In his Findings of Fact, the military judge concluded that the appellant's "previous Defense counsel were afforded a site visit to [Hamdaniyah] to survey the scene, conduct interviews, and investigate the circumstances surrounding the event."[135] In a footnote to this finding, the military judge noted [*123] that the appellant's former civilian defense counsel was

> unavailable for consultation due to the filing of an ineffective assistance of counsel (IAC) claim after the first trial. However, Lt.Col. [J.S.], a reserve judge at N.M.C.C.A., has been advised by his supervisors that he may discuss the case with the Defense and assist them in interpreting any of the information in the file.[136]

The military judge also allowed LtCol J.S. to testify for the defense in support of their efforts to compel a subsequent site visit.

In his motion for recusal of the military judge and again on appeal, the appellant averred that the military judge's *ex parte* communication resulted in him reaching three "opinions":

> (1) the ineffective assistance of counsel claim against LtCol [J.S.] and the other members of the original trial defense team does not give rise to a conflict of interest;
>
> (2) the site visit conducted by LtCol [J.S.] was sufficient for the defense to recover any desired evidence or witness testimony; and
>
> (3) LtCol [J.S.] was concurrently an appellate judge and, without need to consult Sgt Hutchins, a participant in the defense team; [sic] LtCol [J.S.] could actively assist the defense interpretation [*124] of evidence and strategy discussions under the protection of attorney-client privilege.[137]

We address these alleged opinions in turn. First, the appellant alleges that the military judge relied on the *ex parte* communication to resolve a conflict of interest that arguably prevented LtCol J.S. from assisting with the appellant's defense team. During an *Article 39(a), UCMJ*, session to litigate the appellant's motion to compel a site visit, the appellant identified two conflicts of interest affecting LtCol J.S.: his position as a Reserve judge on this court and the ineffective assistance of counsel claim that extinguished his attorney-client relationship with the appellant.[138] When asked about that ineffective assistance claim, LtCol [J.S.] disputed suffering a conflict of interest that prevented him from assisting the appellant's new defense counsel. He was able to "provide the information in a narrative sense" because the appellate issues for which attorney-client relationship was waived were irrelevant to the site visit.[139] The military judge did not explicitly address LtCol J.S.'s purported conflict of interest on the record, so we do not know the extent to which he considered the issue, [*125] if at all. We find no merit in the appellant's claim that LtCol J.S. suffered from a conflict of interest and thus find nothing to resolve. When our superior court set aside the findings of the appellant's first court-martial, his detailed defense counsel's effectiveness or lack thereof became moot. As LtCol J.S. commented in his testimony, his waiver of his attorney-client privilege in the course of litigation about

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[133] *Id.* at 728.

[134] *Id.*

[135] AE CXXV at 3 (footnote omitted).

[136] *Id.*, n.5.

[137] Appellant's Brief at 123. *See also* AE C at 18.

[138] Record at 498.

[139] *Id.* at 742.

his effectiveness did not conflict with his ability to relay his site visit experience to counsel. The military judge's *ex parte* communications could not impact a claim with no merit on its face.

Secondly, the appellant alleges that the military judge's *ex parte* procurement of LtCol J.S.'s assistance allowed him to conclude that the 2007 site visit was "sufficient for the defense to recover any desired evidence or witness testimony[.]"[140] As will be discussed below, in section H, the security situation on the ground in and around Hamdaniyah made a site visit essentially impossible for any counsel in 2014 and 2015. Instead the military judge faced a more academic question about counsels' equality of opportunity to obtain witnesses and other evidence in compliance with [*126] *Article 46, UCMJ*. LtCol J.S.'s availability to the appellant's defense team was a factor in evaluating the appellant's opportunity and access to evidence. But the appellant was never entitled to "recover[y of] any desired evidence or witness testimony," nor did the military judge ever reach that conclusion.

Third and finally, the appellant alleges that he was excluded from the decision to include LtCol J.S. in his defense team's "interpretation of evidence and strategy discussions under the protection of attorney-client privilege."[141] Such a characterization overstates LtCol J.S.'s authorized role in the appellant's second defense. Once the appellant's first court-martial was forwarded for appellate review, LtCol J.S.'s attorney-client relationship with the appellant ended.[142] LtCol J.S. testified to clear guidance from the then- Chief Judge of this court that he "cannot get involved in tactical decisions, strategic decisions, in giving [the appellant's defense team] theories of defense . . . ."[143] His disclosures to the new defense team were a "one-way street" in which both he and the new counsel were obligated to protect attorney-work product from their respective representations of the appellant. [*127] [144]

Thus we decline to find that the military judge's *ex parte* communications spawned any of these "opinions."

d. Whether the communications adversely affected a party who has standing to complain

Turning to the fourth *Quintanilla* factor, we consider any adverse effect of the *ex parte* communication on the appellant. Beyond the three purported opinions, the appellant alleges that the "'availability' of LtCol [J.S.] was a key basis for the military judge's denial of the defense request for a site visit."[145] Allegedly, this amounted to apparent bias against the appellant in that "as a matter of public perception, the appearance is that the military judge's independent investigation and ex parte communications were made for the express purpose of gathering evidence to support a denial of the defense motion."[146]

But the facts again rebut the appellant's characterization. "[A] reasonable man knowing all the circumstances" would not reasonably question the judge's impartiality. *Quintanilla, 56 M.J. at 78*. As will be explained in greater detail below in section H., the security situation in and around Hamdaniyah, not LtCol J.S.'s availability, precluded a site visit. Even if the military judge had ordered a site visit, [*128] witness testimony cast significant doubt on its enforceability. The military judge's *ex parte* communication served no other purpose than to facilitate the trial defense team's access to a Marine judge advocate who traveled to Hamdaniyah on the appellant's behalf in 2007 and was still within the court's jurisdiction. But by procuring LtCol J.S.'s assistance, the military judge helped restore the balance required by *Article 46, UCMJ*, and thus mitigated concerns raised by the appellant's subsequent Motion to Dismiss for Denial of Site Visit, or Alternatively, to Abate Proceedings Until Such Time As a Site Visit Can be Conducted, which depended on a violation of *Article 46, UCMJ*.[147]

Analyzing the eight *Quintanilla* factors— (1) the nature of the military judge's ex parte communication, (2) the circumstances surrounding it, (3) its consequences, (4) the adverse effect on the appellant, and (5-8) the appellant's timely objection and preservation of the issue at trial—we detect not a bias against the appellant but an effort to remove obstacles to his access to evidence.

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[140] Appellant's Brief at 123.

[141] *Id.*

[142] Record at 742.

[143] *Id.*

[144] *Id.* at 729-30, 742.

[145] Appellant's Brief at 124 (citation omitted).

[146] *Id.*

[147] AE XCVI.

A reasonable person aware of the military judge's *ex parte* communications, their effect, the appellant's rationale for challenging [*129] those communications, and the subsequent production of LtCol J.S. would find no cause to question the military judge's impartiality. Thus there is no need for disqualification.

Even in light of the military judge's brief and entirely verbal bases for his decisions not to recuse himself from this case, and the resulting diminution of our deference to his judgment, we still find no abuse of discretion.

F. Abatement for severance of attorney-client relationship

The appellant claims the military judge erred when he refused to abate the proceedings until the appellant's attorney-client relationship with his appellate defense attorney, Maj S.B.K., was restored. The military judge also declined to order Maj S.B.K's appointment as the appellant's individual military counsel (IMC).

HN63[] "A military judge's failure to abate proceedings is reviewed for an abuse of discretion." *United States v. Simmermacher, 74 M.J. 196, 199 (C.A.A.F. 2015)* (citing *United States v. Ivey, 55 M.J. 251, 256 (C.A.A.F. 2001))*.

HN64[] An accused's right to IMC is not absolute but subject to the discretion of the CA and a determination of the availability of the requested counsel. *See United States v. Eason, 21 C.M.A. 335, 45 C.M.R. 109, 111 (C.M.A. 1972)*. "The ruling of a military judge on an IMC request, including the question whether such a ruling severed an attorney-client relationship, is a mixed question of fact and [*130] law. Legal conclusions are subject to *de novo* review, and findings of fact are reviewed under a clearly erroneous standard." *United States v. Spriggs, 52 M.J. 235, 244 (C.A.A.F. 2000)* (citing *United States v. White, 48 M.J. 251, 257 (C.A.A.F. 1998)*; S. CHILDRESS & M. DAVIS, 2 FEDERAL STANDARDS OF REVIEW § 7.05 at 7-26 to 36 (2d ed. 1992)).

1. IMC

HN65[] Pursuant to *Article 38(b), UCMJ*, an accused has the right to be represented at court-martial "by military counsel of his own selection if that counsel is reasonably available[.]" *Art. 38(b)(3)(B)*, UCMJ. If reasonably available, that military counsel may be appointed to the accused's trial defense team as an IMC. Reasonable availability is defined by the service secretary but excludes persons serving, *inter alia*, as trial counsel or appellate defense counsel. *Art. 38(b)(7), UCMJ*; R.C.M. 506(b)(1)(C)-(D). The Manual of the Judge Advocate General of the Navy, or JAGMAN, implements *Article 38(b)(3)(B), UCMJ*, and R.C.M. 506 with regard to counsel in the Navy and Marine Corps.[148] First, counsel must be on active duty to be reasonably available.[149] Then a list of disqualifying criteria significantly limits the pool of available counsel.[150] Those disqualifying criteria include, *inter alia*, performance of duties as trial counsel or appellate defense counsel and permanent assignment to a command outside the Trial Judicial Circuit where the court-martial will [*131] be held or beyond 500 miles from the site of the court-martial.[151]

The military judge found—and the record supports—that Maj S.B.K. was detailed as the appellant's appellate defense counsel, pursuant to *Article 70, UCMJ*, in May 2008.[152] In preparation for his second court-martial, the appellant filed his IMC request for Maj S.B.K. on 8 August 2014.[153] By then, Maj S.B.K. was assigned to a trial counsel billet more than 500 miles from Camp Pendleton, the site of the appellant's court-martial. For these reasons, Maj S.B.K.'s chain of command denied the request on 11 September 2014. The appellant appealed, but his appeal was denied on 24 September 2014. Maj S.B.K. had left active duty the previous day and transferred to the Individual Ready Reserve.

Citing R.C.M. 506(b) and the list of assignments that disqualify counsel from serving as IMC *per se*, the military judge concluded that Maj S.B.K. was "*per se* not reasonably available while serving as a trial counsel and then again when he left active duty shortly thereafter."[154]

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[148] Judge Advocate General Instruction 5800.7F (JAGMAN) § 0131 (26 Jun 2012).

[149] *Id.* at § 0131b.(4).

[150] *Id.*

[151] *Id.* at § 0131b.(4)(b), (d)(1).

[152] Appellee's Response to Court's Order to Produce of 16 Nov 2017, Ruling on Defense Motion re: IMC Request for Maj S.B.K. of 5 May 2015 at 2; AE CXI at 2.

[153] AE CXI at 8.

[154] Appellee's Response to Court's Order to Produce of 16 Nov 2017, Ruling on Defense Motion re: IMC Request for Maj S.B.K. of 5 May 2015 at 8.

2. Existing attorney-client relationship

Despite Maj S.B.K.'s nonavailability, the appellant asserted his attorney-client relationship with Maj S.B.K. and argued denial of the IMC request [*132] would sever that preexisting relationship. ***HN66***[] R.C.M. 506 provides for exceptions to availability requirements "when merited by the existence of an attorney-client relationship regarding matters relating to a charge in question." R.C.M. 506(b)(1). But the exceptions do not apply "if the attorney-client relationship arose solely because the counsel represented the accused on review under *Article 70*[.]" R.C.M. 506(b)(1).

HN67[] *Article 70, UCMJ*, governs the detail of appellate counsel. Specifically, the JAG shall appoint "[a]ppellate defense counsel [who] shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court[.]" *Art. 70(c), UCMJ*. The authority governing detail of appellate counsel is separate and distinct from *Article 27, UCMJ*,[155] which mandates the detail of trial counsel and defense counsel "for each general and special court-martial." *Art. 27(a)(1), UCMJ*.

HN69[] The distinction between representation at courts-martial arising under *Article 27, UCMJ*, and representation on appeal arising under *Article 70, UCMJ*, appears in the JAGMAN's relevant definition of an attorney-client relationship. "For purposes of this section [0131 Standards for Determining Availability of Requested [*133] Individual Military Counsel], an attorney-client relationship exists between the accused and requested counsel when counsel and the accused have had a privileged conversation relating to a charge pending before the proceeding, and counsel has engaged in *active pretrial preparation and strategy with regard to that charge*."[156] Among the "[a]ctions that, in and of themselves, will *not* be deemed to constitute 'active pretrial preparation and strategy'" is "representing the accused in appellate review proceedings under *Article 70, UCMJ*[.]"[157] Finally, the JAGMAN references the JAGINST 5803.1 series[158] "prohibiting a counsel from establishing an attorney-client relationship until properly detailed, assigned, or otherwise authorized." *Id.* at § 0131b.(3).

The military judge concluded that the appellant "provided no evidence to suggest that Maj. [S.B.K.] engaged in active pretrial preparation and strategy with regard to the charges now before the trial court—or that he was authorized to do so under JAGINST 5803.1E."[159] In detailed Findings of Fact, the military judge described Maj S.B.K.'s representation of the appellant:

> zealous advocacy through the overturn of the accused's conviction by CAAF on 26 June 2013 including representation at NMCCA, CAAF, a 2009 *Dubay* [sic] hearing, a 2010 IRO hearing, and at the Naval Clemency and Parole Board, among other actions. [Maj S.B.K.] continued to provide appellate advocacy for Sgt Hutchins subsequent to the re-referral of charges on 6 January 2014, co-signing a Writ of Mandamus on behalf of Sgt. Hutchins in May 2014.[160]

While the record does not explicitly corroborate each of these acts on behalf of the appellant, there is also no

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[155] ***HN68***[] *Article 70, UCMJ*, does require that appellate counsel be qualified under ***Article 27(b)(1), UCMJ***. Qualifications detailed at ***Article 27(b)(1), UCMJ***, include being a judge advocate, graduation from an accredited law school, membership in a federal or state bar, and certification as competent to perform duties as trial or defense counsel by the Judge Advocate General.

[156] JAGMAN § 0131b(3) (emphasis added). The JAGMAN definition of attorney-client relationship continues:

> Actions by counsel deemed to constitute active pretrial preparation and strategy which materially limit the range of options available to the accused include but are not limited to: advising the accused to waive or assert a legal right . . .; representing the accused at a pretrial investigation under *Article 32, UCMJ* . . . ; submitting evidence for testing or analysis; . . . offering a pretrial agreement on behalf of the accused; submitting a request [*134] for an administrative discharge in lieu of trial on behalf of the accused; or interviewing witnesses relative to any charge pending before the proceeding.

Id. at § 0131b.(3)(a).

[157] *Id.* at § 0131b.(3)(b) (emphasis added).

[158] JAGINST 5803.1 series governs "Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General" including Marine Corps judge advocates, active duty and Reserve.

[159] Appellee's Response to Court's Order to Produce of 16 Nov 2017, Ruling on Defense Motion re: IMC Request for Maj S.B.K. of 5 May 2015 at 8.

[160] *Id.* at 2.

indication they are clearly erroneous. It is also unclear the circumstances under which Maj S.B.K. represented the [*135] appellant at the 2009 *DuBay* hearing or the 2010 Initial Review Officer (IRO) hearing and whether he was formally detailed to do so. TDC, not appellate counsel, typically provide representation at those types of hearings. But those hearings are not typically associated with active pretrial preparation and strategy. Finally, *Article 70, UCMJ*, was the authority for Maj S.B.K.'s representation of the appellant, and the scope of that representation was appellate review and other post-trial matters arising after the release of the appellant's original trial defense counsel.

The military judge relied on the distinctions between trial and appellate advocacy in ruling that the appellant had not demonstrated the kind of attorney-client relationship with Maj S.B.K. that required restoration at the trial level. The military judge cited *United States v. Kelker, 4 M.J. 323, 325 (C.M.A. 1978)*, in support of the "separability of the trial and appellate functions." As in the case before us, Private Kelker requested assignment of his appellate defense counsel to his trial defense team for his second court- martial. *Id. at 323-24*. Our superior court held that ***HN70***[] attorney-client relationships formed pursuant to *Article 70, UCMJ*, for appellate representation do not extend to the trial level, [*136] even for a rehearing of the same case. *Id. at 325*.

Citing *Spriggs, supra*, extensively, the military judge focused on what triggers the kind of attorney-client relationship that cannot be severed and thus compels appointment as an IMC. ***HN71***[] Establishing such a relationship requires demonstrating "'both a bilateral understanding as to the nature of future representation and active engagement by the attorney in the preparation and pretrial strategy of the case.'"[161] Although absent from the military judge's ruling, the JAGMAN explicitly precludes IMC approval authorities from considering appellate representation as pretrial preparation and strategy.[162]

The appellant cites *United States v. Morgan, 62 M.J. 631, 635* (N-M. Ct. Crim. App. 2006), for the proposition that the attorney-client relationship with appellate defense counsel continues "through remands and retrials, unless properly excused by the client or other competent authority."[163] For that reason, we disagree with the military judge's implication that Maj S.B.K's representation of the appellant was complete. In fact, Maj S.B.K. continues to represent the appellant before this court. But that relationship, formed under the authority of *Article 70, UCMJ*, is still limited to representation before appellate authorities. [*137] Despite Maj S.B.K.'s representation of the appellant at a *DuBay* hearing and an IRO hearing representation normally provided by trial defense counsel—there is no evidence the statutory authority for the representation changed. Nor did the military judge clearly err in finding no evidence that Maj. S.B.K. was engaged in active pretrial preparation and strategy.

Finding no clearly erroneous findings of fact and no error in the military judge's legal conclusion that the appellant and Maj S.B.K. did not share the kind of attorney-client relationship that demands assignment as an IMC, we affirm the military judge's decision not to order Maj S.B.K.'s assignment to the trial defense team. We also find no abuse of discretion in the military judge's denial of the appellant's request to abate the proceedings.

G. Pretrial punishment in violation of *Article 13, UCMJ*

The appellant contends that the government violated the *Article 13, UCMJ*, prohibition against unlawful pretrial punishment when it subjected him to unduly harsh pretrial confinement in Iraq and at Camp Pendleton, reassigned him from a MTU to an administrative billet, and withheld a Navy-Marine Corps Achievement Medal (NAM) from him.

HN72[] "The [*138] burden is on appellant to establish entitlement to additional sentence credit because of a violation of *Article 13[, UCMJ]*." *United States v. Mosby, 56 M.J. 309, 310 (C.A.A.F. 2002)* (citing R.C.M. 905(c)(2)). Whether an appellant is entitled to relief for a violation of *Article 13, UCMJ*, is a mixed question of law and fact. *Id.* (citing *United States v. Smith, 53 M.J. 168, 170 (C.A.A.F. 2000)*; *United*

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[161] *Id. at 6* (quoting *Spriggs, 52 M.J.at 241*).

[162] JAGMAN at § 0131b.(3)(b).

[163] Appellant's Brief at 130 (citing *Morgan, 62 M.J. at 635* (noting that "appellate counsel . . . join the appellant's growing defense team. Each attorney remains on that team until such time as he or she is released by the appellant or a court having jurisdiction, or is excused by competent authority for good cause shown.")

States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997)). "We will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. We will review *de novo* the ultimate question whether an appellant is entitled to credit for a violation of Article 13." *Id.* (citing Smith, 53 M.J. at 170).

HN73[↑] Article 13, UCMJ, states that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence[.]" In *United States v. Fischer*, the CAAF interpreted Article 13, UCMJ, to prohibit "(1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial[.]" 61 M.J. 415, 418 (C.A.A.F. 2005) (citing United States v. Inong, 58 M.J. 460, 463 (C.A.A.F. 2003); McCarthy, 47 M.J. at 165). Illegal pretrial [*139] punishment "'entails a purpose or intent to punish an accused before guilt or innocence has been adjudicated.'" *Id.* (quoting McCarthy, 47 M.J. at 165). "We apply this standard by examining the intent of detention officials or by examining whether the purposes served by the restriction or condition are 'reasonably related to a legitimate governmental objective.'" *Id.* (quoting United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005)) (citations omitted). Similarly, we consider whether a condition or term of pretrial confinement "'is imposed for . . . punishment or whether it is but an incident of some other legitimate governmental purpose.'" United States v. James, 28 M.J. 214, 216 (C.M.A. 1989) (quoting Bell v. Wolfish, 441 U.S. 520, 538, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)).

In this case, the appellant filed a motion for "appropriate legal and injunctive relief for unlawful pretrial punishment"[164] which the military judge denied.[165] We will examine the military judge's findings with regard to the four types of alleged punishment the appellant has challenged again on appeal. HN74[↑] The military judge correctly placed the burden of demonstrating violation of Article 13, UCMJ, on the appellant. R.C.M. 905(c)(2); *see also* Mosby, 56 M.J. at 310.

[164] AE LXV at 1.

[165] AE LXXXVII.

1. Pretrial restriction in Iraq

From 11 to 23 May 2006, the appellant was "placed in pretrial restriction and housed in a climate-controlled Containerized Housing Unit (CHU) with an escort" in Iraq.[166] [*140] There has been no dispute that this restriction was tantamount to confinement, and the appellant received day-for-day confinement credit for this restriction.[167] The Results of Trial from the first court-martial did not indicate clearly how pretrial confinement credit was calculated, but the record reflects that the appellant received at least one day of pretrial confinement credit for each day spent restricted to the CHU in Iraq.[168]

This period was also the focus of the CAAF's opinion in Hutchins, IV, 72 M.J. 294. The government's failure to facilitate the appellant's access to an attorney, despite his request for counsel upon his initial Article 31(b) rights notification, contributed significantly to the CAAF's suppression of his statements to NCIS, reversal of his initial convictions, and his new trial. Id. at 296-300.

At his second court-martial, the appellant moved for additional remedies for the command's failure to comply with R.C.M. 305 and his "unduly harsh pre-trial confinement conditions"[169] in Iraq.

HN75[↑] R.C.M. 305 prescribes requirements and rules to ensure pretrial confinement is not unduly rigorous or otherwise in breach of Article 13, UCMJ.[170] R.C.M.

[166] *Id.* at 2.

[167] *Id.* at 6. The military judge attributed the credit to United States v. Allen, 17 M.J. 126 (C.M.A. 1984). *Allen* entitles an accused to day-to-day sentence credit for pretrial *confinement*, but, with one exception, the military judge referred to the period for which the appellant received the credit as "pre-trial restraint" and "restriction." *Id.*

[168] AE LXVI at 120; Record at 629.

[169] AE LXV at 1.

[170] HN76[↑] Pretrial confinement requires probable cause, meaning "a reasonable belief that: (1) [a]n offense triable by court-martial has been committed; (2)[t]he person confined committed it; and (3) [c]onfinement is required by the circumstances." R.C.M. 305(d). Continued confinement requires a documented probable cause determination made by the commander not more than 72 hours after learning a member is in confinement. R.C.M. 305(h)(2)(A). A neutral and detached officer shall review the probable cause determination within seven days of the imposition of confinement and

305(j)(2) directs military judges to order administrative credit under R.C.M. 305(k) "for any pretrial confinement served as a result of an abuse of discretion or failure to comply with" the provisions affording members command documentation of probable cause for confinement, independent review of probable cause, and access to military counsel. R.C.M. 305(k) credit ordered for noncompliance [*141] "is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served." R.C.M. 305(k). But the military judge declined to award R.C.M. 305(k) or *Article 13, UCMJ*, credit for the appellant's restriction in Iraq because "the law does not twice rebuke the Government for an after-the-fact reclassification of restraint absent evidence of other unusually harsh circumstances not present here."[171]

Our superior court has held that ***HN77***[↑] "R.C.M. 305 applies to restriction tantamount to confinement only when the conditions and constraints of that restriction constitute physical restraint, the essential characteristics of confinement." *United States v. Rendon, 58 M.J. 221, 224 (C.A.A.F. 2003)*. While restriction tantamount to confinement may entitle an accused to day for-day confinement credit under *Allen, supra*, or *United States v. Mason, 19 M.J. 274 (C.M.A. 1985)*, the accused is not entitled to double that confinement credit under R.C.M. 305(k). *Rendon, 58 M.J. at 224*. We see no evidence in the record leading us to disturb the military judge's implicit finding that the appellant's period of restriction did not include physical restraint and thus did not amount to confinement. Despite the isolated nature of the appellant's restriction, the unique circumstances of restriction in a war zone, and our superior court's characterizations of the [*142] period in *Hutchins, IV, 72 M.J. at 296-97*, the appellant has inexplicably offered no evidence of *physical* restraint. Therefore, we affirm the military judge's decision not to apply R.C.M. 305(k) credit.

Regarding the punitive nature of the restraint and violation of *Article 13, UCMJ*, the military judge found that the appellant had not provided the necessary evidence to demonstrate that "this confinement was either illegal or punitive in nature."[172] ***HN78***[↑] R.C.M. 304(f) prohibits punitive pretrial restraint such as "punitive duty hours or training, . . . punitive labor, or . . . special uniforms prescribed only for post-trial prisoners." The appellant alleged none of these but argued only that his solitary confinement in Iraq deprived him of "the ability to communicate with anyone else, including his family or friends."[173] The government countered by asserting there was contemporaneous probable cause to believe that the appellant and his squad members conspired to commit murder—and committed it—and thus it was necessary to segregate them to prevent further obstruction of justice.[174]

The military judge concluded that "[g]iven the nature of the charged offenses and the proximity of the command in the midst of a war zone in a foreign country, solitary restriction [*143] to a CHU was not beyond the pale."[175] Our review of the record does not contradict this finding as to the nature of the restriction. The military judge correctly cited *Mosby* in support of his legal conclusions. *56 M.J. at 310* (denying additional sentence credit for an *Article 13, UCMJ*, violation when "[o]ther than introducing evidence that appellant was placed in solitary confinement based on the charge alone, appellant has not introduced any evidence of an intent to punish.") Based on this record, we conclude that the military judge's findings are not clearly erroneous and that the circumstances of the restriction were not punitive. We affirm the military judge's decision not to award additional credit or other remedies pursuant to *Article 13, UCMJ*.

2. Pretrial confinement at Camp Pendleton

The appellant was redeployed from Iraq to Camp Pendleton and began a period of pretrial confinement from 24 May 2006 to 3 August 2007. As in Iraq, he argues his "*extreme confinement* conditions" were punitive.[176]

Specifically, the appellant alleges he was held in "a sound-proof, solitary-confinement cell for ten out of the fifteen months" of pretrial confinement and "was

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memorialize his or her factual findings and conclusions. R.C.M. 305(i)(2). At the request of the prisoner, military counsel shall be provided before the 72-hour probable cause determination or the seven-day review, whichever occurs first. R.C.M. 305(f).

[171] AE LXXXVII at 7.

[172] *Id.*

[173] AE LXV at 5.

[174] AE LXVI at 1.

[175] AE LXXXVII at 7.

[176] AE LXV at 7.

shackled every time he left his cell."[177] He argues [*144] the conditions of his pretrial confinement were not necessary and were intended "to exact punishment, harassment, and abuse[.]"[178]

The military judge made the following findings of fact regarding the appellant's pretrial confinement at Camp Pendleton. The appellant's custody classification on 24 May 2006 was "'maximum'" based on "the nature of the allegations against him and an assessment of other factors."[179] The command complied with R.C.M. 305 by providing the appellant a pretrial confinement advice letter on 25 May 2006 and conducting a status review with an IRO on 26 May 2006. The IRO's "comments clearly indicate his view that continued pretrial confinement was appropriate."[180] About three weeks later, brig officials cited the appellant's "'entirely appropriate'" behavior in downgrading his custody classification and increasing his privileges.[181] The military judge noted that the appellant's claim that he was placed in Maximum-[Potentially Violent and Dangerous] status for 150 days was "expressly contradicted by evidence of brig records revealing a downgrade from MAX (maximum) to MDI (medium) after 23 days."[182] Because of "the nature of his charges and concerns about problems in the brig general population" [*145] and ease of access to frequent family and legal visitors, the appellant remained in Special Quarters housing.[183] The military judge noted that on or about 5 October 2006, the appellant complained to the brig officer about problems he had encountered with other inmates on the general population mess decks. Extensive documentation from the Camp Pendleton Base Brig corroborates the military judge's findings.

Detailing administrative and safety reasons for the conditions of the appellant's custody, the military judge concluded that the "Defense has not met its burden to show that the conditions of pretrial confinement at the Camp Pendleton Base Brig were more rigorous than necessary to ensure the accused's presence at trial."[184] The military judge found that the high profile of the appellant's case, the number of alleged co-conspirators, and concerns about the appellant's presence in the general population were safety concerns that amounted to legitimate administrative purposes for continued confinement in Special Quarters housing. He cited *Smith, 53 M.J. at 173*, in which the CAAF affirmed a military judge's determination that (1) "the Government had not restricted the appellant with an intent to punish prior [*146] to trial" and (2) "that there were legitimate nonpunitive governmental objectives served by the restrictions placed on appellant and that, therefore, *Article 13* was not violated[.]" *Id. at 169*.

Although the *Smith* court analyzed pretrial restriction, not confinement, *id. at 170*, our superior court has repeatedly applied the same test to pretrial confinement. In *United States v. Crawford, 62 M.J. 411 (C.A.A.F. 2006)*, the CAAF pledged deference to prison officials who adopt and execute "'policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" *Id. at 416* (quoting *Bell, 441 U.S. at 547*). ***HN79***[↑] In light of confinement officials' responsibility to ensure a detainee's presence for trial and the security of the facility, the burden was on Crawford to demonstrate that the conditions of his confinement were "unreasonable or arbitrary[.]" *Id. at 414*. *See also McCarthy, 47 M.J. at 167* (holding, in the context of maximum custody confinement, that "[i]f the conditions of pretrial restraint are 'reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment.'") (quoting *James, 28 M.J. at 216*) (additional citations omitted).

The military judge implied that solitary confinement and shackles were "'discomforting' administrative measures reasonably [*147] related to the effective management of the confinement facility" and "'*de minimus*' impositions" and therefore not punitive.[185] However, *United States v. Corteguera, 56 M.J. 330 (C.A.A.F. 2002)*, the source of that language, addressed a confinement facility orientation process requiring pretrial detainees to briefly sing and shout. We do not equate solitary confinement and shackles with embarrassment. However, we concur with the military judge that the

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[177] Appellant's Brief at 136 (citation omitted).

[178] *Id.* at 137.

[179] AE LXXXVII at 2.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 8, n.14.

[183] *Id.* at 2-3.

[184] *Id.* at 7.

[185] *Id.* at 8 (quoting *United States v. Corteguera, 56 M.J. 330, 334 (C.A.A.F. 2002)*).

appellant has failed to provide evidence his confinement was unduly rigorous. Unlike in *King, 61 M.J. at 225*, the appellant has not demonstrated that any conditions of his confinement were "an arbitrary response to the physical limitations" of the facility. *Id. at 228*. Instead, the record—especially regular reports from his brig counselor—reveals considered justifications for his custody classifications and his segregation from his squad mates and the general population.

Finding no clear error in the military judge's conclusions that the appellant's confinement conditions stemmed from legitimate purposes, and, impliedly, not punitive intent, we concur there was no *Article 13, UCMJ*, violation during his pretrial confinement.

3. Transfer from the MTU

The appellant alleges that his reassignment from a marksmanship instructor position [*148] to an administrative billet was arbitrary and the result of punitive intent.

While his first court-martial progressed through appellate review, the appellant was in and out of post-trial confinement. After this court set aside his convictions in *Hutchins I, 68 M.J. at 631*, the appellant was released from confinement and returned to duty at Camp Pendleton in June 2010. He was assigned as an instructor at the Battalion Headquarters MTU. In January 2011, the CAAF reversed *Hutchins I* and remanded the case for review. *Hutchins II, 69 M.J. at 293*. The next month, the appellant was returned to confinement. In June 2013, the CAAF set aside the appellant's convictions, *Hutchins IV, 72 M.J. at 300*. He was released from confinement again and returned to Camp Pendleton the next month. He served again as an MTU instructor.

At some point after the appellant's return to Camp Pendleton in July 2013, his assignment as an MTU instructor came to the attention of Col M., the Officer in Charge of the Camp Pendleton LSSS. Col M. contacted the appellant's commanding officer, Col Co., and "relayed his concern about the 'optics' of a Marine working on a rifle range who stood accused of killing a civilian with a rifle."[186] Sometime thereafter, Col Co. transferred the appellant from the MTU [*149] to the S4 Logistics Division, which had repeatedly failed inspections. "Col [Co.] testified that Col [M.]'s call affected the timing of this move, but given the [appellant's] outstanding performance and the perpetual failings of S4, he 'probably' would have moved Sgt. Hutchins there at some point to shore up the division."[187] He did not consider the reassignment to be punitive and believed the S4 billet was rated one or two paygrades above the appellant's paygrade of E-5.

When Col Co. retired in July 2014, Col Cr. relieved him as the appellant's commanding officer. A month later, the appellant was reassigned to the MTU. Conflicting evidence was presented as to Col Cr.'s awareness of the change, and the military judge refrained from making findings of fact on the matter. Col M. contacted Col Cr. to express his continuing concerns about the "'optics'" of the assignment, and the appellant was returned to S4.[188] "Col [Cr.] disavowed an ulterior motive for the transfer and praised Sgt. Hutchins' work."[189] He rated the pay grade of the S4 billet as higher than E-5 and possibly as high as a junior officer.

Substantial testimony from the colonels and members of their staff supports these findings [*150] of fact from the military judge.

Again, the military judge found that the appellant had not met his burden to show that his reassignment from MTU to S4 was punitive. He applied the two-part *Smith* test again. *53 M.J. at 169, 172-73*. The military judge found no evidence that assignment to S4 was considered punitive, and he held that assignment outside of one's military occupational specialty was not, "*ipso facto*," punitive.[190] He questioned the propriety of the LSSS Officer in Charge intervening in the appellant's duties but detected "no evidence of either improper motive or an improper result."[191]

We find no reason to question the military judge's findings and ultimate conclusion as to the appellant's reassignment from MTU to S4. The appellant urges us to infer punitive intent from the "chief prosecutor's" intervention, inconclusive evidence as to why the appellant was briefly returned to the MTU, and his

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[186] *Id.* at 4.

[187] *Id.* at 4, n.9.

[188] *Id.* at 5.

[189] *Id.*

[190] *Id.* at 9.

[191] *Id.*

assertion that there was no legitimate reason for him to leave the MTU. This is not evidence of punitive intent, nor does it successfully rebut the nonpunitive reasons the colonels cited for their advice and decisions.

4. Withdrawal of nomination for a NAM

Finally, the appellant avers that a prosecutor, acting [*151] with punitive intent, dissuaded the appellant's commanding officer from awarding him a proposed impact award and thus punished him.

The military judge found that the appellant made an immediate, positive impact at both MTU and S4 and that praise for his performance was both universal and effusive. Col Co. remembered reviewing a recommendation that the appellant receive a NAM as an impact award for his tenure at MTU. But Col Co. demurred in favor of a letter of continuity because the appellant had been on board less than a year. Col Co. also advocated for the appellant to receive a Combat Action Ribbon.

The appellant asserts that Col Co. withheld his NAM because a prosecutor, Maj S., warned it "would not 'look good' given that he was charged with murder."[192] As support, the appellant cited a deposition of the Battalion Operations Officer, Maj B., who nominated the appellant for the award. Maj B did not testify before the military judge, but a transcript of his deposition was attached to the appellant's motion. According to the deposition transcript, Maj B. remembered being present for a telephone call between Col Co. and Maj S. during which Maj S. balked at awarding a NAM to someone charged [*152] with murder because it wouldn't look good. Col Co. then decided to leave the appellant's proposed NAM citation in the awards system and "'wait until everything clears up.'"[193] He expected similar recognition for the appellant from S4 and, according to Maj B., said, "'[j]ust hold off to all his recognitions. He's not denied but he's not approved.'"[194] Col Co. testified that he frequently consulted with Maj S. on other cases but did not remember discussing the appellant with him.

While there is some disagreement between Col Co. and Maj B., it does not prompt us to disregard the military judge's findings of fact as *clearly erroneous*. Maj S.'s concerns about the appearance of awarding a murder suspect a NAM are consistent with Col M.'s concerns about the optics of assigning a murder suspect to train Marines in marksmanship. Col Co. testified, "I think you should write [the appellant] up for a letter of continuity because we can't have a Marine getting three awards to reach a senior's ears, just because we moved him around."[195] This does not directly contradict Maj B.'s memory of Col Co. deciding to hold the appellant's recognitions from MTU, S4, and others until his court-martial.

The military [*153] judge again found that the defense had not met its burden to show that Col Co.'s decision not to approve the appellant's NAM was punitive. He cited Col Co.'s testimony that a NAM for less than a year of performance was premature. While he did not explicitly cite the *Smith* test in the context of this alleged punishment, he concluded there was no evidence of punishment to overcome the evidence that a legitimate, alternative purpose motivated the decision not to award the NAM to the appellant.

None of the military judge's findings as to the lack of punitive intent and the existence of legitimate, nonpunitive reasons regarding the appellant's restriction in Iraq, pretrial confinement at Camp Pendleton, reassignment from MTU to S4, or impact award is clearly erroneous. Thus we affirm his conclusions that the appellant was not subject to pretrial punishment in violation of *Article 13, UCMJ*.

H. Denial of trial defense counsel's site visit to Iraq

The appellant alleges that the military judge erred in denying his TDC's request for a site visit to Iraq, depriving him of equal access to evidence, due process, and effective representation.

HN80[↑] We review a military judge's discovery rulings for an abuse [*154] of discretion. *United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015)*.

1. Equal access under Article 46, UCMJ

HN81[↑] *Article 46, UCMJ*, affords trial counsel, trial defense counsel, and the court-martial "equal opportunity to obtain witnesses and other evidence[.]" It is implemented in R.C.M. 701 and R.C.M. 703. R.C.M.

[192] Appellant's Brief at 143.

[193] AE LXV at 90.

[194] *Id.*

[195] Record at 612.

701 ensures "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. . . . No party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(e). The government must make evidence in the "possession, custody, or control of military authorities" available if it is "material to the preparation of the defense[.]" R.C.M. 701(a)(2). The standard for production of evidence not in a military authority's possession, custody, or control is higher. Parties to a court-martial are "entitled to production of evidence that is relevant and necessary." R.C.M. 703(f)(1).

HN82[↑] When moving "for discovery under R.C.M. 701 or for production of witnesses or evidence[,]" the burden is on the moving party to prove, by a preponderance of the evidence, "any factual issue the resolution of which is necessary to decide a motion[.]" R.C.M. 905(b)(4), (c).

a. Motion to compel

The appellant filed a motion to compel after the CA denied his TDC's request for a site [*155] visit to Hamdaniyah, Iraq.[196] He sought government-funded and facilitated travel and access to Hamdaniyah so his trial defense counsel could inspect the site of the alleged offenses and locate and interview prospective witnesses.

At an *Article 39(a), UCMJ*, session, the deputy intelligence officer at Marine Forces Central testified about conditions on the ground near Hamdaniyah. Beginning in June 2014, 80-90% of surrounding Al Anbar Province had fallen under the control of the Islamic State of Iraq and the Levant, and nearby Abu Ghraib was "one of the more contested violent areas in Al Anbar[.]"[197] The intelligence officer opined that it would be "very, very difficult, if not impossible" to send a team of investigators or attorneys to the general area.[198] Testimony about the current condition of the homes of SG and the Iraqi man killed on 26 April 2006 was inconclusive. Finally, the intelligence officer understood that the Department of State, not the Department of Defense, had the final authority for such travel to Iraq, and he was doubtful of their approval given the danger and lack of Iraqi governmental control of Hamdaniyah.[199]

During argument at the *Article 39(a), UCMJ*, session, TDC proposed, [*156] as an alternative, a limitation on the government's admission of evidence obtained in Iraq. In rebuttal, TC asserted that his team had given the appellant's trial defense team "everything [they had] . . . that was collected or produced in Iraq[.]"[200] TDC did not dispute the availability of the government's evidence but questioned the adequacy of the NCIS investigation and the evidence it yielded. Challenging the objectivity of the NCIS investigation, TDC speculated that the cache of evidence and exhibits "may have been very different had defense counsel been on the ground[.]"[201] When the military judge queried TDC about what evidence he hoped to find on-site after eight years, TDC responded, "[i]nterviews."[202] Posed with the inability to compel production of any Iraqi witnesses, the TDC replied, "we ask questions and then we open up doors, and we go down this path or that path, and that's what—sometimes you run into some dead ends and sometimes you run into leads."[203]

In his initial written ruling denying the site visit, the military judge made findings of fact, all supported by the record and not clearly erroneous. Conducting a *de novo* review of his application of the law, we concur with his application [*157] and conclusions. The military judge held the appellant to the burden of proving, by a preponderance of the evidence, that evidence and witnesses beyond government control in Iraq were relevant and necessary at trial. He concluded that the appellant offered nothing more than speculation as to the value of personally inspecting the site or the ability to locate witnesses to the events. In a footnote to his written ruling, the military judge noted that the appellant had failed to distinguish his request for a site visit from a "*pro forma*" request, offering nothing to demonstrate "the necessity of a site visit in *this case*."[204] The appellant failed to prove by a preponderance of the evidence that a visit to Hamdaniyah, eight and a half war-torn years after the incident, would yield evidence

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[196] AE LXIX.

[197] Record at 489-90.

[198] *Id.* at 490.

[199] *Id.* at 491-494.

[200] *Id.* at 501.

[201] *Id.* at 502.

[202] *Id.* at 496.

[203] *Id.* at 497.

[204] AE CXXV at 6, n.7.

relevant and necessary to his defense.

HN83[↑] Article 46, UCMJ, does not obviate an accused's requirement to demonstrate the *necessity* of evidence or assistance beyond what is already at hand. *See* R.C.M. 703(f)(1) (production of evidence); R.C.M. 703(d) (employment of expert witnesses). Military courts have rejected the notion that the mere prospect of finding relevant and necessary evidence satisfies the requirement for showing relevance [*158] and necessity. *See* United States v. Washington, 46 M.J. 477, 479 (C.A.A.F. 1997) (finding that the appellant had failed to demonstrate the necessity of investigative assistance when, *inter alia*, "the defense appears to be on a 'fishing expedition' as to defense witnesses who 'may exist who can refute the charges' or 'may be helpful.'"); United States v. Kinsler, 24 M.J. 855, 856 (A.C.M.R. 1987) (noting that "[a] court need not provide for investigative services for a mere 'fishing expedition'") (citing United States v. Schultz, 431 F.2d 907, 911 (8th Cir. 1970)).

The military judge also addressed trial defense counsel's alternative remedy of suppressing government evidence collected in Iraq. He found that "[b]oth sides have equal access to the evidence available at trial and the Government is not calling any Iraqi witnesses on the merits."[205] The military judge initiated arrangements for the appellant's former detailed defense counsel, LtCol J.S., then a Reserve appellate judge on this court, to be made available for privileged consultation with the appellant's current defense team. LtCol J.S. had made a brief visit to Hamdaniyah in January 2007 and had seen the IED crater and interviewed one Iraqi witness. With the appellant's access to all of the evidence and to detailed military counsel from the first trial, the military judge concluded there was no violation [*159] of Article 46, UCMJ, in this case, in 2007 or at the time of the motion.

We find no abuse of discretion in the military judge's initial two rulings.

b. Motion to dismiss

In a subsequent Motion to Dismiss for Denial of Site Visit or, Alternatively, to Abate Proceedings Until Such Time as a Site Visit Can Be Conducted, the appellant argued that without a new site visit, he would receive neither due process nor effective representation. The motion raised the inadequacy of the appellant's first trial defense counsel's site visit to Iraq in 2007. The military judge issued a second written ruling, again denying a site visit as well as the motion to dismiss or abate proceedings.[206]

We again find no clear error in the military judge's findings of fact. The military judge adopted his statement of law from his previous ruling and ruled that the appellant had still failed to meet his burden of demonstrating that a new site visit would "recover relevant and/or admissible evidence regarding the offenses allegedly committed there nine years ago."[207] Regarding the appellant's arguments about the insufficiency of his former trial defense counsel's site visit in 2007, the military judge found "the Defense must [*160] be considered at least somewhat complicit given the short notice they provided in the face of the operational and security constraints in the region."[208]

The military judge did not abuse his discretion in finding no Article 46, UCMJ, violation in original trial defense counsel's 2007 site visit. HN84[↑] The right of access to evidence—or sources of evidence—is not unlimited. There is usually no obligation to arrange interviews between trial defense counsel and witnesses, but the government may not hinder them. United States v. Killebrew, 9 M.J. 154, 160 (C.M.A. 1980). The government may not "unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(e). "'[A]bsent special circumstances, the right to a pretrial interview—guaranteed to [the defense] under the Manual [for Courts-Martial] and the Code—encompasses the right to an interview free from insistence by the Government upon the presence of its representative.'" *Killebrew*, 9 M.J. at 159 (quoting United States v. Enloe, 15 C.M.A. 256, 35 C.M.R. 228, 232 (C.M.A. 1965)) (alterations in original). A witness cannot be compelled to speak to TDC, as long as the government did not bring about the refusal. *Id.* The court may issue subpoenas to compel the attendance of civilian witnesses at trial, but "[f]oreign nationals in a foreign country are not subject to subpoena." R.C.M. 703(e)(2) and Discussion. [*161] Subpoenas are available to produce evidence not in government custody, but "a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process." R.C.M. 703(f)(2). *See*

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[205] *Id.* at 6.

[206] AE CXXVIII at 4.

[207] *Id.* at 3.

[208] *Id.* at 3-4.

also R.C.M. 703(f)(4)(B).

We agree the appellant did not demonstrate, by a preponderance of the evidence, that the government's handling of the original TDC's 2007 site visit to Iraq amounted to a deprivation of equal access in violation of *Article 46*. The evidence suggests that multiple factors conspired to limit the scope and effectiveness of that site visit—from legitimate security concerns to TDC's own tactics. We decline to find that impediments arising from safety and security measures taken in 2007 were unreasonable and thus in violation of R.C.M. 701(e).

We find no abuse of discretion in this second pair of rulings.

Our superior court has interpreted ***HN85***[↑] *Article 46, UCMJ*, to be a statement of congressional intent to prevent the government from marshaling its resources to gain an unfair advantage over an accused and thus to ensure "a more even playing field." *United States v. Warner, 62 M.J. 114, 120 (C.A.A.F. 2005)*. But the parity contemplated in *Article 46, UCMJ*, does not entitle an accused to a blank check. *Id. at 118* (citing *United States v. Calhoun, 49 M.J. 485, 487-88 (C.A.A.F. 1998)* (noting that an accused is not entitled to [*162] the particular expert consultant or witness requested).

Assuming, *arguendo*, a violation of *Article 46, UCMJ*, the appellant must demonstrate material prejudice. *See Adens, 56 M.J. at 732* (holding that ***HN86***[↑] "violations of a [service member's] *Article 46, UCMJ*, rights that do not amount to constitutional error under *Brady* and its progeny must still be tested under the material prejudice standard of *Article 59(a), UCMJ*."). *Article 59(a), UCMJ*, states that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Without specifying the "substantial prejudice" to him, the appellant attributes it to defense counsel being "compelled . . . to rely on the observations and filtered crime scene investigative findings of NCIS and other government agents[.]"[209] The appellant, not the NCIS agents, was at the crime scene on the morning of 26 April 2006. His TDC were able to exploit the weaknesses in the chain of custody of the decedent's body and the appellant's alleged weapon. The government's case rested largely on the testimony of the appellant's squad mates—not evidence collected in Iraq or from Iraqi [*163] witnesses. The appellant has failed to articulate how his lost opportunity to conduct a site visit contributed to the members' findings and thus materially prejudiced him.

We turn now to whether the appellant's inability to conduct a site visit and independent on-site investigation and interviews deprived him of due process.

2. Due process

The appellant asserts a due process right to "the opportunity to conduct a meaningful and full investigation of the underlying conduct, which necessarily includes the opportunity to inspect the scene of the alleged crime."[210] According to the appellant, "[t]he military judge's denial [of a site visit] limited the defense in its ability to inspect for evidence perhaps missed, overlooked or omitted by the government and infringed on due process rights."[211]

HN87[↑] The Supreme Court has "long interpreted" the *Due Process Clause of the Fourteenth Amendment* "to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Cal. v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)*.[212] "To safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" *Id.* (quoting *United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)*). "Less clear from [the Court's] access-to-evidence cases is the extent to which the *Due Process Clause* imposes [*164] on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession." *Id. at 486*. "Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of

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[209] Appellant's Brief at 148.

[210] *Id.*

[211] *Id.*

[212] We acknowledge that the *Fourteenth Amendment* does not govern accused at courts-martial. But our superior court has found the same right to present a complete defense in the *Fifth Amendment*, applying *Trombetta* to courts-martial. *United States v. Webb, 66 M.J. 89, 92 (C.A.A.F. 2008)*; *see also United States v. Bess, 75 M.J. 70, 74 n.3 (C.A.A.F. 2016)* (finding no reason the right to present a complete defense would be any narrower under the *Fifth Amendment* than the *Fourteenth Amendment*).

materials whose contents are unknown and, very often, disputed." *Id.* (citation omitted).

HN88[] Due process does not demand government prescience. The Court has distinguished the government's obligation to recognize and preserve exculpatory evidence from an obligation to predict the exculpatory value of evidence or a source of evidence. A line of Supreme Court cases addressed the application of due process to "potentially exculpatory evidence" the government lost or destroyed, depriving the accused of the opportunity to extract something exonerative from independent investigation of that evidence. *See* Illinois v. Fisher, 540 U.S. 544, 548-49, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004) (a plastic bag containing a white powdery substance forensics tests revealed to be cocaine); Ariz. v. Youngblood, 488 U.S. 51, 52, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (semen samples from the victim's body and clothing); Trombetta, 467 U.S. at 481 (breath sample of a suspected drunken driver). The *Trombetta* Court found no due process violation when the government acted "'in good faith and in accord with [*165] their normal practice[,]'" and the loss or destruction of evidence was not attributable to a "conscious effort to suppress exculpatory evidence." Id. at 488 (quoting Killian v. United States, 368 U.S. 231, 242, 82 S. Ct. 302, 7 L. Ed. 2d 256 (1961)). The constitutional duty to preserve evidence applies to material evidence, which "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489. *See also* United States v. Garries, 22 M.J. 288, 292 (C.M.A. 1986); United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1996). The Supreme Court subsequently confirmed that a due process violation requires evidence of "bad faith" on the part of the government when "potentially useful evidence"—but not "material exculpatory evidence"—is lost or destroyed. Fisher, 540 U.S. at 548-49 (citing Youngblood, 488 U.S.at 57). An accused cannot claim a due process right to evidence, or a source of evidence, with only the potential to yield something exculpatory, unless the government has lost or destroyed that evidence in bad faith.

Although the appellant frames this AOE as a denial of discovery, it is more accurately a denial of opportunity. He does not accuse the trial counsel or the government of withholding a piece of material exculpatory evidence. Instead, the government has allegedly withheld funding [*166] and support for an independent investigation that might have uncovered something exculpatory. At best, hypothetical evidence is potentially useful; therefore, the appellant must attribute its loss or destruction to bad faith on the part of the government. *Id.* Evidence of bad faith is missing here. We found no abuse of discretion in the military judge's decision to deny a site visit to Hamdaniyah. The appellant failed to demonstrate the required necessity of the site visit. Nor did we find an abuse of discretion in the military judge's conclusion that the government did not violate discovery obligations during the original trial defense counsel's site visit to Hamdaniyah in January 2007. The appellant's lost opportunity, attributable to circumstances beyond the U.S. government's control, does not equate to a lack of due process.

3. Effective representation

Invoking Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the appellant implies that counsel must conduct a site visit and independent investigation to be competent.

HN89[] Legal representation is deemed ineffective under *Strickland* when the appellant can demonstrate that "(1) his counsel's performance fell below an objective standard of reasonableness; *and* (2) the counsel's deficient performance [*167] gives rise to a 'reasonable probability' that the result of the proceeding would have been different without counsel's unprofessional errors." United States v. Akbar, 74 M.J. 364, 371 (C.A.A.F. 2015) (quoting Strickland, 466 U.S. at 688, 694). "Trial defense counsel have 'a duty to make *reasonable* investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Id. at 379 (quoting Strickland, 466 U.S. at 691) (emphasis added). "The Supreme Court has 'rejected the notion that the same [type and breadth of] investigation will be required in every case.'" Id. at 380 (quoting Cullen v. Pinholster, 563 U.S. 170, 195, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (additional citation omitted) (alteration in original)).

The appellant overreaches when he claims that the Army Court of Military Review "intimated" that "'failure to visit a crime scene ipso facto contributes to deficient performance of trial'" in United States v. Boone, 39 M.J. 541, 544 (A.C.M.R. 1994).[213] The court adopted this concession for sake of argument before summarily

[213] Appellant's Brief at 146.

dismissing it in Boone's case. *Id.* Although Boone alleged his TDC's "failure to visit the crime scenes . . . led to a serious factual error in [his] closing argument[,]" the court found "there [was] no obvious prejudice to the appellant in [Boone's] case." *Id.* Nor has this court found "deficiencies in defense counsel's performance under the *Strickland* standards" when counsel "was denied [*168] the ability to view the crime scene by the Staff Judge Advocate and the military judge" and "had extreme difficulty in interviewing the witnesses[.]" *United States v. Ryan, 2007 CCA LEXIS 111, *11-*12, unpublished op. (N-M. Ct. Crim. App. 2007)*, *rev'd. as to sentence*, *65 M.J. 328 (C.A.A.F. 2007)* (summary disposition). In a case similar to the one before us, civilian defense counsel declined to pursue a site visit to the scene of an alleged murder in Afghanistan because "the area became so kinetic that U.S. forces withdrew from there altogether." *United States v. Lorance, 2017 CCA LEXIS 429, *19 (A. Ct. Crim. App. 27 Jun 2017)*, *rev. denied*, *77 M.J. 136, 2017 CAAF LEXIS 1165 (C.A.A.F. 19 Dec 2017)*. The Army Court of Criminal Appeals found no merit in Lorance's claim of ineffective assistance of counsel in light of the defense team's overall performance and the lack of prejudice in the face of "overwhelming evidence against [him]." *Id. at *18-*19*. In the case before us, conditions on the ground in Hamdaniyah made trial defense counsel's request to travel there to investigate unreasonable.

Not only does the appellant fail to demonstrate that denial of a site visit robbed him of TDC performance within an objective standard of reasonableness, he fails to articulate how a site visit would have altered the outcome of his court-martial. His assertion of prejudice [*169] is detached from the facts of his case and is almost circular; instead he claims that denial of a site visit robbed him of his rights to a fair trial and due process. As discussed previously, we disagree.

Instead, we find that the appellant benefited from zealous, competent representation throughout his second court-martial. His TDC effectively challenged the evidence brought from Iraq, and there were no Iraqi witnesses to impeach. The strength of the government's case lay in the testimony of the Marines and Navy corpsmen present in Hamdaniyah on the morning of 26 April 2006. Nothing in Iraq could have better equipped TDC to challenge their testimony.

The appellant does not point to a piece of evidence or witness whose testimony would have altered the outcome of his trial. His assertion of prejudice is speculative. Not only has he failed to demonstrate that "his counsel's performance fell below an objective standard of reasonableness," he has also failed to demonstrate that his "counsel's performance gives rise to a 'reasonable probability' that the result of the proceeding would have been different without counsel's unprofessional errors." *Akbar, 74 M.J. at 371*. Without either, there is no ineffective assistance [*170] of counsel.

I. Admissibility of identification on autopsy report

The appellant claims that the military judge abused his discretion when he admitted an autopsy report whose relevance depended upon impermissible testimonial hearsay from Iraqi citizens who identified the body.

This AOE presents us with hearsay within hearsay—alleged testimonial hearsay appearing in a routine professional report prepared by and informing the testimony of an expert witness. ***HN90***[↑] Whether the imbedded evidence was testimonial hearsay is a question of law we review *de novo*. *United States v. Katso, 74 M.J. 273, 278 (C.A.A.F. 2015)* (citing *United States v. Tearman, 72 M.J. 54, 58 (C.A.A.F. 2013))*. We review the military judge's decision to admit evidence that contains testimonial hearsay for an abuse of discretion, "'considering the evidence in the light most favorable to the prevailing party.'" *Katso, 74 M.J. at 278-79* (quoting *United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996))*.

1. Testimonial hearsay

First we examine the appellant's allegation of testimonial hearsay. ***HN91***[↑] "[A]dmission of 'testimonial statements of a witness who did not appear at trial'" violates the *Sixth Amendment's Confrontation Clause* unless the witness is "'unavailable to testify, and the [accused] had had a prior opportunity for cross-examination.'" *Id. at 278* (quoting *Crawford, 541 U.S. at 53-54*); *U.S. CONST., amend VI*. In *Crawford*, the Supreme Court defined testimony as "typically '[a] solemn declaration or affirmation made [*171] for the purpose of establishing or proving some fact.' . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *541 U.S. at 51* (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (alteration in original). Our superior court has characterized a statement as testimonial "'if

made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Katso, 74 M.J. at 278* (quoting *United States v. Sweeney, 70 M.J. 296, 301 (C.A.A.F. 2011)* (additional citations omitted). There are also three factors to guide this objective, but contextual, analysis, often referred to as *Rankin* factors:

> (1) the statement was elicited by or made in response to law enforcement or prosecutorial inquiry;
>
> (2) the statement involved more than a routine and objective cataloging of unambiguous factual matters; and
>
> (3) the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial.

United States v. Squire, 72 M.J. 285, 288 (C.A.A.F. 2013) (citing *United States v. Gardinier, 65 M.J. 60, 65 (C.A.A.F. 2007)*; *United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007)*).

The appellant asserts that the identification of the body exhumed and autopsied in the course of investigating this case constitutes testimonial hearsay. The [*172] lead NCIS agent, Special Agent (SA) J.C., testified about his efforts to exhume the body of the man shot in the IED crater on 26 April 2006. The victim's family led a convoy of military personnel, including SA J.C., to the burial site, but an IED detonated under one of the vehicles in the convoy en route to the site. SA J.C. never reached the burial site that day. At SA J.C.'s request, the appellant's company commander visited the victim's family and obtained GPS coordinates for the burial site. The company commander testified during the second court-martial but was not asked to confirm that he collected GPS coordinates of the burial site from the family at SA J.C.'s request. Following the GPS coordinates, a second convoy traveled to the site, and SA J.C. led the exhumation. SA J.C. testified that the victim's brother accompanied him to the burial site, pointed to the grave, "and at one point, he started digging in the grave site."[214] No Iraqi witness was subject to cross-examination or made available for either trial of the appellant.

Applying the *Rankin* factors to this information, we find it constitutes testimonial hearsay. *72 M.J. at 288*. First, the victim's family revealed the burial site location [*173] at the request of NCIS, a law enforcement entity supporting the Navy and Marine Corps. Second, the information involved the recent death of a family member. The family attributed the death to American service members and had pressed a complaint with the military leadership in the area. "[T]he statement involved more than a routine and objective cataloging of unambiguous factual matters[.]" *Id.* Finally, NCIS requested the information after securing an order to exhume the Iraqi citizen's remains with the intent to transport them to the United States for an autopsy. During cross-examination, SA J.C. acknowledged the difficulty in obtaining the exhumation order. As NCIS sought the autopsy in furtherance of its investigation of serious criminal offenses, presentation of the resulting evidence at court-martial was a possible, if not likely and intended, outcome.

2. Admissibility of the autopsy report

Having found there was testimonial hearsay in identification of the body autopsied, we now turn to whether it rendered the medical examiner's report and testimony inadmissible. TDC objected to admission of the autopsy report based on hearsay and lack of relevance. With regard to hearsay, the military [*174] judge ruled from the bench that the report satisfied the hearsay exception for records of regularly conducted activities under MIL. R. EVID. 803(6). As to relevance, TDC protested, "[t]hey haven't even identified the body yet, sir, if this is even the person that they should be doing [the] autopsy report on."[215] The military judge acknowledged, "that's certainly a link in the chain that the government—they got that problem."[216] But then the military judge posited that "wounds consistent to what witnesses have testified to being inflicted on [the victim]" were circumstantial evidence of identity and thus relevant and admissible.[217]

TDC did not explicitly invoke testimonial hearsay and the *Confrontation Clause* in his objection to the autopsy report. Nevertheless, the references to links in the chain on the record reveal the parties' cognizance of flaws in the body's chain of custody. Testimonial hearsay formed not just a weak link but the chain's questionable origin.

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[214] Record at 1515.

[215] *Id.* at 1814.

[216] *Id.*

[217] *Id.*

To determine whether the testimonial hearsay should have resulted in exclusion of this report from evidence, we examine the significance of that testimonial hearsay to the report and testimony about it.

HN92[↑] When testimonial hearsay is presented to the court through an [*175] expert witness, we determine whether that expert testimony violates the Confrontation Clause by asking:

> First, did the expert's testimony rely in some way on out-of-court statements that were themselves testimonial?
>
> Second, if so, was the expert's testimony nonetheless admissible because he reached his own conclusions based on knowledge of the underlying data and facts, such that the expert himself, not the out-of-court declarant, was the 'witness against [the appellant]' under the Sixth Amendment?

Katso, 74 M.J. at 279 (citing Crawford, 541 U.S. at 44, 51-52) (additional citations omitted). Put another way, we ask whether the expert witness "had sufficient personal knowledge to reach an independent conclusion as to the object of his testimony and his expert opinion." Id. at 280 (citing United States v. Blazier (Blazier II), 69 M.J. 218, 224-25 (C.A.A.F. 2010)).

Navy CAPT S.L., the Deputy Medical Examiner at the Armed Forces Medical Examiner at Dover Air Force Base, Delaware, conducted the autopsy, authored the report, and authenticated it while testifying at the appellant's second court-martial. After the NCIS-directed exhumation of the body identified as the shooting victim in this case, Master-at-Arms Second Class (MA2) I.D. accepted custody of the body from "mortuary affairs"[218] on 6 June 2006 and escorted it from Camp Fallujah, Iraq, to Dover. An NCIS agent [*176] met MA2 ID when he landed at Dover and took custody of the body from him. On 8 June 2006, CAPT SL, performed the autopsy.[219] His report of 6 July 2006 includes a "[p]resumptive identification . . . established by accompanying documentation and photographs."[220] CAPT S.L. testified that NCIS typically provided a history on a decedent "[t]o give us some background information. . . . You have to get something specific to focus your attention on."[221] Based on the information provided by NCIS, the decedent was "believed to be" H.I.A., a 52-year-old Iraqi civilian who died in Hamdaniyah, Iraq on 26 April 2006.[222] For the circumstances of death, "[i]nvestigation reports that United States Military Personnel detained this Iraqi civilian, bound him with flexible cuffs, and shot him multiple times at different ranges of fire."[223]

The remaining 14 pages of the report detailed CAPT S.L.'s external and internal examinations of the body and its injuries, his diagnosis, and his opinion. Descriptions of the gunshot wounds to the body comprised the majority of the report and supported CAPT S.L.'s diagnosis of multiple gunshot wounds as the cause of death. Responding to the information that the shooting victim was bound, [*177] CAPT S.L. noted that "[d]issection into the skin and soft tissues of the wrists and ankles revealed no hemorrhage or other injury, which might be expected if the individual was bound."[224] But the use of flexible cuffs and the advanced state of composition prevented him from excluding the possibility that he was bound. CAPT S.L. also commented on findings from which he could infer that the man "had some degree of difficulty with ambulation."[225] Nowhere in the report did CAPT S.L. appear to rely on any information from NCIS to form his opinion.

Qualified as an expert witness in forensic pathology, CAPT S.L. authenticated and explained his report, including the process of performing an autopsy and his specific findings in this case. TC asked CAPT S.L. about the trajectory of gunshot wounds, the existence of stippling and its evidence of the range of the shot, and his interpretation of metal fragments recovered from the body. CAPT S.L.'s testimony relied almost entirely on the application of his expertise to observations he made during an autopsy he performed.[226] He relied on the

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[218] *Id.* at 1826.

[219] PE 88 at 1, 15.

[220] *Id.* at 1.

[221] Record at 1861.

[222] PE 88 at 1, Record at 1887.

[223] PE 88 at 1.

[224] *Id.* at 15.

[225] *Id.*

[226] *See* Bullcoming v. New Mexico, 564 U.S. 647, 661, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) (holding that the Confrontation Clause requires that prosecutors call the

purported identity of the body, the circumstances surrounding the death, or anything else flowing from the testimonial [*178] hearsay only for the nexus they created between the body and this case. Presented with background details such as the possible use of flexible handcuffs, the purported victim's reported limp, and the location of gunshot wounds, he indicated whether his autopsy findings were consistent, or inconsistent, with such facts. Ultimately the relevance of the report, not the report's findings themselves, relied on testimonial hearsay.

With some reliance on the testimonial hearsay, we proceed to the second *Katso* factor—whether the expert's testimony was nonetheless admissible because he reached his own conclusions based on knowledge of the underlying data and facts, and his opinions, not those of an out-of-court declarant, were subject to the cross-examination required by the *Confrontation Clause*. *74 M.J. at 279*. While testimonial hearsay formed the basis of the relevance of CAPT S.L.'s report and testimony to this case, the conclusions in the report and testimony suggest no reliance on that testimonial hearsay. CAPT S.L. carefully documented, in writing and on the stand, the scientific processes he followed and the data he relied on to support his conclusions. The transparency of the scientific process supports our conclusion [*179] that testimonial hearsay was incidental, not foundational, to CAPT S.L.'s report, testimony, and opinion. Furthermore, CAPT S.L. acknowledged early in cross-examination that he had not independently identified the body he autopsied through DNA, dental records, fingerprints, or other scientific methods. But other than reporting the background information NCIS provided, CAPT S.L. did not opine on the identity of the body in his report or his testimony. We conclude CAPT S.L. demonstrated sufficient personal knowledge, education, and expertise to reach the independent conclusions of his report and testimony. *Id. at 280*.

In his closing argument, TC minimized the significance of the identity of the body in the autopsy report and asked members "to consider the circumstantial evidence. Look at the wound patterns."[227] TC encouraged the members to compare the wounds CAPT S.L. highlighted on the autopsy report to the photograph of the man killed in the IED crater on 26 April 2006. This was circumstantial evidence from which the members could identify the body as that of the man killed in the IED crater on 26 April 2006. Even without the direct evidence of a fully documented chain of custody for the body, circumstantial [*180] evidence in the report tying the body to the victim in this court-martial was sufficient to render the report relevant. *See United States v. Hurt, 9 C.M.A. 735, 27 C.M.R. 3, 31 (C.M.A. 1958)* (citing *United States v. Walker, 6 U.S.C.M.A. 158, 19 C.M.R. 284 (C.M.A. 1955)* (holding that circumstantial evidence can be as dispositive as direct evidence).

The problems in the body's chain of custody and the reliance on testimonial hearsay to link the body to this case affected the weight of the autopsy report, not its admissibility. Testimonial hearsay and identity were not so imbedded in the expert's report and testimony as to violate the appellant's right of confrontation and render the report and subsequent testimony inadmissible. We find no abuse of discretion in the military judge's finding that the report and testimony were admissible.

J. Failure to Grant a Mistrial

The appellant contends that the military judge abused his discretion when he declined to grant a mistrial after the lead NCIS agent testified before members that the appellant "invoked at the interview."[228]

HN93[↑] "We will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *Ashby, 68 M.J. at 122* (citing *United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990))*.

HN94[↑] A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice [*181] because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). But "a mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial." *United States v. Diaz, 59 M.J. 79, 90 (C.A.A.F. 2003)*. "A curative instruction is the preferred remedy, and the granting of a mistrial is an extreme remedy which should only be done when 'inadmissible matters so prejudicial that a curative instruction would

analysts who write the reports to introduce them into evidence).

[227] Record at 2306.

[228] *Id.* at 1417.

be inadequate are brought to the attention of the members.'" *Diaz, 59 M.J. at 92* (quoting R.C.M. 915(a), Discussion).

Inadmissible matters include mention that an accused exercised his or her rights under the *Fifth Amendment to the Constitution* or *Article 31(b), UCMJ*, by remaining silent, refusing to answer a question, requesting counsel, or requesting to terminate an interview. MIL. R. EVID. 301(f)(2). The erroneous presentation of such evidence to members implicates constitutional rights; therefore, to be harmless, "'the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" *United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007)* (quoting *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*). The inadmissible evidence must not have contributed to the verdict. *Id.* ***HN95***[↑] To determine an error does not contribute to the verdict is "'to find that error unimportant in relation to everything [*182] else the jury considered on the issue in question, as revealed in the record.'" *Id.* (quoting *Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991)*, *overruled on other grounds by Estelle v. McGuire, 502 U.S. 62, 72 n.4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*.

1. "[H]e invoked"

In this case, the inadmissible evidence of the appellant's invocation of his right to remain silent came from the lead investigator, SA J.C. SA J.C. was on the stand authenticating physical evidence in the government's case. The prosecutor asked him if he confronted the appellant with the appellant's after-action report about the shooting, and SA J.C. responded:

> Well, I don't remember specifically showing that to him at that time. But like I said, eventually after a time into the interview, it was time to start playing some of our cards that we had developed through some of the other interviews through some of the other squad members from earlier in the day. And at which time, he invoked at the interview.[229]

TDC objected immediately, requested a mistrial, and protested, "[h]e's going into Sergeant Hutchins's Constitutional right to remain silent."[230] At a brief *Article 39(a), UCMJ*, session immediately following the comments and objection, the military judge decided to give the members a curative instruction right away but to postpone litigation [*183] of the motion for a mistrial until the next morning. As soon as the members reassembled in the courtroom, the military judge admonished them to disregard any invocation of rights by the appellant[231] and then confirmed with them as a group that they understood.

The following day, after hearing arguments from both parties, the military judge adopted TDC's proposed curative instruction[232] and agreed to conduct individual *voir dire* of the members. We [*184] must now determine whether—in light of the requirement that the members' exposure to the inadmissible evidence be harmless beyond a reasonable doubt—the military judge abused his discretion in declining to declare a mistrial. He briefly made findings of fact from the bench:

> [W]hat I found here is that this was a [sic] isolated reference to a singular invocation of rights by the witness. It was extremely brief. There are no details about the rights invoked or the offense or offenses to which the rights were invoked. We immediately called a[n *Article] 39(a)* [session]. I immediately gave instructions to disregard. I find that the inadmissible invocation testimony didn't have any direct bearing on the testimony prior to it. It was toward the end and was unrelated to the other issues in any substantive manner.[233]

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[229] *Id.*

[230] *Id.*

[231] The military judge told the members:

> Members, you heard some testimony that suggesting, perhaps, that the accused in this case may have invoked some rights when being questioned by this witness. That's a completely improper discussion point for us here. It's irrelevant to your consideration, and it's never, ever, to be held against anyone accused of a crime that they invoked, whether they invoked, whether they didn't invoke.
>
> It's not to be considered by you for any reason whatsoever. That testimony is stricken, and it's to be completely disregard [sic] by you for any purpose whatsoever. It will not be held against Sergeant Hutchins in any manner whatsoever. If you all understand that, could you please indicate by raising your hand.
>
> That's an affirmative response from all the members.

Id. at 1419-20.

[232] AE CXLVIII; Record at 1450-51.

[233] Record at 1435.

The military judge did not articulate the legal standard he followed, but he referred counsel to two cases: *United States v. Sidwell, 51 M.J. 262 (C.A.A.F 1999)* and *United States v. Boore, 2014 CCA LEXIS 609, unpublished op. (A.F. Ct. Crim. App. 21 Aug 2014)* (per curiam).

2. Sidwell test

In *Sidwell*, the CAAF analyzed testimony from a law enforcement agent who uttered, "[s]*ubsequent to [Sidwell] invoking his rights*, he made —" before being interrupted by trial defense counsel's [*185] objection. *51 M.J. at 263* (emphasis in original). To assess the possible prejudice resulting from this erroneous admission and gauge whether it was, instead, harmless beyond a reasonable doubt, the CAAF considered three things: the nature of the comment, the curative instruction given, and the "effect of the error on the other prosecution and defense evidence presented in the case." *Id. at 265* (citing *United States v. Riley, 47 M.J. 276, 279-80 (C.A.A.F. 1997))*. The CAAF concluded that, "viewed in its entirety, [the error] did not have great potential to prejudice appellant." *Id.* In support of their conclusion, the CAAF cited the isolated nature of the reference, its extreme brevity, the immediacy with which the military judge called an *Article 39(a), UCMJ*, session, the prompt instruction to the members to disregard the evidence, and trial counsel's silence about Sidwell's invocation in argument. *Id.*

The military judge's factual findings mirrored those on which the CAAF relied, in part, in *Sidwell*. The record supports his characterization of SA J.C.'s comment as isolated and extremely brief. Aside from the trial counsel's question about the appellant's after-action report and SA J.C.'s reference to the other squad members' interviews, this statement was bereft of context. [*186] Trial defense counsel's objection, the *Article 39(a), UCMJ*, session, and the initial curative instruction came in quick succession. TC then asked SA J.C. one more brief question about the appellant's interview and his after-action report before returning to the authentication of physical evidence.

The next day, the military judge adopted the appellant's proposed curative instruction and read it to members before TDC began his cross-examination of SA J.C. While the appellant does not object to the content of his own curative instruction, we nevertheless note that it closely hews to the curative instruction in *United States v. Garrett, 24 M.J. 413, 417 (C.M.A. 1987)*, which the CAAF has endorsed. *See Sidwell, 51 M.J. at 265*; *United States v. Whitney, 55 M.J. 413, 416 (C.A.A.F. 2001)*. After reminding the members that they all enjoyed the "absolute and moral right to exercise their constitutional privileges," the military judge echoed the *Garrett* instruction in stating:

> The only thing that matters in this case is that Sergeant Hutchins always has a constitutional right to exercise his legal prerogative and no adverse result may obtain from his exercise of those constitutional rights. You may not infer guilt, nor may you infer any other fact based on Sergeant Hutchins' proper exercise of his constitutional rights.[234]

The military [*187] judge then conducted individual *voir dire* of the members, confirming their ability to follow the instruction. ***HN96***[⬆] "Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003)* (citations omitted). There is no evidence the members disregarded the military judge's instructions.

Finally, we consider the impact of the error on the subsequent presentation of evidence. The appellant does not allege any impact on the rest of the case. Suppression of the appellant's statements to NCIS and the related reversal of his first court-martial had already transformed the appellant's statements to SA J.C. into a third rail for the government. The prosecution focused some attention on the appellant's after-action report, which was the subject of the only false official statement charge against the appellant. But the appellant's interviews with NCIS were otherwise absent from the government's case. Nor did the trial counsel allude to the appellant's invocation in his closing argument.

Errant mention of the invocation did not affect the trial defense team's presentation of evidence either. Recognizing that the strongest evidence against the appellant lay in [*188] the testimony of his squad mates, TDC focused on attacking their interrogations and testimony at the first court-martial. According to the defense theory, the appellant's guilt was an NCIS fabrication imposed on the frightened and coerced members of the appellant's squad. SA J.C. had not confronted the appellant with a truth he could not refute. SA J.C. had confronted the appellant with a concocted version of events. The appellant's decision to remain

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[234] *Id.* at 1451.

silent did not matter.

Instead of pointing to where the error manifested elsewhere in the trial, the appellant alleges substantial prejudice by framing SA J.C.'s brief statement as improper lie detector testimony. According to the appellant, members were left with the impression that SA J.C. "determined Sgt Hutchins was lying during the initial portion of the interrogation, so then he confronted Sgt Hutchins with the overwhelming evidence of guilt—the 'cards'—, and that caused Sgt Hutchins to opt for silence because he could not explain it away."[235]

We do not find that argument persuasive. The members acquitted the appellant of the sole specification of false official statement for submitting his after-action report. This acquittal indicates [*189] that their findings of guilty did not rely on their assessments of the appellant's credibility. Nor do we believe their findings relied on SA J.C.'s assessment of his credibility. Without the context of the appellant's interrogations, SA J.C.'s comment came in a vacuum and simply did not carry the weight the defense alleges. SA J.C. was not an expert or other authoritative witness on whom members might unduly rely for his insight. *Cf* Diaz, 59 M.J. at 93 (concluding that a curative instruction was inadequate to correct the expert witness's testimony that Diaz murdered the victim).

Secondly, the appellant argues that the members would interpret the invocation in conjunction with their knowledge of a prior trial set aside for some technicality and assume only someone guilty would face retrial. This argument requires us to assume the members disregarded the military judge's clear instruction about everything from the presumption of innocence and the burden of proof to inferring guilt from the act of invocation. Without any evidence to support such an assumption, we decline to do so.

We find no clear error in the military judge's finding that the reference to invocation was so brief and isolated as to be effectively [*190] cured by the instructions he promptly gave. Notably, those curative instructions were consistent with curative instructions the CAAF has favorably endorsed under similar circumstances. *See* Sidwell, 51 M.J. at 265. We conclude that the military judge did not abuse his discretion in denying the appellant's motion for a mistrial.

[235] Appellant's Brief at 161.

K. Cumulative error

The appellant urges us to set aside the findings and sentence based on the cumulative effect of the errors in this case.

HN97[↑] "The cumulative effect of all plain errors and preserved errors is reviewed *de novo*." United States v. Pope, 69 M.J. 328, 335 (C.A.A.F. 2011). When the accumulation of errors deprived the appellant of a fair trial, Article 59(a), UCMJ, compels us to reverse it. United States v. Banks, 36 M.J. 150, 171 (C.M.A. 1992).

Despite the military judge's failure to consider the appellant's proffered acquittal of conspiring to kill anyone other than S.G., we ultimately found no error in the admission of the evidence of a conspiracy to commit Plans B and C.

We found only one error in the course of this trial—NCIS SA J.C.'s reference to the appellant's invocation of his right to remain silent. As previously discussed in section J., not one but two curative instructions sufficiently addressed any risk of prejudice from the members' brief exposure to evidence the appellant [*191] invoked his right to remain silent.

These two errors, even in aggregate, did not deprive the appellant of a fair trial, and Article 59(a), UCMJ, does not require reversal. Further, we decline the appellant's invitation to set aside the findings and sentence under *Article 66(c)*.[236]

L. Sentence appropriateness

The appellant argues that his sentence "was excessive and disproportionate," particularly in light of his squad members' and co-conspirators' sentences.

HN98[↑] *Article 66(c), UCMJ*, requires us to approve a court-martial sentence only if we find it "correct in law and fact and [determine], on the basis of the entire record, [that it] should be approved." "The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing United States v. Lacy, 50 M.J. 286, 287-88 (C.A.A.F. 1999)) (additional citation

[236] *Id.* at 163-64.

omitted). Uniformity in sentencing is typically subsumed in the discretionary assessment of appropriateness encompassed in our *Article 66, UCMJ*, review authority. But in certain circumstances, sentence disparity can rise to a question of law.

1. Sentence disparity

HN99[] Assessing [*192] sentence appropriateness by comparison to other cases has long been disfavored, except in specific circumstances. *See* *United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985)* ("It is well settled that, except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases, such as those of accomplices, sentence appropriateness should be determined without reference to or comparison with the sentences received by other offenders." (citation omitted)). The burden falls on the appellant to demonstrate those exceptional circumstances: (1) the cases the appellant cites for comparison are "'closely related' to his or her case" and (2) "the sentences are 'highly disparate.'" *Lacy, 50 M.J. at 288* (internal citations omitted in original). If the appellant succeeds on both prongs, then the burden shifts to the government to "show that there is a rational basis for the disparity." *Id.; see also* *United States v. Kelly, 40 M.J. 558, 570 (N.M.C.M.R. 1994)* (noting that *Article 66, UCMJ*, authorizes reduction of "widely disparate dispositions or sentences" between "closely related" cases when "unsupported by good and cogent reasons").

Cases may be "closely related" by virtue of "coactors involved in a common crime, servicemembers involved [*193] in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared[.]" *Lacy, 50 M.J. at 288*. *See also* *Kelly, 40 M.J. at 570* (defining "closely related" cases as those that "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design"). The appellant and his seven squad mates were accused of being party to the same conspiracy. The charges referred against all of them arose from the same course of events. We need not belabor our determination that the appellant's case is closely related to his squad mates' and co-conspirators' cases. Thus we turn to whether the outcomes were highly disparate.

On appeal, the appellant alleges that his sentence is highly disparate because none of his squad mates served more than 18 months of confinement, and only two left the Marine Corps with bad-conduct discharges.[237] To meet his burden, the appellant submits his squad mates' "final approved sentences" and details their convictions, punitive discharges where applicable, and confinement served.[238] However, ***HN100***[] we gauge disparity among closely related cases based on adjudged sentences, not approved sentences. *See* *United States v. Roach, 69 M.J. 17, 21 (C.A.A.F. 2010)* (clarifying that Courts of Criminal [*194] Appeals compare the adjudged sentences of closely related cases because "there are several intervening and independent factors between trial and appeal—including discretionary grants of clemency and limits from pretrial agreements—that might properly create the disparity in what are otherwise closely related cases"). Disparity is also relative to the maximum punishment an accused faces. *Lacy, 50 M.J. at 289*.

The appellant was found guilty of conspiracy to commit larceny, false official statements, murder, and obstruction of justice, unpremeditated murder, and larceny of a shovel and an AK-47 assault rifle and faced a dishonorable discharge and life imprisonment.[239] He was sentenced to a bad-conduct discharge and 2,627 days' confinement, which equated to time served.[240] Military judges awarded all five of the most junior members of the appellant's squad *dishonorable* discharges and sentences to confinement ranging from five to 14 years.[241] Only PFC Jodka received a shorter sentence of confinement than the appellant. With the exception of LCpl Pennington, the junior squad members pleaded guilty to less serious charges and faced far less than confinement for life. Only LCpl Pennington pleaded guilty to conspiracy to [*195] commit murder, and he was awarded 14 years' confinement. Pursuant to pretrial agreements, the CA significantly reduced their terms of confinement and disapproved their punitive discharges. Any disparity between the appellant's sentence and his junior squad members' adjudged sentences lay in the relative leniency he received. Perhaps for this reason, the appellant asks us to limit the pool of closely related

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[237] *Id.* at 166.

[238] *Id.* at 165-66.

[239] AE CXCIII.

[240] AE CXCVII.

[241] Staff Judge Advocate's Recommendation of 18 Sep 2015, Enclosures (4)-(8).

cases to Cpl Thomas and Cpl Magincalda. But he cites no authority for his self-serving selection of comparables.

Both Cpl Thomas and Cpl Magincalda pleaded not guilty to all charges before panels with enlisted representation but were convicted of conspiracy to commit murder and other less serious charges.[242] Members sentenced Cpl Thomas to a bad-conduct discharge and reduction to pay grade E-1.[243] Cpl Magincalda was awarded 448 days' confinement (time served) and reduction to pay grade E-1.

Assuming, *arguendo*, we disregard the sentences military judges handed down and find the appellant's sentence to be highly disparate among members' sentences, we look at whether the government has offered "a rational basis for disparity." Lacy, 50 M.J. at 288. The government argues that the appellant's position as [*196] squad leader and highest ranking member of the conspiracy is the rational basis for the disparity. Citing squad member testimony, the government asserts that the appellant

> first raised the topic and hatched the scheme to commit murder, . . . asked each junior Marine and Sailor to agree to engage in the plot, . . . gave the order to fire, . . . [and] held two meetings with the squad to encourage them to "stick to the story." In short, Appellant was the mastermind of this plot—from inception, to firing the fatal shots into the Victim's face as he gurgled his last breathes [sic], to orchestrating the cover-up.[244]

The record supports the appellant's leadership role in the formation and execution of the conspiracy and lacks any evidence that one of the more combat-experienced corporals superseded him. While we do not find the appellant's sentence to be highly disparate, the presence of a rational basis and good and cogent reasons for a more severe sentence for the appellant effectively rebuts the appellant's claim of a highly disparate sentence among closely related cases. *See e.g.,* United States v. Fee, 50 M.J. 290, 291-92 (C.A.A.F. 1999) (upholding this court's affirmation of allegedly highly disparate sentences awarded to a wife and husband based [*197] on the identification of "a rational basis for the differences in the sentences").

Thus we are left with the more generalized assessment of the appropriateness of the appellant's sentence.

2. Sentence appropriateness

HN101[↑] *Article 66, UCMJ*, obliges us to evaluate the appellant's sentence independently for appropriateness. *See* United States v. Baier, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We review sentence appropriateness *de novo.* United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." Healy, 26 M.J. at 395. This requires our "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1988) (quoting United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). In making this assessment, we analyze the record as a whole. Healy, 26 M.J. at 395. Notwithstanding our significant discretion to determine appropriateness, we may not engage in acts of clemency, which is the prerogative of the CA. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010).

As the appellant requests, **HN102**[↑] we may consider approved as well as adjudged sentences in companion cases when assessing sentence appropriateness. *See* Roach, 69 M.J. at 21 ("In contrast, when the CCA (Courts of Criminal Appeals) is exercising its power over sentence appropriateness generally, it may consider both adjudged [*198] and approved sentences."). The CA in this case negotiated pretrial agreements with the five junior squad members and granted clemency to LCpl Pennington, greatly reducing their sentences. But even *Article 66, UCMJ*, does not grant CCAs the same unfettered discretion CAs enjoyed under Article 60, UCMJ, or command prerogative. *See* Nerad, 69 M.J. at 145. "While the CCA clearly has the authority to disapprove part or all of the sentence and findings, nothing suggests that Congress intended to provide the CCAs with unfettered discretion to do so for any reason, for no reason, or on equitable grounds[.]" *Id.* Uniformity of sentence is but one consideration when evaluating

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[242] *Id.*, Enclosures (9) and (10).

[243] *Id.*, Enclosure (9).

[244] Answer on Behalf of Appellee of 20 Dec 2016 at 150-51 (citations omitted).

appropriateness,[245] and equity is not a proper basis for disapproving a sentence.

Considering the entire record, there is nothing excessive or disproportionate about a sentence to a bad-conduct discharge and less than eight years' confinement for the murder of the unknown Iraqi man in this case. The appellant's widespread reputation as a charismatic and effective leader of Marines and his compelling account of his confinement following his first court-martial earned him significant extenuation and mitigation and spared him a dishonorable discharge [*199] and a return to confinement. Further reduction of his sentence would not be an act of justice but of mercy, or perhaps equity, and beyond our authority under *Article 66, UCMJ*. *See id.*

M. Legal and factual sufficiency

Finally, the appellant alleges that the case against him was legally and factually insufficient.

HN103[↑] We review the legal and factual sufficiency of evidence *de novo*. *Art. 66(c), UCMJ*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for the legal sufficiency of evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)* (quoting *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*). In resolving questions of legal sufficiency, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

HN104[↑] "For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [appellate court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. "Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the [*200] trial court on factual sufficiency beyond the admonition in *Article 66(c), UCMJ*, to take into account the fact that the trial court saw and heard the witnesses." *Washington, 57 M.J. at 399*. "By 'reasonable doubt' is not intended a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in this case. . . . The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt." *United States v. Loving, 41 M.J. 213, 281 (C.A.A.F. 1994)*.

The remarkably detailed and consistent testimony of the five squad members provided overwhelming evidence of the appellant's guilt, covering all elements of the offenses of which he was convicted. Although we were unable to personally observe the squad members testify at the first and second courts-martial, the minute details that brought their depictions to life, including specifics with no real bearing on the offenses, conveyed their credibility. Details varied depending on the role each member played—providing security, participating in the initial planning discussion, stepping off with the snatch team, or remaining behind. But the squad members corroborated each other, and their narratives [*201] wove together to form a complete and clear account of the night's events.

The appellant challenges his squad mates' testimony as a fabrication forced upon them during coercive interrogations. TDC accused Hospitalman Second Class (HM2) S., the platoon's other Navy corpsman and a member of the Quick Reaction Force that responded to the scene minutes after the shooting, of framing his close friend and mentor, HM3 Bacos, the appellant and the other members of the squad for murder. According to the appellant, HM2 S. is the source of the elaborate conspiracy to kill S.G. or someone close to him. Although HM2 S. admitted to later fabricating a threatening note in order to escape the squad he had implicated and their platoon, no convincing motive for such a large-scale fiction as this conspiracy ever came to light. Instead, HM3 Bacos's testimony foreshadowed the crisis of conscience that prompted him to confide in HM2 S., who later reported those confidences to NCIS.

According to the appellant, multiple NCIS agents then forced HM3 Bacos to adopt HM2 S.'s statement and forced the other members of the squad to adopt HM3 Bacos's statement. Again, the appellant offers no plausible motive for an [*202] entire team of investigators to strong-arm him and five other members of his squad into parroting the statement of a non-participant. Nor does he credibly explain how a relatively

[245] *See Snelling, 14 M.J. at 268* ("However proper it may be for the convening authority and [Courts of Criminal Appeals] to consider sentence comparison as an aspect of sentence appropriateness, it is only one of many aspects of that consideration.") (citations omitted).

brief interview between NCIS agents and HM2 S. evolved into the robust testimony before us. The conspicuously uniform affidavits from HM3 Bacos, LCpl Pennington, LCpl Shumate, and PFC Jodka alleging coercive interrogations and resulting perjury are insufficient to raise reasonable doubt, even in light of our superior court's suppression of the appellant's confession. The overwhelming weight of the testimony of the appellant's co-conspirators also renders the autopsy, physical evidence collected, and the testimony of lead SA J.C., who did little more than authenticate the evidence, inconsequential.

Not only do we find the evidence legally sufficient, but we also find it factually sufficient.

III. CONCLUSION

The findings and sentence are affirmed.

Chief Judge GLASER-ALLEN and Senior Judge HUTCHISON concur.

United States v. Jones

United States Air Force Court of Criminal Appeals

February 4, 2016, Decided

ACM 38028 (rem)

Reporter
2016 CCA LEXIS 71 *

UNITED STATES v. Second Lieutenant WILLIAM R. JONES, United States Air Force

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Jones, 2016 CAAF LEXIS 472 (C.A.A.F., June 3, 2016)*

Prior History: [*1] Sentence adjudged 29 July 2011 by GCM convened at Laughlin Air Force Base, Texas. Military Judge: Matthew D. Van Dalen. Approved Sentence: Dismissal, confinement for 6 months, and forfeiture of all pay and allowances.

United States v. Jones, 74 M.J. 95, 2015 CAAF LEXIS 206 (C.A.A.F., 2015)

Core Terms

military, sentence, appointment, instructions, forfeiture, post-trial, docketed, superior court, convening, factors, civilian employee, assigned error, new counsel, sua sponte, continuance, prejudicial, allowances, defense counsel, reconsideration, confinement, mitigating, waived

Case Summary

Overview
HOLDINGS: [1]-Failure to exercise a peremptory challenge against any member by the party who makes an unsuccessful challenge for cause waives further review, R.C.M. 912(f)(4), Manual Courts-Martial. Concerning the challenge for cause, the court found the issue waived; [2]-The military judge (MJ) instructed the servicemember accurately. He knowingly and intelligently, while perhaps also reluctantly, withdrew his request to release his counsel, and waived his request for new counsel; [3]-There was the potential that the MJ's failure to caution the members not to rely on potential mitigation by the convening authority could have impacted their decision to impose forfeiture of all pay and allowances in this case. This prejudicial error was cured by not affirming the forfeiture of all pay and allowances portion of sentence; [4]-Three months for reconsideration was not unreasonable.

Outcome
The approved findings and the sentence, as adjusted, were affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review

Military & Veterans Law > Military Justice > Judicial Review

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review

HN1[] **Peremptory Challenges, Appellate Review**

Failure to exercise a peremptory challenge against any member by the party who makes an unsuccessful challenge for cause waives further review. R.C.M. 912(f)(4), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Courts Martial > Judges

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN2[] **Courts Martial, Court-Martial Member Panel**

While a military judge has the discretionary authority to sua sponte excuse a member, there is no duty to exercise this power. The court of criminal appeals has authority under Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, to review this discretionary authority of the military judge.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Mistrial

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] **Abuse of Discretion, Mistrial**

A military judge has the option to deny a continuance to obtain new counsel. The court of criminal appeals would have reviewed the denial of the continuance for an abuse of discretion. A mistrial is a drastic remedy and is to be used sparingly; the court of criminal appeals reviews a decision to deny a motion for a mistrial for clear evidence of an abuse of discretion.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN4[] **Sentences, Deliberations, Instructions & Voting**

R.C.M. 1005(e)(4), Manual Courts-Martial, requires that the members be instructed that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] **Sentences, Deliberations, Instructions & Voting**

The adequacy of a military judge's instructions is reviewed de novo. The military judge bears the primary responsibility for ensuring that mandatory instructions are given and given accurately; refer to R.C.M. 920(a), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] **Courts Martial, Sentences**

If the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error.

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7[] **Presumptions, Particular Presumptions**

The court reviews de novo whether an appellant has been denied his due process right to a speedy post-trial review and whether any constitutional error is harmless beyond a reasonable doubt. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before the court of criminal appeals. The Moreno standards continue to apply as a case remains in the appellate process. The Moreno standard is not violated when each period of time used for the resolution of legal issues between the

court of criminal appeals and the U.S. Court of Appeals for the Armed Forces is within the 18-month standard. If a delay is presumptively unreasonable it triggers an analysis of the four factors elucidated in Barker and Moreno. Those factors are (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

HN8 **Procedural Due Process, Scope of Protection**

The Moreno standards were developed to deter excessive systemic delays in post-trial and appellate processing. The court declines to adopt a time standard that would discourage reconsideration, either sua sponte or at the request of either party. When the initial decision is issued within the 18-month Moreno standard but the subsequent decision on reconsideration is more than 18 months after docketing, the court will not presume an unreasonable delay; instead, it will focus on the standards established in Barker. The first factor is a threshold one; the full due process analysis is not triggered unless the delay is facially unreasonable. Three months for reconsideration is not unreasonable.

Military & Veterans Law > Military Justice > Judicial Review

HN9 **Military Justice, Judicial Review**

The Moreno standards continue to apply as a case continues through the appellate process.

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

Military & Veterans Law > Military Justice > Judicial Review

HN10 **Presumptions, Particular Presumptions**

If the standards set forth in Moreno are violated, the delay is presumptively unreasonable and triggers an analysis of the four factors elucidated in Barker and Moreno. Those factors are (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant. When there is no showing of prejudice under the fourth factor, the court will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

HN11 **Judicial Review, Courts of Criminal Appeals**

Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)* (art. 66(c), UCMJ), empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*. Bischoff identified a list of factors to consider in evaluating whether art. 66(c), UCMJ, relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay, the length and complexity of the record, the offenses involved, and the evidence of bad faith or gross negligence in the post-trial process. No single factor is dispositive and the court may consider other factors as appropriate. The court has the authority to tailor an appropriate remedy without giving an appellant a windfall.

Counsel: For Appellant: Major Jeffery A. Davis; Major Travis K. Ausland; and Major Zaven T. Saroyan.

For the United States: Colonel Don M. Christensen; Colonel Linell A. Letendre; Lieutenant Colonel Roberto Ramirez; Major Rhea A. Lagano; Major Meredith L. Steer; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, MITCHELL, and BROWN, Appellate Military Judges.

Opinion by: MITCHELL

Opinion

OPINION OF THE COURT UPON REMAND

MITCHELL, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of drunk driving, assault consummated by a battery, and conduct unbecoming an officer, in violation of Articles 111, 128, and 133, UCMJ, *10 U.S.C. §§ 911*, *928*, *933*. The court sentenced him to a dismissal, confinement for six months, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

Procedural History

On 25 January 2013, The Judge Advocate General of the Air Force appointed a retired Air Force officer and former appellate military [*2] judge, who was serving as a civilian litigation attorney in the Department of the Air Force, to the position of appellate military judge on the Air Force Court of Criminal Appeals pursuant to Article 66(a), UCMJ, *10 U.S.C. § 866(a)*. On 25 June 2013, the Secretary of Defense, "[p]ursuant to [his] authority under title *5, United States Code, section 3101 et seq.*," issued a memorandum that appointed the same civilian employee of the Department of the Air Force to serve as an appellate military judge on the Air Force Court of Criminal Appeals. Memorandum from Sec'y of Def. Chuck Hagel for Sec'y of the Air Force Eric Fanning (25 June 2013).

When Appellant's case was initially before us, he argued that we should find error in the military judge's denial of a challenge for cause, despite Appellant's decision to not exercise a peremptory challenge. He also supplemented his initial assignments of error with four additional errors submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. The supplemental errors were that his counsel were ineffective, the military judge erred in denying Appellant the right to find new counsel, the military judge erred in denying a request for an expert consultant in forensic pathology, and the evidence on the charge of drunk driving in violation of Article 111, UCMJ, [*3] was legally and factually insufficient.

On 15 April 2013, this court issued a decision in which we affirmed the findings and sentence after examining the five raised issues. *United States v. Jones*, ACM 38028 (A.F. Ct. Crim. App. 15 April 2013) (unpub. op.). The appointed civilian employee was a member of the panel that decided the case. Following the appointment by the Secretary of Defense, this court reconsidered its decision sua sponte. Within 60 days, this court provided notice it would reconsider the decision and thus retained jurisdiction over the case. *Cf. United States v. Labella, 75 M.J. 52 (C.A.A.F. 2015)* (failure to file notice of reconsideration within 60 days ends service court's jurisdiction over a case). On 23 July 2013, we issued a new opinion and again affirmed the findings and sentence. *United States v. Jones*, ACM 38028 (recon) (A.F. Ct. Crim. App. 23 July 2013) (unpub. op.).

On 15 April 2014, our superior court issued its decision in *United States v. Janssen, 73 M.J. 221, 225 (C.A.A.F. 2014)*, holding that the Secretary of Defense did not have the legislative authority to appoint civilian employees as appellate military judges and that the earlier appointment was "invalid and of no effect." On 11 March 2015, our superior court concluded the improper appointment of the civilian [*4] employee by the Secretary of Defense was not waived by an earlier failure to object. *United States v. Jones, 74 M.J. 95 (C.A.A.F. 2015)*. Our superior court reversed our decision and remanded the case to us for a new review under Article 66, UCMJ, before a properly constituted panel. *Id.* In addition to reviewing the prior pleadings, we issued an order authorizing Appellant to file a supplemental briefing.

In light of this ruling by our superior court, we have reviewed Appellant's case. Our review includes Appellant's previous filings and the previous opinions issued by this court, as well as a supplemental assignment of error in which Appellant asserts he is entitled to relief due to excessive post-trial processing delays and there was error in the sentencing instructions provided by the military judge. Finding prejudicial error in the military judge's failure to provide one of the mandatory sentencing instructions, we adjust the sentence to remove any prejudicial effect. We affirm the findings.

Challenge for Cause

Concerning the challenge for cause, we find the issue waived. Appellant challenged a panel member for

implied bias, citing primarily the member's interaction on disciplinary matters with other squadron commanders to include [*5] the commander who preferred charges against Appellant. The military judge denied the challenge and provided a detailed explanation for his decision which expressly referenced the liberal grant mandate. Shortly thereafter, trial defense counsel elected not to exercise a peremptory challenge. ***HN1***[⬆] Failure to exercise a peremptory challenge against any member by the party who makes an unsuccessful challenge for cause waives further review. Rule for Courts-Martial (R.C.M.) 912(f)(4). This issue is waived and Appellant is not entitled to relief.

Appellant argues that, nonetheless, we should review the military judge's decision based on the judge's sua sponte ability to excuse a member in the interest of justice even if a challenge is not made. R.C.M. 912(f)(4). ***HN2***[⬆] While a military judge has the discretionary authority to sua sponte excuse a member, there is no duty to exercise this power. *United States v. McFadden, 74 M.J. 87, 90 (C.A.A.F. 2015)*. We are not convinced to exercise our authority under Article 66, UCMJ, to review this discretionary authority of the military judge. We apply waiver. *Cf. United States v. Akbar, 74 M.J. 364, 395-97 (C.A.A.F. 2015)* (explaining why the military judge did not abuse his discretionary authority to sua sponte remove members).

Release of Counsel

After the Government rested its case in chief and an overnight recess, trial defense counsel [*6] motioned for a continuance so Appellant could pursue hiring a forensic pathologist he contacted the day before. Previously, trial defense counsel filed a motion to compel the appointment of an expert consultant in forensic pathology and after that motion was denied, filed a motion for reconsideration which was also denied. After the military judge denied the continuance, Appellant requested to release his counsel. Earlier in the proceeding, after the military judge explained the rights to counsel and then asked Appellant who he wanted to have represent him, Appellant indicated he desired to be represented by his detailed counsel and did not express any dissatisfaction with their appointment. Appellant now indicated that prior to trial he made a specific request for a particular defense counsel, but this request was denied. The military judge questioned Appellant further about his request to release counsel. In response to Appellant's declared belief that the release of counsel would result in a "brand new trial," the military judge explained that although new counsel could file a motion for a mistrial, that motion would not have to be granted. The military judge also explained that [*7] Appellant could proceed pro se. After receiving this information, Appellant stated that "based upon the information I just received, I would like to continue with my counsel." The military judge stated that he viewed that statement as Appellant withdrawing his request to release his counsel and, therefore, did not rule on the motion.

The military judge's explanation to Appellant was correct. ***HN3***[⬆] The military judge had the option to deny a continuance to obtain new counsel. We would have reviewed the denial of the continuance for an abuse of discretion. *United States v. Wiest, 59 M.J. 276, 279 (C.A.A.F. 2004)*. A mistrial is a drastic remedy and is to be used sparingly; we review a decision to deny a motion for a mistrial for clear evidence of an abuse of discretion. *United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003)*. There is no guarantee that the military judge would have been compelled to grant a motion for a continuance for new counsel to be detailed or hired, nor would it have been guaranteed that a mistrial would have been required if new counsel became involved. We conclude that the military judge instructed Appellant accurately. Appellant knowingly and intelligently, while perhaps also reluctantly, withdrew his request to release his counsel. Appellant waived his request for new counsel. [*8] We find no error.

Sentencing Instructions

HN4[⬆] Rule for Courts-Martial 1005(e)(4) requires that the members be instructed that "they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority." Although the military judge provided the other R.C.M. 1005(e) mandatory instructions, this instruction was not given by the military judge in either his written or oral instructions. Trial defense counsel did not object.

HN5[⬆] 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)*. "The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately." *United States v. Miller, 58 M.J. 266, 270 (C.A.A.F. 2003)*; *see also* R.C.M. 920(a). We find plain error in the military judge's failure to provide this mandatory instruction. Having found error, we test for prejudice. *Id. at 271*.

The military judge accurately instructed the members on the maximum punishment. He further instructed that it was the duty of each member to vote for a proper sentence and their "determination of the kind and amount of punishment, if any, [was] a grave responsibility requiring the exercise of wise discretion." The military judge also instructed the members that they "alone [were] responsible [*9] for determining an appropriate sentence in this case."

During trial, there was one reference to the convening authority's ability to impact or affect the sentence imposed by the members. The military judge orally instructed the members that, "when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit, be paid to the accused's dependents for a period not to exceed six months." Upon realizing that Appellant did not have any dependents, however, the military judge did not include this portion of his oral instructions in the written version he provided to the members.

Trial counsel argued for a dismissal, 12 months of confinement, and forfeiture of all pay and allowances. The members adjudged a sentence to a dismissal, confinement for 6 months, and forfeiture of all pay and allowances.

Our superior court has repeatedly held that ***HN6***[↑] if we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." *United States v. Sales, 22 M.J. 305, 308 (C.A.A.F. 1986)*; *see also United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985)*. Here, the [*10] only reference to later mitigation by the convening authority involved potential forfeitures, and that fleeting reference was not further explained, clarified, or repeated in the written instructions or otherwise. This raises the potential that the military judge's failure to caution the members not to rely on potential mitigation by the convening authority could have impacted their decision to impose forfeiture of all pay and allowances in this case. *But see United States v. Irizarry*, ACM 37748 (A.F. Ct. Crim. App. 15 March 2012) (unpub. op.) (finding the omission of this same instruction did not prejudice the appellant). This prejudicial error is cured by not affirming the forfeiture of all pay and allowances portion of this sentence. The remaining sentence of a dismissal and 6 months confinement is free of any prejudicial effects of the error.

Appellate Review Time Standards

Appellant argues, citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*, that the unreasonable post-trial delay from the date the case was first docketed with this court in March 2012 until this opinion warrants relief. Appellant further cites to *United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002)*, noting this court's broad power and responsibility to affirm only those findings and sentence that should be [*11] approved.

HN7[↑] We review de novo "[w]hether an appellant has been denied [his] due process right to a speedy post-trial review . . . and whether [any] constitutional error is harmless beyond a reasonable doubt." *United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006)*. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before this court. *Moreno, 63 M.J. at 142*. The *Moreno* standards continue to apply as a case remains in the appellate process. *United States v. Mackie, 72 M.J. 135, 135-36 (C.A.A.F. 2013)*. The *Moreno* standard is not violated when each period of time used for the resolution of legal issues between this court and our superior court is within the 18-month standard. *Id. at 136*; *see also United States v. Roach, 69 M.J. 17, 22 (C.A.A.F. 2010)*. If a delay is presumptively unreasonable it triggers an analysis of the four factors elucidated in *Barker v. Wingo, 407 U.S. 514 (1972)*, and *Moreno. See United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011)*. Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala, 61 M.J. 122, 129 (C.A.A.F. 2005)*; *see also Barker, 407 U.S. at 530*.

This case was originally docketed with this court on 25 October 2011. The time from that initial docketing until our initial decision on 15 April 2013 did not exceed 18 months and is therefore not facially unreasonable. We then sua sponte reconsidered [*12] our decision and issued an opinion on 23 July 2013, more than 20 months after the initial docketing. ***HN8***[↑] The *Moreno* standards were developed to deter excessive systemic delays in post-trial and appellate processing. *Moreno, 63 M.J. at 142*. We decline to adopt a time standard that would discourage reconsideration, either sua sponte or at the request of either party. When the initial decision is issued within the 18-month *Moreno* standard but the subsequent decision on reconsideration is more than 18

months after docketing, we will not presume an unreasonable delay; instead, we will focus on the standards established in *Barker*. The first factor is a threshold one; the full due process analysis is not triggered unless the delay is facially unreasonable. Moreno, 63 M.J. at 136; *see also* United States v. Toohey, 60 M.J. 100, 102 (C.A.A.F. 2004). We conclude that three months for reconsideration is not unreasonable, and therefore we do not examine the remaining *Barker* factors.

We also examine the time subsequent to our July 2013 decision.**HN9**[] The *Moreno* standards continue to apply as a case continues through the appellate process. Mackie, 72 M.J. at 135-36. The time between our superior court's action to return the record of trial to our court for our action and this decision has not exceeded 18 months; therefore, the *Moreno [*13]* presumption of unreasonable delay is not triggered. *See id.* at 136. Appellant argues that, because neither of the previous decisions were issued by a properly constituted panel, we should consider the time from initial docketing until this opinion as uninterrupted for *Moreno* analysis. We reject Appellant's argument that, because the Secretary of Defense's appointment of the civilian employee was invalid and of no effect, the *Moreno* clock was not tolled by our earlier decisions.[1]

HN11[] Article 66(c), UCMJ, empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). Tardif, 57 M.J. at 224; *see also* United States v. Harvey, 64 M.J. 13, 24 (C.A.A.F. 2006). In United States v. Bischoff, 74 M.J. 664, 672 (A.F. Ct. Crim. App. 2015), we identified a list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. "Among the non-prejudicial factors are the length and reasons for the delay, the length and complexity of the record, the offenses involved, and the evidence of bad faith or gross negligence in the post-trial process." *Id.* No single factor is dispositive and we may consider other factors as appropriate. *Id.* After considering the relevant factors in this case, we determine that no relief is warranted. [*15] Even analyzing the entire period from the time the case was first docketed until today, we find there was no bad faith or gross negligence in the post-trial processing. The reason for the delay after our initial decision was to allow this court and our superior court to fully consider a constitutional issue of first impression about whether the Secretary of Defense has the authority under the Appointments Clause[2] to appoint civilian employees to the service courts of criminal appeals. *See* Janssen, 73 M.J. at 221. While the answer may seem clear now with the advantage of subsequent decisions, we find no evidence of harm to the integrity of the military justice system by allowing the full appellate review of this novel issue. Appellant has not articulated any harm. At most, Appellant asks us to infer increased anxiety; we decline to do so. Furthermore, the impact of any delay was mitigated when we specifically allowed Appellant to file a supplemental assignment of error and we have granted relief on an issue that was not raised in his initial assignment of error. We have the authority to tailor an appropriate remedy without giving Appellant a windfall. *See* Tardif, 57 M.J. at 225. We have expressly considered whether we should further reduce some or [*16] all of Appellant's sentence. Based on our review of the entire record, we conclude that additional sentence relief under Article 66, UCMJ, is not warranted.

Other Assignments of Error

We have considered the remaining assignments of error and find them to be without merit. *See* United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

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[1] Alternatively,**HN10**[] if the standards set forth in United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006), are violated, the delay is presumptively unreasonable and triggers an analysis of the four factors elucidated in Barker v. Wingo, 407 U.S. 514 (1972), and *Moreno. See* United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011). Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." United States v. Mizgala, 61 M.J. 122, 129 (C.A.A.F. 2005); *see also* Barker, 507 U.S. at 530; United States v. Morita, 73 M.J. 548, 567 (A.F. Ct. Crim. App. 2013). Appellant has not made any showing of prejudice, beyond referencing the general "anxiety and concern" of appellants awaiting resolution of their appeal. When there is no showing of prejudice under the fourth factor, "we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely [*14] affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, when we balance the other three factors, we find the post-trial delay in this case to not be so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system. We are convinced that even if there is error, it is harmless beyond a reasonable doubt.

[2] U.S. Const. art. II, § 2, cl. 2.

Conclusion

We affirm a sentence to a dismissal and 6 months of confinement. The approved findings and the sentence, as adjusted, are correct in law and fact, and no error prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and Article 66(c), UCMJ. Accordingly, the approved findings and the sentence, as adjusted, are **AFFIRMED**.

Concur by: ALLRED (In Part)

Dissent by: ALLRED (In Part)

Dissent

ALLRED, Chief Judge (concurring in part and dissenting in part):

In my view any error in the trial judge's failure to instruct the court members regarding possible mitigating action by the convening or higher authority was harmless. *See United States v. Irizarry*, ACM 37748 (A.F. Ct. Crim. App. 15 March 2012) (unpub. op.). Accordingly, I dissent from that portion of the majority opinion which grants relief by refusing to affirm the adjudged forfeiture of all pay and allowances.

In all other respects, I concur with Senior Judge Mitchell's [*17] opinion.

United States v. Lancaster

United States Army Court of Criminal Appeals

May 6, 2021, Decided

ARMY 20190852

Reporter
2021 CCA LEXIS 219 *; 2021 WL 1811735

UNITED STATES, Appellee v. Sergeant VANESSA L. LANCASTER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by United States v. Lancaster, 2021 CAAF LEXIS 554, 2021 WL 2949792 (C.A.A.F., June 16, 2021)

Review denied by United States v. Lancaster, 2021 CAAF LEXIS 743 (C.A.A.F., Aug. 9, 2021)

Prior History: [*1] Headquarters, Fort Bliss. Edwin B. Bales, Military Judge, Colonel Sean T. McGarry, Staff Judge Advocate.

Core Terms

divorce, ex-husband, defense counsel, deliberate, innocence, caregiver, asserts, concede, married, larceny, ineffective, opening statement, trial strategy, military, deprive, guilt, actual knowledge, permanently, contested, assistance of counsel, reasonable doubt, strategic

Case Summary

Overview
HOLDINGS: [1]-The servicemember was not denied her Sixth Amendment right to autonomy in her defense because the servicemember's affidavit clarified that defense counsel's concessions did not actually conflict with her desired overall objective of acquittal or maintaining her innocence. In fact, the servicemember's overall desired strategy—to assert she did not know the divorce went through—was the very strategy defense counsel pursued.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

HN1[] **Criminal Process, Assistance of Counsel**

The Sixth Amendment guarantees to each accused the Assistance of Counsel for his or her defence. Yet because the Sixth Amendment also protects an accused's right to participate in her own defense, when an accused accepts counsel's assistance, they do not surrender control entirely to counsel. The Sixth Amendment contemplates a norm in which the accused, and not a lawyer, is master of his or her own defense. Even when represented by counsel, some decisions remain the sole province of the accused.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN2[] **Effective Assistance of Counsel, Trials**

Autonomy to decide that the objective of the defense is to assert innocence is one such decision. Put simply, when an accused unequivocally states their desire to maintain their innocence, counsel may not steer the ship the other way. Notably, an accused's decision about their objective—to assert their innocence—is not the same as the attorney's strategic decisions regarding how best to achieve appellant's objective, and trial management remains the purview of counsel.

Criminal Law & Procedure > Appeals > Reversible

Error > Structural Errors

HN3[] Reversible Error, Structural Errors

Because a client's autonomy to assert her innocence stems from the fundamental legal principle that a defendant must be allowed to make his or her own choices about the proper way to protect his or her own liberty, when an attorney violates this autonomy, a structural error occurs. Accordingly, if a court determines an appellant's autonomy was violated, that appellant need not show prejudice to be entitled to relief. Because a client's autonomy, not counsel's competence, is in issue, courts do not apply their ineffective-assistance-of-counsel jurisprudence and do not test for prejudice.

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Acquittals

HN4[] Double Jeopardy Protection, Acquittals

An attorney may, as a strategic decision, effectuate a client's overall objective of acquittal by conceding certain elements of a crime, while still contesting others.

Military & Veterans Law > Military Offenses > Attempts

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Offenses > Cruelty & Maltreatment

HN5[] Military Offenses, Attempts

Unif. Code Mil. Justice art. 121, 10 U.S.C.S. § 921 prohibits the wrongful obtaining from the owner any money or article of value with the intent to permanently deprive.

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > Elements

Criminal Law & Procedure > ... > Theft & Related Offenses > Embezzlement > Elements

HN6[] Larceny & Theft, Elements

The offense of larceny requires an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to the thief's own use.

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > Elements

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

Military & Veterans Law > Military Offenses > Forgery

Criminal Law & Procedure > ... > Fraud > False Pretenses > Elements

HN7[] Larceny & Theft, Elements

A thief commits larceny by false pretenses when the thief makes a false representation of a past or existing fact, and the false representation is knowingly false in the sense that it is made without a belief in its truth. Manual Courts-Martial pt. IV, para. 46.c.(1)(e).

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN8[] De Novo Review, Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are reviewed de novo. To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error. These prongs may be addressed in any order because the appellant must satisfy both prongs to prevail.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN9[] **Criminal Process, Assistance of Counsel**

To establish counsel's deficiency, an appellant must show counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. In evaluating performance, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. This presumption can be rebutted by showing specific errors made by defense counsel that were unreasonable under prevailing professional norms. Prejudice is established by showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. An appellant must show a reasonable probability that, but for counsel's deficient performance the result of the proceedings would have been different. It is not enough to show that the errors had some conceivable effect on the outcome. An appellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Captain Lauren M. Teel, JA (on brief and reply brief).

For Appellee: Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain Anthony A. Contrada, JA (on brief).

Judges: Before BURTON, SALADINO,[1] and FLEMING, Appellate Military Judges. Senior Judge BURTON and Judge FLEMING concur.

Opinion by: SALADINO

Opinion

MEMORANDUM OPINION

SALADINO, Judge:

Appellant claims her trial defense counsel violated her right to autonomy in her defense by conceding her guilt at trial. Additionally, in matters submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, appellant asserts her counsel were ineffective because they failed to comprehend the law relevant to her case. We disagree on both counts, and affirm the findings and sentence.[2]

BACKGROUND

An enlisted panel sitting as a general court-martial convicted appellant, contrary to her pleas, of one specification of larceny of military property, in violation of *Article 121, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 921*.[3] The convening authority approved the adjudged sentence of a bad-conduct [*2] discharge, confinement for 30 days, a reprimand, and reduction to E-1.

Appellant married JY ("ex-husband") on 4 July 2008. As a result of traumatic brain injury sustained during a deployment in 2008, ex-husband medically retired with a one hundred percent disability rating while appellant and ex-husband were stationed at Fort Lewis, Washington. Sometime in 2010, ex-husband asked appellant for a divorce, but neither appellant nor ex-husband filed until after appellant's permanent change of station (PCS) to Fort Bragg, North Carolina.

Sometime in 2012, appellant and ex-husband decided to go through with the divorce. Appellant flew back to Washington, where ex-husband lived with his caregiver,[4] DY ("caregiver"), to sign the legal documents required to petition for divorce. After drafting the required documents and having them reviewed by a judge advocate on Fort Lewis, appellant and ex-husband went to the Pierce County, Washington, courthouse to file for divorce in October 2012. To

[1] Judge Saladino decided this case while on active duty.

[2] We have given full and fair consideration to appellant's other assigned errors, as well as matters personally raised pursuant to *Grostefon, 12 M.J. 431*, and determine they warrant neither discussion nor relief.

[3] The panel acquitted appellant of one specification of larceny of military property in violation of *Article 121*, UCMJ.

[4] Caregiver testified ex-husband required nearly constant care as a result of his injuries.

facilitate the processing of the case, appellant joined ex-husband's case, and filed a joinder to that effect. That joinder, signed by appellant, specifically waived notice of entry of the divorce decree.

Several [*3] days after filing, the court provided appellant and ex-husband with a letter informing them their case was set for trial on 22 February 2013. The notice also stated "[i]f no one appears on February 22nd, your case will be dismissed." The letter further notified appellant and ex-husband they could finalize their case earlier than 22 February if they desired. In accordance with this notice, ex-husband appeared in court on 25 January 2013, but appellant did not. On that date, the court ordered appellant and ex-husband's marriage dissolved, and signed the divorce decree previously submitted and signed by both appellant and ex-husband. Ex-husband called appellant the same day and informed her their divorce was finalized. Appellant also kept regular contact with ex-husband, and between 2013 and 2019, ex-husband told appellant at least five times they were divorced.

Part of the reason appellant maintained regular contact with ex-husband was because ex-husband and caregiver continued to manage the rental of the house appellant received in the divorce, including handling maintenance requests and finding new tenants. Although they did not have a formal agreement, appellant facilitated ex-husband's [*4] role as property manager and compensated him for his share of the house she acquired in the divorce by providing regular payments to a joint account to which appellant had access.

In 2015, ex-husband married caregiver. Appellant was aware of the marriage, but continued to express doubts regarding whether she and ex-husband were actually divorced. When ex-husband confronted appellant regarding her belief that they were still married, appellant told ex-husband she called the Pierce County courthouse, and someone there told her the divorce was not final. Concerned by this news, ex-husband and caregiver looked up the divorce through Pierce County's online database, and confirmed the divorce was, in fact, finalized. Immediately after confirming the divorce's finality, ex-husband and caregiver called appellant and again told her she and ex-husband were divorced.

Appellant personally observed ex-husband and caregiver's married life when she stayed with them in early 2017 during her PCS from Joint Base Elmendorf-Richardson, Alaska to Fort Bliss, Texas. After observing their marriage, appellant held herself out to be single. In March 2018, appellant began dating Sergeant RT ("boyfriend"), but [*5] she did not tell him she was married or divorced.

The government charged appellant with two specifications of larceny of basic housing allowance (BAH): one from 21 May 2014 to 14 March 2017 at Joint Base Elmendorf-Richardson (JBER); and one from 15 March 2017 to 29 October 2018 at Fort Bliss, Texas. During opening statements at appellant's contested trial, defense counsel framed the case by saying "[t]he only question that really this whole case will come down to is, did [appellant] know that she was divorced?" Defense counsel later continued:

> [T]he government will present a lot of facts and evidence as to, should [appellant have] known. There are many opportunities in which she could have known, but the question is, did [appellant] know? And you will find at the end of the government's case that there's no evidence that [appellant] knew for sure that she was divorced. So we ask that you please pay attention to certain things when they happened and when certain things didn't happen and how they happen. And you will find that it is possible that she did not know.
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> . . .
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> And so the key issue with this, the question is, did [appellant] know? Not should she have known, not were there opportunities [*6] for her to know. It's did she know. The evidence will show that she didn't. . . . So there's no dispute that [appellant] and [ex-husband] were divorced in 2013, and there's no dispute that [appellant] received entitlements to which she was not entitled. The only issue is whether she intended to steal from the U.S. government and you will see that the government will fail to prove that beyond a reasonable doubt.

After the taking of evidence, the military judge held an *Article 39(a)*, UCMJ session to discuss findings instructions. During this session, government counsel requested the military judge give a non-standard instruction on deliberate avoidance, citing *United States v. McDonald, 57 M.J. 18, 22 (C.A.A.F. 2002)*.

Defense counsel objected, arguing government counsel failed to provide adequate notice of the instruction in accordance with the military judge's pretrial order and the proposed instruction confused the issues. Defense stated: "[i]f we had known about [the requested deliberate avoidance instruction] prior to trial it may

have affected our case theory, case presentation, or case strategy overall. I'm not arguing prejudice about preparation for argument, I'm arguing about prejudice in regards to case strategy . . . ." Additionally, [*7] defense counsel argued "*McDonald* only discussed mistake of fact instruction, it did not discuss [a] deliberate avoidance instruction." The government quickly retorted that *McDonald* explicitly discussed a deliberate avoidance instruction. Based on his reading of *McDonald*, the military judge ultimately gave the panel the following instructions:

> If the accused at the time of the offense was under the mistaken belief that she was married, then she cannot be found guilty of the offense of larceny. The mistake, no matter how unreasonable it might have been, is a defense. In deciding whether the accused was under the mistaken belief that she was married, you should consider the probability or improbability of the evidence presented on the matter. You should consider the accused's age, education, and experience along with the other evidence on this issue. The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to the accused's conduct in order to escape the consequences of criminal law.
>
> Therefore, if you have a reasonable doubt that the accused actually knew that she was divorced, but you are nevertheless satisfied beyond a reasonable doubt [*8] that: A. The accused did not know for sure that she was married; B. The accused was aware that there was a high probability that she was divorced; and C. The accused deliberately and consciously tried to avoid learning that, in fact, she was divorced, then you may treat this as a deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge. I emphasize that knowledge of the divorce cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of the offense, including that the accused actually knew that she was divorced. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either: one, had actual knowledge that she was divorced; or two, deliberately avoided that knowledge, then you must find the accused not guilty.

Ultimately, the panel convicted appellant of larceny from 10 March 2017 to 29 October 2018 while stationed at Fort Bliss (Specification 2), but acquitted her of larceny while stationed at JBER.[5]

LAW AND DISCUSSION

On appeal, appellant asserts she was denied her Sixth Amendment right to autonomy in her defense [*9] when her defense counsel admitted to a culpable *mens rea* and the other elements of the charged offenses during the opening statement. Specifically, appellant asserts defense counsel did not properly comprehend the law, and as a result, inadvertently admitted appellant's guilt in her opening statement, despite appellant's wish to maintain her innocence. Additionally, in matters personally asserted under *United States v. Grostefon*, appellant asserts her counsel were ineffective because they did not adequately research the law regarding deliberate avoidance, and therefore used a trial strategy that prejudiced appellant. For the reasons stated below, we disagree with both assertions.

1. Appellant's Sixth Amendment Protected Autonomy Law

HN1[] The Sixth Amendment guarantees to each accused "the Assistance of Counsel for his [or her] defence." U.S. Const. amend VI. Yet because the Sixth Amendment also protects an accused's right to participate in her own defense, when an accused accepts counsel's assistance, they do not "surrender control entirely to counsel." McCoy v. Louisiana, 138 S. Ct. 1500, 1508, 200 L. Ed. 2d 821 (2018); *see* Gannett Co. v. DePasquale, 443 U. S. 368, 382, n. 10, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his [or her] own defense"). Even when represented by counsel, some decisions remain the sole province of the accused. [*10] McCoy, 138 S. Ct. at 1508 (citing Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)).

HN2[] In *McCoy*, the United States Supreme Court clarified "[a]utonomy to decide that the objective of the defense is to assert innocence" is one such decision. Id. at 1508. Put simply, *McCoy* stands for the proposition that when an accused unequivocally states their desire to maintain their innocence, counsel may not "steer the

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[5] The panel found appellant guilty by exceptions and substitutions, substituting 10 March 2017 for the charged date of 15 March 2017.

ship the other way." *Id. at 1509*. Notably, an accused's decision about their objective—to assert their innocence—is not the same as the attorney's strategic decisions regarding how best to achieve appellant's objective, and trial management remains the purview of counsel. *Id. at 1508* (citing *Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017)*).

HN3[] Because a client's autonomy to assert her innocence stems from the "fundamental legal principle that a defendant must be allowed to make his [or her] own choices about the proper way to protect his [or her] own liberty," when an attorney violates this autonomy, a structural error occurs. *Id. at 1511* (citations omitted); *Weaver, 137 S. Ct. at 1908*. Accordingly, if a court determines an appellant's autonomy was violated, that appellant need not show prejudice to be entitled to relief. *McKaskle v. Wiggins, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)*; *McCoy, 138 S. Ct. at 1510-11* ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence" and do not test [*11] for prejudice).

McCoy's holding, however, did not directly address the question of whether an attorney violates an accused's autonomy when the attorney merely concedes certain elements of the crime.[6] ***HN4***[] However, subsequent federal court decisions interpreting *McCoy* clarify an attorney may, as a strategic decision, effectuate a client's overall objective of acquittal by conceding certain elements of a crime, while still contesting others. *United States v. Rosemond, 958 F.3d 111, 123 (2d Cir. 2020)* (petition for cert. denied, *141 S. Ct. 1057, 208 L. Ed. 2d 524 (2021)*). "Conceding an element of a crime while contesting the other elements falls within the ambit of trial strategy." *Id. at 122* (citing *United States v. Jones, 482 F.3d 60, 76-77 (2d Cir. 2006)* (finding it was objectively reasonable for an attorney to admit his client shot the victim but argue the shooting was unrelated to a drug conspiracy); *see* *United States v. Arena, 180 F.3d 380, 397 (2d Cir. 1999)* (referring to a decision not to dispute an element as "sound trial strategy")); *see also* *United States v. Holloway, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019)* (defendant's right to autonomy was not violated when attorney and defendant had "strategic disputes" about how to achieve same goal); *United States v. Audette, 923 F.3d 1227, 1236 (9th Cir. 2019)* (defendant's right to autonomy was not violated because he disagreed with his attorney about "which arguments to advance" but his attorney still asserted his innocence); *Thompson v. United States, 791 F.App'x 20, 26-27 (11th Cir. 2019)* (defendant's right to autonomy is not violated because attorney [*12] conceded some, but not all, elements of a charged crime). Accordingly, as long as attorney and client share the same objective, an attorney may make strategic concessions in pursuit of an acquittal—including conceding some elements of the crime—without running afoul of *McCoy*. *Id.* (finding such a concession resulted in "no *McCoy* violation").

HN5[] *Article 121, UCMJ*, prohibits the wrongful obtaining from the owner any money or article of value with the intent to permanently deprive. As charged here, the panel was required to find the following to convict appellant: first, that between on or about 15 March 2017 and 29 October 2018, at Fort Bliss, Texas, appellant wrongfully obtained certain property, that is, Basic Housing Allowance, from the possession of the United States Government; second, that the property belonged to the United States Government; third, that the property was of a value of more than $500; fourth, that the obtaining by the accused was with the intent permanently to deprive the United States Government of the use and benefit of the property; and fifth, that the property was military property.

HN6[] The offense of larceny requires an [*13] intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to the thief's own use. Manual for Courts-Martial, United States (2016 ed.) [MCM, 2016], pt. IV, ¶ 46.c.(1)(f)(i). ***HN7***[] A thief commits larceny by false pretenses—as was the government's theory here—when the thief makes a false representation of a past or existing fact, and the false representation is "knowingly false in the sense that it is made without a belief in its truth." MCM, 2016, pt. IV, ¶ 46.c.(1)(e).

Analysis

With this framework in mind, we turn to the question of whether appellant's counsel deprived appellant of her right to assert her innocence. The question before us

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[6] *McCoy*'s holding did not reach the issue of "strategic disputes about whether to *concede an element* of a charged offense," but was limited to "intractable disagreements about the fundamental objective of the defendant's representation." *138 S. Ct. at 1510* (emphasis added). Even the dissent acknowledged *McCoy* does not answer the question of whether it is "ever permissible for counsel to make the unilateral decision to *concede an element* of the offense charged." *Id. at 1516* (Alito, J., dissenting) (emphasis added).

requires us to first consider whether defense counsel actually conceded appellant's guilt at trial thereby depriving appellant of her autonomy to assert her innocence, or merely made a strategic decision to concede some elements of appellant's offenses but contest others in accordance with appellant's overall objective of asserting innocence. In order to determine whether defense counsel conceded guilt, we look to the elements of the charged offenses.

We agree with appellant—and it is readily [*14] apparent from the record—that her counsel conceded four of the elements of the crimes with which she was charged.[7] However, it is just as apparent to us that defense counsel did not concede the final element, but *contested* that appellant intended to permanently deprive the government of the BAH in question. By conceding the elements counsel knew were clearly and unequivocally supported by documentary evidence, counsel pursued a trial strategy focusing entirely on the singular element that mattered: whether appellant could form the requisite intent to commit larceny if she did not know she was divorced at the time she received the BAH. *Rosemond, 958 F.3d at 122-23*. This strategy allowed appellant's defense attorney to garner credibility with the fact-finder while vociferously maintaining the government could not meet the required proof on the single contested element—thereby necessitating an acquittal to the whole offense.[8]

But the corpus of appellant's argument is that even if trial defense counsel did not *outright* concede appellant's guilt on opening, she effectively did so because she advanced an erroneous view of the law, thereby admitting a culpable *mens rea*.[9] In support of [*15] this assertion, appellant asks this court to focus on several statements defense counsel made in opening statements. Specifically, appellant asks us to determine defense counsel's statement that the question before the panel was not whether appellant should have known about the divorce, but whether appellant had actual knowledge of the divorce, was a tacit admission appellant deliberately avoided finding out about the divorce.[10]

Here, the government could meet its burden to show appellant had the required knowledge to form the intent to steal BAH in one of two ways. The government could prove appellant had actual knowledge of the divorce. Alternatively, the government could prove appellant "deliberately and consciously" avoided learning she was divorced.[11] *United States v. Brown, 50 M.J. 262, 265-66 (C.A.A.F. 1999)*; *see McDonald, 57 M.J. at 22*; *see also United States v. Adeniji, 31 F.3d 58, 62 (2d Cir. 1994)* (quoting *United States v. DiTommaso, 817 F.2d 201, 218 n.26 (2d Cir. 1987)* ("The rationale for the conscious avoidance doctrine is that 'a defendant's affirmative efforts to "see no evil" and "hear no evil" do not

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[7] We note trial defense counsel made no reference to whether the BAH in question was military property, or whether BAH is property of the United States Government. However, given that neither issue was seriously contested at this trial, it is readily apparent from the record before us that when counsel conceded appellant received BAH to which she was not entitled, she also conceded appellant received military property belonging to the United States Government.

[8] Notably, on the first of the two charged offenses, this strategy appears to have worked, as the panel acquitted appellant of the first specification. Thus, because appellant's defense counsel conceded all but the intent elements of *both* offenses, the only logical conclusion is the panel *agreed with the defense counsel* that appellant did not form the requisite intent to commit larceny while stationed at JBER as the first offense alleged.

[9] In her reply brief, appellant asserts her counsel "also admitted to the act of wrongfully receiving entitlements." This statement is both misleading and wholly unsupported by the record. While defense counsel did admit "there's no dispute that [appellant] received entitlements to which she was not entitled," this statement is a far cry from admitting the payments were *wrongfully* received. This is especially apparent given defense counsel told the panel in her very next statement that the government would fail to prove appellant formed the requisite intent to commit larceny.

[10] As a preliminary matter, we note as did our superior court stated in *United States v. Larson*, the trial defense counsel's opening "did not relieve the Government of its burden of proof, inject new factual matters into the trial, or stand as the legal equivalent of a confession." *66 M.J. 212, 218 (C.A.A.F. 2008)*. Yet even if it was possible for defense counsel's opening statement to have been "equivalent to a confession," we would still find, as we do below, that defense counsel did not concede a culpable *mens rea*.

[11] Despite her objections at trial, appellant does not now challenge the deliberate avoidance instruction the military judge provided. In fact, the premise of appellant's ineffective assistance argument, discussed below, is that her counsel was ineffective because she did not know the law on deliberate avoidance. As such, it appears appellant and the government agree on the propriety of the deliberate avoidance instruction provided by the military judge.

somehow magically invest [her] with the ability to "do no evil."""). The deliberate and conscious decision to avoid knowledge of the divorce could not, as the military judge properly instructed, be proven through "mere negligence, [*16] foolishness, or even stupidity on the part of [appellant]." *Brown, 50 M.J. at 266*. (citing *United States v. Mari, 47 F.3d 782, 785 (6th Cir. 1995))*.

Accordingly, defense counsel's opening statement to the panel that the question before them was "[n]ot should [appellant] have known, not were there opportunities for [appellant]to know. It's did [appellant] know," was not a concession. Read in the context of the entirety of defense counsel's opening statement—and the balance of their actions at trial—it is clear defense counsel conceded neither that appellant actually knew she was divorced, nor that appellant "deliberately and consciously" avoided learning she was divorced.

We draw this conclusion for two reasons. First, defense counsel bracketed her opening statement by asking the panel to pay attention to the states of mind of everyone involved in the case. The majority of this opening focused on the confusion surrounding appellant and ex-husband's marital status, to include the confusion caused by caregiver's entry into the situation. Yet even though the majority of the opening focused on appellant's actual knowledge of the divorce, defense counsel continually wove in plausible reasons *why* appellant did not have actual knowledge—and none of these reasons were [*17] that appellant "purposely contrived to avoid learning" she was divorced. *Brown, 50 M.J. at 266* (quoting *United States v. Lara-Velasquez, 919 F.2d 946, 951 (5th Cir. 1990))*.

Second, the central thrust of appellant's defense was that she actually made attempts to determine whether she was divorced, including both calling the Pierce County courthouse and maintaining contact with ex-husband over time. Accordingly, defense vociferously asserted that while appellant's actions may have been less than ideal, they were a far cry from deliberate actions to bury her head in the sand. *Id.* (referring to the deliberate avoidance instruction as the "ostrich" instruction).

Importantly, appellant's sworn affidavit submitted to this court does not actually conflict with defense counsel's opening statement or trial strategy. There, appellant asserts she "wanted [her] attorneys to say that [she] did not *know* the divorce went through." (emphasis added). Appellant asserts her counsel instead pursued a "trial strategy which [she] was opposed [to]," and she "did not know [her defense attorneys] were going to admit [she] was divorced and did not earn the money or basically say [she] was dumb."

Appellant's affidavit clarifies that defense counsel's concessions did not actually conflict with appellant's [*18] desired "overall objective of acquittal" or maintaining her innocence. *Rosemond, 958 F.3d at 123*; *see McCoy, 138 S. Ct. at 1508*. In fact, appellant's overall desired *strategy*—to assert she "did not *know* the divorce went through"—was the very strategy defense counsel pursued. Thus defense counsel, consistent with appellant's overall objective, contemporaneously maintained appellant's innocence and pursued a trial strategy to that end. Accordingly, we conclude defense counsel did not concede appellant's guilt, and therefore did not violate appellant's *Sixth Amendment* right to autonomy to assert her innocence or run afoul of *McCoy. 138 S. Ct. at 1508*.

2. Ineffective Assistance of Counsel

Next, we turn to appellant's personal assertion that even if her defense counsel did not violate her *Sixth Amendment* right to autonomy, she still received ineffective assistance of counsel. Appellant asserts this is so because her counsel failed to understand the law surrounding deliberate avoidance. Again, we disagree.

Law

HN8[⬆] We review ineffective assistance of counsel claims de novo. *United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015)*; *United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012)*. "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain, 75 M.J. 99, 103 (C.A.A.F. 2016)* (citing *Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))*. We may address these [*19] prongs in any order because appellant must satisfy both prongs to prevail. *United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010)* (citations omitted).

HN9[⬆] To establish her counsel's deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Strickland, 466 U.S. at 687*. In evaluating performance, courts "must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id. at 689*. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001)*.

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland, 466 U.S. at 687*. Appellant must show "'a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different.'" *Captain, 75 M.J. at 103* (quoting *Strickland, 466 U.S. at 694*). "'It is not enough to show that the errors had some conceivable effect on the outcome . . .'" *Captain, 75 M.J. at 103* (citations omitted); *see also United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005)* ("[A]ppellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice" (citations [*20] omitted)).

Analysis

Appellant asserts her defense counsel were ineffective because they "did not research the law which clearly applied to appellant," and therefore missed that under *McDonald*, "deliberate avoidance of knowledge of facts suffices to meet the *mens rea* element of larceny."[12] We agree with appellant that defense counsel's erroneous statement that *McDonald "*did not discuss deliberate avoidance instruction" indicates defense counsel did not comprehend the import of *McDonald* to appellant's case. However, we need not decide whether defense counsel's understanding of *McDonald* led to deficient performance because we can easily conclude that even if defense counsel did not know the holding of *McDonald*, and were unaware a deliberate avoidance instruction was appropriate in appellant's case, their lack of understanding of the state of the law did not prejudice appellant.

We draw this conclusion because deliberate avoidance was only one of two ways the government could meet the knowledge requirement in appellant's case. The other, as we discuss above, was that appellant had *actual* knowledge she was divorced after 10 March 2017. Our review of the record reveals the evidence supporting [*21] appellant's actual knowledge of her divorce after 10 March 2017 was overwhelming. The government presented testimony from both ex-husband and caregiver that they told appellant she was divorced, and they verified as much through the court system. Furthermore, appellant—with her own eyes—observed that ex-husband and caregiver were married when she stayed with ex-husband and caregiver during her PCS to Fort Bliss and observed them living together as a married couple, wearing wedding bands and displaying wedding photographs in the marital home. Additionally, the fact appellant began, as early as 2017, holding herself out as single only strengthens the evidence that she knew she was actually divorced. In light of these multiple pieces of damning evidence, we cannot conclude that had defense counsel properly apprehended *McDonald*'s holding, the result at trial would have been any different. *Captain, 75 M.J. at 103*. As a result, even assuming deficiency, appellant has not met her burden to show there is a "reasonable probability that the factfinder would have had a reasonable doubt respecting appellant's guilt" absent the error. *United States v. Larson, 66 M.J. 212, 219 (C.A.A.F. 2008)*.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the [*22] sentence are AFFIRMED.

Senior Judge BURTON and Judge FLEMING concur.

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[12] Appellant also claims her counsel were ineffective because they failed to interview certain witnesses prior to trial, and admitted culpability in their opening statement. We have reviewed these additional ineffective assistance of counsel claims and find they merit neither discussion nor relief.

Maxwell v. Clarke

United States District Court for the Western District of Virginia, Roanoke Division

June 13, 2013, Decided; June 13, 2013, Filed

Civil Action No. 7:12cv00477

Reporter
2013 U.S. Dist. LEXIS 83461 *; 2013 WL 2902833

BRADLEY MAXWELL, Plaintiff, v. HAROLD CLARKE, et al., Defendants.

Subsequent History: Affirmed by *Maxwell v. Clarke, 2013 U.S. App. LEXIS 19836 (4th Cir. Va., Sept. 27, 2013)*

Prior History: *Maxwell v. Clarke, 2012 U.S. Dist. LEXIS 160541 (W.D. Va., Nov. 8, 2012)*

Core Terms

segregation, grooming, inmate, defendants', offenders, alleges, summary judgment motion, confinement, hair, Disciplinary, prison, least restrictive, grievances, religious, retaliation, exercise of religion, prison official, recreation, disciplinary charges, state interest, conditions, violators, atypical, housed, compelling governmental interest, constitutional right, grievance procedure, liberty interest, demonstrating, deprivation

Counsel: [*1] Bradley Maxwell, Plaintiff, Pro se, Big Stone Gap, VA.

For Harold Clarke, James Parks, George Hinkle, Gregory Halloway, David Zook, R.C. Mathena, Dennis Collins, T. Farris, B.D. Collins, J.W. Carico, C.L. Stacy, R.C. Williams, H.R. Hensley, M. Counts, Brenda Ravizer, Defendants: Kate Elizabeth Dwyre, LEAD ATTORNEY, Office of the Attorney General, Richmond, VA.

Judges: Hon. Jackson L. Kiser, Senior United States District Judge.

Opinion by: Jackson L. Kiser

Opinion

MEMORANDUM OPINION

By: Hon. Jackson L. Kiser

Senior United States District Judge

Bradley Maxwell, a Virginia inmate proceeding pro se, filed a civil rights action pursuant to *42 U.S.C. § 1983* and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") *42 U.S.C. §§ 2000cc et seq.* Maxwell names as defendants Harold Clarke, James Parks, George Hinkle, Gregory Holloway, David Zook, Dennis Collins, T. Farris, H.R. Hensley, Brenda Ravizee, J.W. Carico, B.D. Collins, C.L. Stacy, R.C. Williams, R.C. Mathena, and M. Counts. Maxwell alleges in his complaint that defendants violated his constitutional rights by initially refusing to house him in a Graduated Privilege Program ("GPP"), falsely convicting him of institutional infractions once in the GPP, and [*2] subsequently removing him from the GPP and again placing him in segregation. Maxwell further complains that housing him in segregation precludes him from practicing his religion. He concludes that defendants' acts constitute retaliation for his use of the grievance procedure and refusal to comply with the VDOC grooming policy, which would require he violate his Rastafarian faith by cutting his hair. Finally, plaintiff complains that the conditions of his confinement violate the *Eight Amendment*. This matter is presently before me on defendants' motion for summary judgment. Maxwell filed a response and the matter is now ripe for disposition. [1]

I. Facts

In considering a motion for summary judgment, a court must consider the facts and draw all reasonable

[1] Maxwell also filed requests for production of documents on April 3, 2013. However, as none of the discovery requested is relevant to the disposition of his claims, his discovery requests will be denied as moot.

inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; see also *MLC Auto., LLC, v. Town of S. Pines, 532 F.3d 269, 273 (4th Cir. 2008)*.

Maxwell alleges [*3] that his religious beliefs as a Rastafarian of the Nyahbinghi order prevent him from complying with the Operating Procedure ("OP") 864.1 grooming policy. Plaintiff attached an exhibit to his response to defendants' motion for summary judgment which explains "the dreadlocks on a Rasta's head symbolize the Rastas roots....This has also come to symbolize rebellion of the system and the 'proper' way to wear hair." (Docket No. 31-2 at 8) OP 864.1 provides, in pertinent part, that male offenders' hair will be cut no longer than above the shirt collar and around the ears, hair will not be more than one inch in thickness or depth, and any style that could conceal contraband, including dreadlocks, is not permitted. (Docket No. 26-1, p. 6)

Maxwell has refused to comply with the grooming policy since his transfer from the U.S. Virgin Islands to the Virginia Department of Corrections ("VDOC") in 2001 and has been subjected to disciplinary charges and administrative segregation as a result. [2] During pertinent time periods related to this lawsuit, Maxwell has been housed at either Wallens Ridge State Prison ("Wallens Ridge") or Red Onion State Prison ("Red Onion").

Maxwell faces restrictions in segregation that a prisoner in the general population does not. His complaint and response to the motion for summary judgment state he has five hours recreation inside an enclosed recreation area, non-contact visits, two calls monthly, three showers per week, 24 hour lights on with lights dimmed at night, 12 books and magazines and one newspaper, and no television or consumables. [3] He also claims he is not permitted to attend religious services, and is placed in handcuffs and leg irons and strip-searched each time he is removed from his cell.

In September 2010, the GPP was established specifically for offenders [*6] who are habitual violators of the grooming policy as a secure alternative permanent segregation. (Docket 26, p. 4) Prisoners in the GPP housing unit have certain additional privileges not available to segregation prisoners, including recreation in the pod with other offenders, double-cell assignments, outside recreation, television and visitation. Following the development of the GPP, Maxwell made "numerous verbal and written requests" to be placed in the program, which were denied. (Docket 1, p. 11) Maxwell was ultimately placed in the GPP housing unit on February 8, 2012. However, Maxwell was subsequently removed from the GPP and transferred to Red Onion after being found guilty of two disciplinary charges. He has since been returned to Wallens Ridge and placed in segregation. According to defendants, he was placed in segregation because it is the practice of Wallens Ridge to place offenders into segregation for 90 days "to determine whether the offender can make a stable adjustment to less restrictive housing." (Docket 26, p. 5) However, due to a possession of a weapon charge, as of March 15, 2013, the date defendants filed their motion for summary judgment, Maxwell was not currently [*7] eligible to participate in the GPP. He will be evaluated for future entry into the program at his ICA hearing, which occurs every 90 days. (Docket No. 26, p. 8)

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[2] Maxwell filed this action on October [*4] 5, 2012. Due to the 2 year statute of limitations applicable to *§ 1983* actions, all *§ 1983* claims arising prior to October 5, 2010 are time barred. See *Lewis v. Richmond City Police Dep't, 947 F.2d 733 (4th Cir. 1991)* (finding that as there is no statute of limitations for *§ 1983* violations, the state limitations period governing personal injury actions should be applied); *Va. Code Ann. § 8.01-243(a)* (establishing a two year statute of limitations for personal injury actions).

RLUIPA does not contain its own statute of limitations period. However, in 1990, Congress enacted *28 U.S.C. § 1658*, which provides a four-year statute of limitations period for federal civil actions "arising under an Act of Congress enacted after [December 1, 1990]." Thus, according to the terms of the statute, any federal civil action arising under an Act of Congress enacted after December 1, 1990, is subject to the four-year statute of limitations period contained therein.

In Couch v. Jabe, the court reasoned that, because RLUIPA was enacted in September 2000, and RLUIPA created a new right of action which the plaintiff invoked in his complaint, the four-year statute of limitations under *§ 1658* applied to plaintiff's [*5] claims brought under RLUIPA. *479 F. Supp. 2d 569, 576-577 (W.D. Va. 2006)*. Similarly, I find that a four year statute of limitations applies to Maxwell's RLUIPA claims and thus all Maxwell's RLUIPA claims arising prior to October 5, 2008 are time barred.

[3] Defendants assert in the motion for summary judgment that offenders in administrative segregation pods are allowed to watch television from their cells and may receive restricted commissary.

Plaintiff notes that prior to July 9, 2001 no visits, calls (except for lawyer calls) or education was allowed.

In his complaint, Maxwell appears to seek monetary damages and either immediate release from segregation and transfer to the GPP housing unit, or exemption from OP 864.1, which would assumedly allow him to be housed with the general population.

II. Analysis

A. Improper Processing of Institutional Grievances

Maxwell alleges that defendants have violated his constitutional rights by failing to properly process his institutional grievances. Specifically, plaintiff claims that defendant T. Farris told him "to drop numerous grievances" because he was angering correctional staff and that Brenda Ravizee denied his grievance regarding release as "repetitive" of another grievance, when it actually raised a different issue. (Docket No. 1, p. 13-14) However, inmates have no constitutionally protected right to a grievance procedure. See *Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994)*; *Blagman v. White, 112 F. Supp. 2d 534, 542 (W.D. Va. 2000)*. Therefore, Maxwell's allegations regarding defendants' alleged failure to properly process institutional [*8] grievances are not cognizable under *42 U.S.C. § 1983*. As such, defendants' motion for summary judgment must be granted regarding these claims.

B. Filing of False Charges as Retaliation

Maxwell alleges that defendant R.C. Williams issued a false charge against him for using gang signs (Disciplinary Offense Code 248), as retaliation for plaintiff's use of the grievance procedure. Plaintiff further alleges that defendants J.W. Carico and C.L. Stacy issued a false charge against him for participating or encouraging others to participate in work stoppage or a group demonstration (Disciplinary Offense Code 128), also as retaliation for plaintiff's use of the grievance procedure. Plaintiff further alleges that defendant B.D. Collins authorized both false offense codes.

To succeed on a *§ 1983* claim that prison officials retaliated against him, an inmate must show that his exercise of a constitutional right was a substantial factor motivating the retaliatory action. See *Adams, 40 F.3d at 75*. The inmate must present more than conclusory allegations of retaliation by alleging facts showing that his exercise of a constitutional right was a substantial factor motivating the retaliatory action. See, [*9] e.g., *American Civil Liberties Union v. Wicomico County, 999 F.2d 780, 785 (4th Cir. 1993)* (citing *Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)* (requiring plaintiff to show "a causal relationship between the protected expression and the retaliatory action"); *Wagner v. Wheeler, 13 F.3d 86, 90-91 (4th Cir. 1993)* (same). Mere "temporal proximity" between the inmate's protected activity and the official's allegedly retaliatory action "is simply too slender a reed on which to rest" a *§1983* retaliation claim. *Wagner, 13 F.3d at 91*. Maxwell has presented no evidence outside of his bald assertion, that the charges filed by these defendants had anything to do with this lawsuit or with any grievances that he filed. Maxwell makes no claim that R. C. Williams, C. L. Stacy, J.W . Carico, or B. D. Collins were even aware that he was filing "numerous" grievances or grievances regarding the grooming policy or the GPP. Thus, Maxwell's attempted claim fails under both parts of the constitutional standard. First, since plaintiff had no constitutional right to the jail's grievance procedure, his use of the procedure did not constitute exercise of a constitutionally [*10] protected right. Second, Maxwell fails to state any facts suggesting that the defendants' challenged actions were, in any way, motivated by his grievances. I need not accept as true plaintiff's conclusory assertion to the contrary, and a claim grounded in nothing more than unsupported assertions of retaliation is subject to summary judgment.

C. Unfair Disciplinary Hearings and Appeal

Maxwell alleges that defendants H.R. Hensley, M. Counts, Gregory Holloway, George Hinkle and R.C. Mathena violated his *Fourteenth Amendment* right to due process and his *First Amendment* right to petition the government for redress of grievances because he did not receive a fair disciplinary hearing or appeal. Specifically, Maxwell states that Hensley found him guilty of Disciplinary Offense Codes 128 and 248 based on false information and insufficient evidence. Plaintiff further claims that, on rehearing, Counts found plaintiff guilty of Disciplinary Offense Code 128 based on insufficient evidence. Finally, Maxwell states that Hinkle, Holloway and Mathena upheld the guilty verdicts on both charges based on false testimony and evidence. Maxwell claims that as a result of these disciplinary charges and rulings, [*11] he is still confined to segregation, while other grooming policy offenders who received offense reports were sent to the GPP unit.

To establish a violation of procedural due process guaranteed by the *Fourteenth Amendment*, an inmate must demonstrate a deprivation of "life, liberty, or property" by governmental action. *Beverati v. Smith, 120 F.3d 500, 502 (4th Cir.1997)*. When the punishment does not cause the original sentence to be enhanced, protected interests will be generally limited to freedom from restraint that imposes atypical and significant

hardship on the inmate in relation to the ordinary incidents of prison life. See, *Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)* (holding that disciplinary segregation did not present the type of atypical, significant deprivation in which a state might create a liberty interest). Maxwell has alleged that the disciplinary rulings caused him to be confined to segregation, instead of remaining in the GPP unit. However, because the conditions of segregation do not present an atypical hardship or enhance his sentence, Maxwell has no liberty interest in being in the GPP unit rather than in segregation. Therefore, he has no federally protected due process [*12] right here.

Moreover, Maxwell received due process protections. Under the standard established in *Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)*, an inmate is entitled to the following due process: (1) written notice of the charges at least twenty-four (24) hours in advance of the hearing; (2) a written statement by the fact finders as to the evidence relied on and reasons for disciplinary action; and (3) to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. *Id. at 564-566*. Additionally, the findings of a prison disciplinary board must be supported by some evidence in the record, *Superintendant v. Hill, 472 U.S. 445, 454-55, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985)*, and be made by an impartial adjudicator. *Wolff, 418 U.S. at 570-71*.

Here, Maxwell does not allege that he was denied the right to call and cross-examine witnesses, and the disciplinary hearing record states he submitted witness request forms, which were determined relevant and reviewed as evidence. Additionally, a review of the record reflects that the disciplinary charges were supported by some evidence. Regarding Disciplinary Offense Code 248, correctional [*13] officer Williams testified that he had a clear view of plaintiff's arms and hands and had been trained to identify gang signs. Regarding Disciplinary Offense Code 128, a copy of the letter found in plaintiff's cell by correctional officer Stacy contained directions from plaintiff on how to carry out a coordinated hunger strike. Based on the foregoing, Maxwell has not alleged any constitutional violations in connection with his disciplinary hearings, and defendants' motion for summary judgment must be granted regarding these claims.

D. Violation of the *Eighth Amendment*

Maxwell alleges that the conditions of confinement in administrative segregation constitute cruel and unusual punishment under the *Eighth Amendment*. He states his administrative segregation amounts to "punitive conditions of isolation, constant *First Amendment* deprivation [and] miniscule social connections." (Docket No. 1, p. 19) Maxwell lists the conditions of confinement as follows: five hours recreation inside an enclosed recreation area, non-contact visits, two calls monthly, three showers per week, 24 hour lights on with lights dimmed at night, 12 books and magazines and one newspaper and no television or consumables. [*14] He also states he is not permitted to attend religious services and is placed in handcuffs and leg irons each time he is removed from his cell.

"The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*. The *Eighth Amendment's* prohibition on cruel and unusual punishment requires that prison officials provide humane conditions of confinement. Prison officials must "ensure that inmates receive adequate food, clothing, shelter, and medical care, and ... 'take reasonable measures to guarantee the safety of the inmates.'" Id. (quoting *Hudson v. Palmer, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)*). Thus, a plaintiff must describe an objectively serious deprivation of a basic human need and that a prison official was deliberately indifferent to an inmate's health or safety to state a violation of the *Eighth Amendment*. *Id. at 834*; *Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir. 1993)*. Deliberate indifference requires a state actor to have been personally aware of facts indicating a substantial risk of serious harm, and the actor must have actually recognized the existence of such a risk. *Id. at 838*. "Deliberate indifference [*15] may be demonstrated by either actual intent or reckless disregard." *Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990)*.

None of Maxwell's claims state a violation of the *Eighth Amendment*. Maxwell does not allege any significant physical or emotional injury resulting from any challenged condition. See *Strickler, 989 F.2d at 1381* (requiring an inmate to produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions to succeed on an *Eighth Amendment* claim). Plaintiff also does not allege an objectively serious deprivation of a basic human need. Accordingly, Maxwell fails to state a violation of the *Eighth Amendment* and defendants' motion for summary judgment must be granted regarding these claims.

E. Free Exercise of Religion under RLUIPA

Maxwell claims that defendants' actions in denying him an exemption from OP 864.1 and confining him to segregation for violation of the policy violated his right to the free exercise of his religion under RLUIPA. Maxwell states that confinement to segregation precludes him from practicing his religion, including group prayer. RLUIPA provides that "[n]o government shall impose a substantial burden on the [*16] religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability," *42 U.S.C. § 2000cc-1(a)*, unless it demonstrates that, the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Id.; *Lovelace v. Lee, 472 F.3d 174, 189 (4th Cir. 2006)*. Thus, to state a prima facie case under RLUIPA, Maxwell must demonstrate that the challenged practice substantially burdens his exercise of religion. If he is successful, the burden of persuasion shifts to the government to prove that the burden on religious exercise is the least restrictive means of furthering a compelling state interest. While Congress mandated that RLUIPA be construed "in favor of broad protection of religious exercise," *42 U.S.C. § 2000cc-3(g)*, the Supreme Court has also determined that lawmakers intended courts to "apply RLUIPA's standards with due deference to the experience and expertise of prison and jail administrators." *Cutter v. Wilkinson, 544 U.S. 709, 723, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005)*.

For purposes of this motion, I assume that the grooming policy, which confines [*17] Maxwell to segregation without permission to attend religious services for his refusal to cut his hair, substantially burdens the Maxwell's religious beliefs. Defendants state in their memorandum in support of defendants' motion for summary judgment that, "[t]he VDOC does not contest that its actions place a substantial burden on Plaintiff's religious exercise." (Docket No. 26) This position is supported by similar cases. See, e.g., *Couch v. Jabe, 679 F.3d 197, 200 (4th Cir. 2012)* (concluding that placing a prisoner in segregation for a religiously-motivated violation of VDOC's grooming policy constitutes a substantial burden under RLUIPA). There is no dispute about the religious motivation for Maxwell's refusal to cut his hair and defendants have not questioned Maxwell's sincerity. Therefore, I conclude that Maxwell has stated a prima facie case.

(1) Compelling State Interest

The burden of persuasion now shifts to the defendants to show that OP 864.1 is supported by a compelling state interest pursued by the least restrictive means. In Couch, the Fourth Circuit recently concluded that OP 864.1 [4] satisfied the RLUIPA compelling state interest test because the proffered explanation "connected [*18] the Policy's restrictions to specific health and security concerns and showed that those concerns are furthered by the Policy." *679 F.3d at 202*. [5] The explanation given by the defendants in the present case is largely identical to the explanation provided to the Fourth Circuit in *Couch, 679 F.3d at 202*. Defendants argue they have a compelling governmental interest in promoting safety, security, health, sanitation and establishing uniform grooming standards for offenders:

> The VDOC implemented its grooming policy to facilitate the identification of offenders, to promote safety, security, sanitation, and to establish uniform grooming standards for offenders in VDOC facilities. Allowing offenders to have hair styles that do not comply with this policy poses a security risk for other inmates and staff because offenders can use certain hairstyles to hide contraband, including weapons or other items prohibited in VDOC facilities. Left unregulated, inmates can also use their hair to identify with gangs, which poses a security risk, or to quickly change appearance; the latter being very important in the event of an attempted or actual escape. Furthermore, the health and safety of inmates is [*19] increased by promoting better hygiene.

(Docket No. 26, pp. 16-17) I find that OP 864.1's requirement that prisoners either cut their hair to a certain length and style, or be housed in segregation, satisfies the RLUIPA compelling state interest test. See *Couch, 679 F.3d at 202* citing *Jova v. Smith, 582 F.3d 410, 416 (2d Cir. 2009)* (finding a compelling interest based on "affidavits and exhibits which showed that the restrictions imposed . . . were justified by powerful security and administrative interests"); also citing

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[4] VDOC's policy has been revised with regard to beard length since the Couch decision, however, according to the defendants, the policy has not been changed with regard to hair length and styles permitted. Thus, the revision does not affect the compelling state interest finding.

[5] In Couch, the petitioner was challenging a policy which prohibited [*20] him from growing a beard, not regarding hair length. However, the compelling state interest analysis regarding the grooming policy is virtually identical.

DeMoss v. Crain, 636 F.3d 145, 153-54 (5th Cir. 2011) (per curiam) (finding no clear error in district court's conclusion at bench trial that grooming policy furthered compelling interests within a prison based on security concerns such as easy identification, gang affiliation, and the ability to conceal contraband within a beard).

(2) Least Restrictive Means

The prison officials must also establish that the grooming policy's provisions regarding hair length and segregation for violators are the least restrictive means of furthering the compelling governmental interests that they identify. See 42 U.S.C. § 2000cc-1(a)(2). "RLUIPA adopts a . . . strict scrutiny" standard. Lovelace, 472 F.3d at 198 n.8; see also Vision Church v. Vill. of Long Grove, 468 F.3d 975, 996 (7th Cir. 2006) ("RLUIPA provide[s] that, if a facially-neutral law . . . imposes a substantial burden on religion, it is subject to strict scrutiny.").

However, RLUIPA was not intended to "elevate accommodation of religious observances over an institution's need to maintain order and safety." Cutter, 544 U.S. at 722; Lovelace, 472 F.3d at 190. The Supreme Court has noted that its' "decisions indicate that an accommodation must be measured so that it does not override other significant interests" and thereby run afoul of the Establishment Clause. Id. Therefore, in analyzing whether a particular regulation [*21] is the least restrictive means of furthering the government's compelling security interest, the reviewing court must avoid "substituting its judgment in place of the experience and expertise of prison officials." Hoevenaar v. Lazaroff, 422 F.3d 366, 370 (6th Cir. 2006) ("In conducting an analysis of whether the regulation in issue was the least restrictive means of furthering the government's compelling security interest, the district court did just what the Supreme Court and Congress have warned against: substituting its judgment in place of the experience and expertise of prison officials."). Moreover, prison administrators do not have to refute every conceivable option to satisfy the least restrictive means prong of [RLUIPA]. Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir.1996) (applying RFRA); accord Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 41 n. 11 (1st Cir. 2007) (suggesting that "to meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives, and their rejection should generally be accompanied by some measure of explanation") (applying RLUIPA); see also Couch, 679 F.3d at 203 (The court stated it "required that the [*22] government, consistent with the RLUIPA statutory scheme, acknowledge and give some consideration to less restrictive alternatives.").

Maxwell does not suggest any alternative to the grooming policy, other than asking the court for an injunction to "immediately stop the enforcement of [the grooming policy] as applied to the plaintiff." (Docket No. 1, pp. 21, 25) Defendants assert that the VDOC's grooming policy is the least restrictive means available to further the government's compelling state interest in promoting safety, security, health and sanitation and in establishing uniform grooming standards for offenders. In Ragland v. Angelone the VDOC grooming policy regarding hair length and style and the segregation of violators, was upheld in the face of a challenge under RLUIPA. *420 F.Supp.2d 507 (W.D. Va. 2006)* (Turk, J.), affd, *Ragland v. Powell, 193 Fed. Appx. 218 (4th Cir. 2006)* (unpublished), cert. denied, *Ragland v. Powell, 549 U.S. 1306, 127 S. Ct. 1877, 167 L. Ed. 2d 366 (March 26, 2007)*. Similar to Maxwell, the plaintiff in Ragland was of the Rastafarian religion, Nyahbinghi Order, and refused to cut his hair, resulting in his assignment to segregation. *Id. at 510*. At that time, the GPP had not yet been instituted [*23] and the VDOC grooming policy provided that inmates who refused to comply remained assigned to segregation until full compliance. [6] The court, noting that Ragland retained his right to practice his religious belief that his hair and beard not be cut, "defer[ed] to prison officials' judgment in crafting segregation restrictions so as to control as effectively as possible the difficult segregation population." *Id. at 519*. Maxwell, during his entire period

[6] Subsequent to the decision in Ragland, in September 2010, the VDOC developed the GPP to maintain grooming policy violators in a secure environment without all the restrictions of segregation status. However, entry into the program is not guaranteed, or instantaneous. Offenders who violate OP 864.1 are placed into segregation for one year, where their behavior is monitored and their status is reviewed every 90 days. At the end of the year, if an offender still refuses to comply with the grooming policy, but has consistently complied with other prison rules and regulations, the offender may be placed into GPP. Defendants state that the one-year segregation period tests [*24] the sincerity of prisoner's beliefs and contains the cost of running the GPP pod, which requires extra security. While Ragland does not address the one-year segregation period, it does hold that prisoners who violate the grooming policy may be held in segregation indefinitely. Thus, a less restrictive option of alternative housing for grooming policy violators would certainly pass constitutional muster. Moreover, plaintiff does not specifically challenge the one-year waiting period under RLUIPA. His Equal Protection claim regarding entry into the GPP is addressed below.

with the VDOC since 2001, has also not been forced to cut his hair.

In the instant case, beyond simply asking for an "exemption" from the grooming policy, plaintiff does not describe any manner in which VDOC could except him from the policy, based on his religious beliefs, without incurring additional security risks. Moreover, defendants have explained that, among other risks, allowing offenders to have hairstyles that do not comply with OP 864.1 allows them to hide contraband, including weapons and change their appearance quickly, which poses a security risk in the event of escape. (Docket No. 26-1, Aff. R. Mathena) The provisions of the grooming policy which defendants have enforced [*25] against Maxwell, that he will be housed in segregation unless he cuts his hair, have been upheld. Thus, I find that these provisions of the grooming policy are the least restrictive means of furthering the compelling governmental interests identified.

For these reasons, I find defendants' motion for summary judgment should be granted regarding plaintiff's RLUIPA claims.

F. Free Exercise of Religion under the *First Amendment*

Maxwell also raises claims challenging the grooming policy on *First Amendment* grounds. In comparison to RLUIPA's strict scrutiny standard, the court applies a "rational means" test when evaluating *First Amendment* Free Exercise claims. Under this test, the government bears the burden of demonstrating only that the regulation is "reasonably related to legitimate penological interests." *Hines v. S.C. Dep't of Corr., 148 F.3d 353, 358 (4th Cir. 1998)* (citing *O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-53, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987)*). This is a less demanding standard than RLUIPA. Therefore, if the grooming policy survives scrutiny under RLUIPA, it necessarily also passes muster under the *First Amendment's* rational means test. See *Charles v. Frank, 101 Fed. App'x 634, 635 (7th Cir. 2004)*; [*26] see also *Lovelace, 472 F.3d at 199-200* ("[T]he *First Amendment* affords less protection to inmate's free exercise rights than does RLUIPA."). Because I find that VDOC's grooming policy satisfies RLUIPA's strict scrutiny standard, I also find it satisfies scrutiny under the *First Amendment*. Accordingly, I grant the defendants' motion for summary judgment on this claim as well.

G. Equal Protection Claim Regarding Access to Graduated Privilege Program

Maxwell alleges defendants denied him access to the GPP at Keen Mountain Correctional Center and Wallens Ridge in violation of his Equal Protection rights. The *Equal Protection Clause of the Fourteenth Amendment* provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The *Equal Protection Clause* . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*; *Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 818 (4th Cir. 1995)*. To succeed on this claim, Maxwell "'must first demonstrate that he has been treated differently from others with whom he is similarly situated [*27] and that the unequal treatment was the result of intentional or purposeful discrimination.' If he makes this showing, 'the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny.'" *Veney v. Wyche, 293 F.3d 726, 730-31 (4th Cir. 2002)* (quoting *Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001)*). In a prison context, this level of scrutiny is "whether the disparate treatment is 'reasonably related to [any] legitimate penological interests.'" *Veney, 293 F.3d at 732* (quoting *Shaw v. Murphy, 532 U.S. 223, 225, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001)*).

All that supports Maxwell's Equal Protection claim is his unsubstantiated assertion that VDOC officials, including defendants Clarke, Parks, Hinkle, Holloway, Zook, Collins and Farris, are discriminating against him. Maxwell claims that "a few institutions" transferred OP 864.1 offenders to the GPP in November 2010; however, despite his repeated requests to be placed in the GPP when it began in 2010, he was not placed in the program until February 2012. Maxwell also claims that he "is still confined to segregation while other 864.1 offenders whom receive offense reports was sent to the 864.1 GPP unit." (Docket [*28] No. 1, p. 18) He does not identify these alleged other offenders, or provide any details regarding their disciplinary charges, beyond stating they were placed in the GPP unit two months after a "133 offense." (Docket No. 31) Maxwell has offered no evidence, statistical or otherwise, to show that he is similarly situated to the offenders transferred in November 2010, or those prisoners currently in the GPP, or that discrimination motivates his exclusion from the program. To avoid summary judgment, Maxwell must set forth "specific, non-conclusory factual allegations that establish improper motive." *Williams v. Hansen, 326 F.3d 569, 584 (4th Cir. 2003)*; see also *White v. Boyle, 538 F.2d 1077, 1079 (4th Cir. 1976)*

(conclusory allegations insufficient to avoid summary judgment). Indeed, the evidence is that Maxwell was placed in the GPP housing unit on February 8, 2012, where he remained for two months before being found guilty of disciplinary charges that resulted in his removal from the GPP and transfer to Red Onion. (Docket No. 26, p. 8) Due to a weapons charge while at Red Onion, Maxwell is not currently eligible to participate in the GPP. However, he will be evaluated at his Institutional [*29] Classification Authority hearing, which takes place every 90 days, for future entry into the program. (Docket No. 26, p. 3,8,9) Because Maxwell has submitted nothing more than conclusory allegations regarding discrimination, I will grant the defendants' motion for summary judgment on his Equal Protection claim.

H. Due Process Claim Regarding Access to the GPP

Maxwell claims that defendants' arbitrary application of OP 864.1 violates his due process rights, "imposing atypical and significant hardships in relation to the ordinary incidents of prison life." (Docket No. 1, p. 19) Ostensibly, Maxwell attempts to invoke due process protections afforded by the *Fourteenth Amendment*, but he may not state a claim by relying on buzzwords, labels, or conclusions. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Moreover, when a defendant is lawfully convicted and confined to prison, he loses a significant interest in his liberty for the period of the sentence. *Gaston v. Taylor, 946 F.2d 340, 343 (4th Cir. 1991)*. Inmates have no protected liberty interest in being housed in any particular prison or in a prison with less restrictive conditions. *Meachum v. Fano, 427 U.S. 215, 224-25, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976)*("The [*30] conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons."). To state a claim that he has a protected liberty interest related to long-term administrative confinement, an inmate must first allege facts demonstrating that conditions to which he is subject in that confinement status constitute an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin, 515 U.S. at 484*. Maxwell has not alleged any facts demonstrating this. See, e.g., *Beverati, 120 F.3d at 503* (holding that administrative segregation for six months with vermin; human waste; flooded toilet; unbearable heat; cold food; dirty clothing, linens, and bedding; longer periods in cell; no outside recreation; no educational or religious services; and less food was not so atypical as to impose significant hardship); *Sandin, 515 U.S. at 486-87* (holding custodial classifications do not create a major disruption in a prisoner's environment). To the extent plaintiff alleges that his placement in segregation violates his federal due process rights, his allegations are without merit. Thus, I will grant the defendants' [*31] motion for summary judgment on Maxwell's due process claim.

III. Conclusion

For the reasons stated above, I grant the defendants' motion for summary judgment on all of plaintiff's claims.

The Clerk of the Court is directed to send copies of this memorandum opinion and the accompanying order to the plaintiff.

ENTER: This 13th day of June, 2013.

/s/ Jackson L. Kiser

Senior United States District Judge

FINAL ORDER

By: Hon. Jackson L. Kiser

Senior United States District Judge

In accordance with the memorandum opinion entered this day, it is hereby **ADJUDGED AND ORDERED** that defendants' motion for summary judgment is **GRANTED** and the action is hereby stricken from the active docket of the court. Plaintiff's motion for reconsideration of this court's order entered November 8, 2012 is **DENIED** as moot.

The Clerk is directed to send copies of this order and the accompanying memorandum opinion to the plaintiff and to counsel of record for the defendants.

ENTER: This 13th day of June, 2013.

/s/ Jackson L. Kiser

Senior United States District Judge

Tashbook v. Petrucci

United States District Court for the Southern District of New York

April 22, 2021, Decided; April 22, 2021, Filed

20 Civ. 5318 (KMK)(PED)

Reporter
2021 U.S. Dist. LEXIS 255382 *

ROBERT TASHBOOK, Petitioner, -against- WARDEN JAMES PETRUCCI, Respondent.

Subsequent History: Adopted by, Request denied by, Certificate of appealability denied, Writ of habeas corpus denied *Tashbook v. Petrucci, 2022 U.S. Dist. LEXIS 54386 (S.D.N.Y., Mar. 25, 2022)*

Prior History: *Tashbook v. Petrucci, 2020 U.S. Dist. LEXIS 132634 (S.D.N.Y., July 23, 2020)*

Core Terms

exhaust, quarantine, administrative remedy, moot, inmate, recommend, confinement, grievance, argues, respectfully, conditions, cessation, quotation, alleges, marks, staff

Counsel: [*1] Robert Tashbook, Petitioner, Pro se, Otisville, NY.

Judges: PAUL E. DAVISON, UNITED STATES MAGISTRATE JUDGE. HONORABLE KENNETH M. KARAS, United States District Judge.

Opinion by: PAUL E. DAVISON

Opinion

REPORT AND RECOMMENDATION

TO THE HONORABLE KENNETH M. KARAS, United States District Judge:

I. INTRODUCTION

On or about July 1, 2020, *pro se* petitioner Robert Tashbook filed the instant habeas petition seeking to be released "either from prison or from the restrictive conditions [he is] being housed under." Dkt. #1. Petitioner, a federal inmate currently housed by the Federal Bureau of Prisons ("BOP") at FCI Otisville, alleges he was placed in quarantine on June 16, 2020 based upon a suspicion that he had been exposed to Covid-19. *Id.* According to petitioner, he and his cellmate tested negative, and staff confirmed that no one in petitioner's housing unit or in his work crew tested positive for the virus. *Id.* Nonetheless, petitioner alleges, he remains in quarantine with no release date. *Id.* Petitioner asserts that the conditions on the quarantine unit are "akin to solitary confinement" in that he is denied access to educational, recreational and religious programming. *Id.*[1] Petitioner also alleges that his job in food [*2] services was given to another inmate. *Id.*

On September 9, 2020, respondent filed an opposition wherein he argues that the instant petition should be denied because: (1) petitioner has been released to the general population and, therefore, the petition is moot; and (2) petitioner failed to exhaust administrative remedies. Dkt. #12. This matter is before me pursuant to an Order of Reference dated July 27, 2020. Dkt. #6. For the reasons set forth below, I respectfully recommend that Your Honor deny the petition in its

[1] Because petitioner is clearly challenging the manner in which his sentence is being executed (with respect to conditions of confinement) rather than his underlying conviction, his habeas petition is governed by *28 U.S.C. § 2241*. *See Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 632 (2d Cir. 2001)* ("A writ of habeas corpus under *§ 2241* is available to a federal prisoner who does not challenge the legality of his sentence, but challenges instead its execution subsequent to his conviction."). *See also Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008)* ("This court has long interpreted *§ 2241* as applying to challenges to the execution of a federal sentence, "including such matters as the administration of parole, . . . prison disciplinary actions, prison transfers, type of detention and prison conditions.") (citation omitted).

entirety.

II. MOOTNESS

"To satisfy the Constitution's case-or-controversy requirement, a party must, at each stage of the litigation, have an actual injury which is likely to be redressed by a favorable judicial decision." *Janakievski v. Exec. Dir., Rochester Psych. Ctr., 955 F.3d 314, 319 (2d Cir. 2020)*. "If, as a result of changed circumstances, a case that presented an actual redressable injury at the time it was filed ceases to involve such an injury, it ceases to fall within a federal court's Article III subject matter jurisdiction and must be dismissed for mootness." *Id.*

Respondent asserts that petitioner was released from the Quarantine Unit on July 17, 2020 and, since then, has been housed in the general population. Dkt. #12, at 5.[2] Thus, respondent [*3] contends, the instant petition is moot because petitioner is no longer subjected to the complained-of conditions on the Quarantine Unit. *Id.* at 6-7.[3] In reply, petitioner argues that this Court should not dismiss his case as moot under two exceptions to mootness: (1) the "capable of repetition, yet evading review" exception, and (2) the voluntary cessation exception. Dkt. No. 19 at 3-7.

A dispute qualifies for the "capable of repetition, yet evading review" exception only "if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540, 200 L. Ed. 2d 792 (2018)* (quotation marks and citation omitted). With respect to the first prong, petitioner alleges that he was released from quarantine nine days after he filed the instant action. Dkt. #36 at 4. With respect to the second prong, petitioner asserts: (1) Assistant Warden for Operations (Ms. Elmore), in the presence of the Chief Psychologist (Dr. Davis), told petitioner he "was still subject to an extended stay in the Quarantine Unit at any time and for any reason"; (2) inmates and staff at [*4] FCI Otisville are still testing positive for Covid-19; and (3) as a result, petitioner is reasonably likely to be subjected to quarantine again. *Id.* at 6-7. Under the circumstances, in light of the ongoing Covid-19 pandemic, it appears reasonably likely that petitioner could again be quarantined and subsequently released therefrom—perhaps multiple times—without an opportunity to fully litigate his contention that the BOP's quarantine policy, on its face and/or as applied, is unconstitutional.

For the same reason, under the voluntary cessation exception, petitioner's release from quarantine does not moot his claim. "The voluntary cessation of allegedly illegal activities will usually render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 603 (2d Cir. 2016)* (quotation marks and citation omitted). "A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Id. at 603-04* (emphasis [*5] in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*). Here, defendant has not met his "formidable burden" of showing that it is "absolutely clear" that petitioner would not be subjected to Covid-19 quarantine again.

Accordingly, I conclude and respectfully recommend that petitioner's claim is not moot under either the "capable of repetition, yet evading review" exception or the voluntary cessation exception.[4]

III. EXHAUSTION

A petitioner seeking relief pursuant to *§ 2241* must exhaust his or her administrative remedies. *See Carmona, 243 F.3d at 634*. "Although not required by the Prison Litigation Reform Act, *42 U.S.C. § 1997e(a)*,

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[2] All citations to docket entries herein reflect ECF pagination.

[3] As respondent notes, petitioner has not proffered any basis for his alternative request to be released from prison; he challenges only the conditions—not the fact—of his confinement.

[4] Petitioner also asserts that a live case-or-controversy exists because he continues to suffer collateral injuries (including the loss of his food service job). Dkt. #36, at 3. Respondent avers that petitioner did *not* lose his food service position, and proffers the Declaration of Robert Scheffler (Executive Assistant/Camp Administrator at FCI Otisville) in support of this assertion. Dkt. #12, at 5; Dkt. #14, ¶ 8. However, it is unnecessary to resolve this factual dispute for purposes of determining the mootness issue because petitioner's claim is ripe pursuant to the exceptions discussed above.

section 2241 exhaustion is the analogue of the exhaustion of state remedies requirement for a state prisoner seeking federal habeas review, and the results governing failure to take this path should be the same." Goodall v. Von Blanckensee, No. 17 Civ. 3615, 2019 U.S. Dist. LEXIS 121898, 2019 WL 8165002, at *4 (S.D.N.Y. July 19, 2019) (quotation marks and citations omitted), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 38727, 2020 WL 1082565 (S.D.N.Y. Mar. 5, 2020).[5] Accordingly, federal inmates who seek to challenge the conditions of their confinement must first utilize the BOP's Administrative Remedy Program ("the Program"). *See* Chi v. Fernandez, No. 18 Civ. 1212, 2019 U.S. Dist. LEXIS 217193, 2019 WL 6894837, at *5 (N.D.N.Y. Dec. 18, 2019); *see also* Rosenthal v. Killian, 667 F. Supp.2d 364, 366 (S.D.N.Y. 2009) (citing 28 C.F.R. §§ 542.10-542.19). Exhaustion requires completion of the Program's four steps. *See* Rosenthal, 667 F. Supp.2d at 366. First, the inmate must attempt to informally resolve the issue by raising it with prison staff. 28 C,F,R, § 542.13(a). Second, if [*6] the issue is not resolved informally, the inmate must submit "a formal written Administrative Remedy Request on the appropriate form (BP-9)" to the designated staff member at the facility. *Id.* § 542.14(a). Third, if the formal request is denied by the Warden, the inmate must appeal to the appropriate BOP Regional Director. *Id.* § 542.15(a). Fourth, the inmate must appeal an unfavorable decision at the regional level to the BOP's General Counsel. *Id.*

"When . . . legitimate circumstances beyond the prisoner's control preclude him from fully pursuing his administrative remedies," failure to exhaust may be excused by a showing of "cause and prejudice." Carmona, 243 F.3d at 634. "Generally, cause can be shown when: (1) 'available remedies provide no genuine opportunity for adequate relief'; (2) 'irreparable injury may occur without immediate judicial relief'; (3) 'administrative appeal would be futile'; and (4) 'in certain instances a plaintiff has raised a substantial constitutional question.'" Hodge v. United States (BOP), No. 20 Civ. 10474, 2021 U.S. Dist. LEXIS 34616, 2021 WL 738707, at *3 (S.D.N.Y. Feb. 24, 2021) (quoting Guitard v. U.S. Sec'y of Navy, 967 F.2d 737, 741 (2d Cir. 1992)).

Here, respondent contends that the instant petition should be dismissed on the ground that petitioner failed to exhaust his administrative remedies. Dkt. #12, at 5-6. Petitioner admits that he did not fully exhaust via the Program, [*7] but argues: (1) the exhaustion requirement has been waived in Covid-19 cases because of the irreparable harm which may occur absent immediate judicial relief; (2) administrative appeal would be futile; and (3) administrative remedies were unavailable. Dkt. #36, at 7-9.

As to petitioner's allegation of irreparable harm, "[w]here a delay poses a serious threat to the inmate's health and safety, the court may waive the exhaustion requirement." Dov v. Bureau of Prisons, No. 20 Civ. 4343, 2020 U.S. Dist. LEXIS 120649, 2020 WL 3869107, at *5 (S.D.N.Y. July 9, 2020). Indeed, as petitioner suggests, at least one court has excused prisoners from exhausting § 2241 claims alleging that the fact of their confinement in prison during the Covid-19 pandemic amounts to an Eighth Amendment violation because their medical histories place them in grave danger. *See* Martinez-Brooks v. Easter, 459 F. Supp.3d 411, 433-34, 437-38 (D. Conn. 2020). Here, however, as stated above, petitioner challenges only the conditions—not the fact—of his confinement. He complains that he was unjustifiably confined to the quarantine unit, where he was denied access to educational, recreational and religious programs, and that he lost his food services position as a result of his time in quarantine. More to the point, petitioner does *not* allege that the *fact* of his confinement violates his constitutional rights because the current health [*8] conditions at the facility expose him to a high risk of contracting Covid-19. In other words, petitioner does not demonstrate that he would likely suffer irreparable harm (*i.e.* a serious threat to his health and safety) if he were required to exhaust his administrative remedies before seeking relief in this Court.

Petitioner also alleges that administrative appeal would be futile because: (1) when he entered quarantine on June 23rd , he met with Warden Petrucci who promised petitioner that he would be released by June 29th ; (2) on June 29th , during a suicide risk assessment, administrators (including Mr. Schreffler) assured petitioner that he would promptly be retested and released upon confirmation of a negative test — certainly no later than July 6th ; and (3) despite representations to the contrary, petitioner was not released at the time he filed the instant action on July 1st . Dkt. #36, at 8. Thus, petitioner argues: "It would be absurd to suggest that I needed to file a BP-9 appeal to

[5] Copies of all unpublished cases available only in electronic form cited in this Report and Recommendation have been mailed to petitioner. *See* Lebron v. Sanders, 557 F.3d 76, 78 (2d Cir. 2009).

the Warden through Admin. Remedy Coordinator Mr. Schreffler when they were the people who reneged on their promises." *Id.* To be sure, petitioner's conversation with the Warden constituted fulfillment [*9] of the Program's step one requirement (an attempt at informal resolution). However, petitioner proffers no evidence that the Warden was aware that petitioner had not been released on June 29th . Thus, a formal written appeal to the Warden (as required at the Program's step two) would have given him an opportunity to rectify the situation. Nonetheless, petitioner argues that he had no obligation to file a step two formal written appeal because the Warden granted him relief at step one but reneged on his promise. Dkt. #36, at 7-8. Petitioner is correct, to a point: "Where prison regulations fail to provide a remedy for implementation failures, prisoners who receive a favorable outcome to their initial grievance that remains unimplemented have fully exhausted their available remedies." *Dickinson v. York, 828 F. App'x 780, 784 (2d Cir. 2020)* (quoting *Ruggiero v. County of Orange, 467 F.3d 170, 176 (2d Cir. 2006)*). However, there is a reasonable likelihood that petitioner will again be quarantined pursuant to Covid-19 protocols at FCI Otisville. And it is for this reason that petitioner's claim is not moot. Yet, petitioner never challenged FCI Otisville's quarantine policy and protocols via the BOP's Program. In other words, a formal grievance would have allowed prison officials to reconsider their Covid-19 [*10] quarantine policy. Thus, plaintiff did have available administrative remedies and was required to exhaust them. *See Ruggiero, 467 F3d at 177*.

Finally, petitioner argues that administrative remedies were unavailable because prison staff acknowledged his request for grievance forms but failed to provide them. However, "a denial of grievance forms does not, in itself, make administrative remedies unavailable." *Gottesfeld v. Anderson, No. 18 Civ. 10836, 2020 U.S. Dist. LEXIS 40638, 2020 WL 1082590, at *8 (S.D.N.Y. Mar. 6, 2020)* (quotation marks and citation omitted). More specifically, " [a] correctional facility's failure to make grievance forms available does not relieve a prisoner from the obligation to undertake reasonable efforts to properly exhaust." *Id.* (quotation marks and citation omitted); *cf. Cruz v. Lee, No. 14 Civ. 4870, 2016 U.S. Dist. LEXIS 33337, 2016 WL 1060330, at *5 (S.D.N.Y. Mar. 15, 2016)* (failure to exhaust was excused where plaintiff had been denied access to grievance procedures but made reasonable efforts to exhaust by writing a letter to his counselor, speaking to a mental health professional and writing to the Superintendent); *O'Connor v. Featherston, No. 01 Civ. 3251, 2002 U.S. Dist. LEXIS 7570, 2002 WL 818085, at *2-3 (S.D.N.Y. Apr. 29, 2002)* (reasonable attempt to exhaust found where plaintiff, whose requests for forms had been denied, wrote letters, filed and appealed a FOIA request and made several other inquiries). Here, petitioner proffers no evidence that he undertook "reasonable efforts" to administratively grieve [*11] his claim. Therefore, his "failure to exhaust cannot be excused on the basis that remedies were unavailable to him." *Evans v. Aramark Food, No. 14 Civ. 6469, 2016 U.S. Dist. LEXIS 57418, 2016 WL 1746060, at *3 (S.D.N.Y. Apr. 28, 2016)*.

Accordingly, I conclude and respectfully recommend that petitioner failed to exhaust his administrative remedies.

IV. CONCLUSION

For the reasons set forth above, I conclude—and respectfully recommend that Your Honor should conclude—that the instant petition for a writ of habeas corpus should be denied in its entirety. Further, because the Petition was brought under *28 U.S.C. § 2241*, a certificate of appealability is not required for petitioner to appeal the denial of his Petition. *See Drax v. Reno, 338 F.3d 98, 106 n.12 (2d Cir. 2003)* (holding that the Antiterrorism and Effective Death Penalty Act's certificate of appealability requirement does not apply to *§ 2241* petitions). However, to the extent one is required, I recommend that no certificate of appealability be issued because reasonable jurists would not find it debatable that petitioner has failed to demonstrate by a substantial showing that he was denied a constitutional right. *See 28 U.S.C. § 2253(c)*; *Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*.

Dated: April 22, 2021

White Plains, New York

Respectfully Submitted,

/s/ Paul E. Davison

PAUL E. DAVISON, U.S.M.J.

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United States v. Witt

United States Air Force Court of Criminal Appeals

November 19, 2021, Decided

No. ACM 36785 (reh)

Reporter
2021 CCA LEXIS 625 *; 2021 WL 5411080

UNITED STATES, Appellee v. Andrew P. WITT, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Witt, 82 M.J. 193, 2022 CAAF LEXIS 45, 2022 WL 510370 (C.A.A.F., Jan. 14, 2022)*

Motion granted by *United States v. Witt, 82 M.J. 196, 2022 CAAF LEXIS 67, 2022 WL 514730 (C.A.A.F., Jan. 18, 2022)*

Motion granted by *United States v. Witt, 82 M.J. 225, 2022 CAAF LEXIS 112, 2022 WL 705914 (C.A.A.F., Feb. 3, 2022)*

Motion granted by *United States v. Witt, 82 M.J. 274, 2022 CAAF LEXIS 223 (C.A.A.F., Mar. 21, 2022)*

Motion granted by *United States v. Witt, 2022 CAAF LEXIS 254, 2022 WL 1492543 (C.A.A.F., Apr. 1, 2022)*

Motion granted by *United States v. Witt, 2022 CAAF LEXIS 255 (C.A.A.F., Apr. 1, 2022)*

Review granted by *United States v. Witt, 2022 CAAF LEXIS 467, 2022 WL 3215437 (C.A.A.F., July 7, 2022)*

Motion granted by *United States v. Witt, 2022 CAAF LEXIS 636 (C.A.A.F., Sept. 7, 2022)*

Prior History: Appeal from the United States Air Force Trial Judiciary. Military Judge: Mark A. Bridges, U.S. Army (sentence rehearing).[1] [*1] Approved sentence: Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. Sentence adjudged 6 July 2018 by GCM convened at Robert Dole Federal Courthouse, Kansas City, Kansas.

United States v. Witt, 75 M.J. 380, 2016 CAAF LEXIS 576 (C.A.A.F., July 19, 2016)

Core Terms

military, trial counsel, sentence, questions, trial defense counsel, skirt, voir dire, death penalty, slides, cross-examination, court-martial, answered, questionnaire, mitigation, matters, convening, instructions, inmates, confinement, prison, risk assessment, automatically, Disciplinary, challenges, processing, assigned, objected, parties, argues, prosecutorial misconduct

Case Summary

Overview
HOLDINGS: [1]-The court did not err by not granting the defense's challenge of a member because the member agreed during voir dire to weigh a law enforcement officer's testimony the same as he would any other witness's testimony; [2]-The court did not err by not granting the defense's challenge of a member because at no time during voir dire did the member suggest she would automatically vote for the death penalty; rather, she said that based solely on the charges—without knowing more—she would probably be leaning more towards the death penalty, but she also said that was not necessarily automatic; [3]-Appellant's speedy trial rights were not violated because he did not suffer from oppressive incarceration, he had not asked for a rehearing, he had not asserted any grounds for appeal had been impaired.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

[1] An Army military judge was detailed to this case due to the fact the Chief Trial Judge of the Air Force had been detailed as trial counsel at Appellant's initial court-martial.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Prosecutorial Misconduct

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Prosecutorial Misconduct

HN1 **Plain Error, Definition of Plain Error**

An appellate court reviews claims of prosecutorial misconduct de novo; when no objection is made at trial, the error is forfeited, and the appellate court reviews for plain error. Under the plain error standard, such error occurs when: (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.

Criminal Law & Procedure > Counsel > Prosecutors

HN2 **Counsel, Prosecutors**

Trial prosecutorial misconduct is behavior by the prosecuting attorney that overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN3 **Voir Dire, Judicial Discretion**

Military judges have discretion in controlling the nature and scope of voir dire. Rule for Courts-Martial (R.C.M.) 912(d), Discussion. Generally, the procedures for voir dire are within the discretion of the trial judge. A military judge may permit counsel for the parties to conduct voir dire, or the military judge may conduct the examination him-or herself. R.C.M. 912(d). Military judges may also supplement questions asked by counsel. Limitations placed by a military judge on the voir dire process are reviewed for abuse of discretion. Military judges' decisions amount to abuses of discretion if their findings of fact are clearly erroneous, their decisions were influenced by an erroneous view of the law, or their decisions are outside the range of choices reasonably arising from the applicable facts and the law.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Right to Unbiased Jury

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

HN4 **Bias & Prejudice, Right to Unbiased Jury**

An accused has the right to an impartial and unbiased panel. A person detailed to a court-martial shall be excused whenever it appears he or she should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. R.C.M. 912(f)(1)(N). Such is the case when a person has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

R.C.M. 912(f)(1)(N. Potential court-martial members are subject to challenges for cause under actual bias and implied bias theories. Under the former, the question is whether the member personally holds a bias which will not yield to the military judge's instructions and the evidence presented at trial. Claims that a military judge erred with respect to challenges alleging actual bias are reviewed for an abuse of discretion.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5 **Judges, Challenges to Judges**

The analysis of implied bias is, considering the totality of the circumstances and assuming the public is familiar with the military justice system, whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high. Review of implied bias challenges is more deferential than de novo review, but less deferential than abuse of discretion. Implied bias, however, should be invoked sparingly.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN6 **Judges, Challenges to Judges**

When an accused challenges members for cause, the military judge is required to liberally grant such challenges. Reasons for this include the fact that peremptory challenges in the military justice system are far more constrained than in the civilian criminal justice arena, as well as convening authorities' broad discretion to detail members to courts-martial. Challenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations. Military judges who squarely address the liberal grant mandate on the record are given greater deference on appeal than those who do not.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Capital Cases

Criminal Law & Procedure > ... > Challenges to Jury Venire > Death Penalty > Tests for Excusal of Juror

Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN7 **Bias & Impartiality, Capital Cases**

An inelastic opinion regarding the appropriate punishment is grounds for an actual-bias challenge, while a mere predisposition to adjudge some punishment upon conviction is not, standing alone, sufficient to disqualify a member. Rather the test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions. When a potential member in a death-penalty case has expressed views on capital punishment, the standard for a causal challenge of that member is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Thus, a member who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN8 **Courts Martial, Court-Martial Member Panel**

The burden in establishing the grounds for the challenge of a member lies with the party making the challenge. R.C.M. 912(f)(3). When a basis for challenge is first raised on appeal, an appellate court reviews such claims for plain error.

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Number of Challenges

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

HN9 **Peremptory Challenges, Number of Challenges**

Although a common feature of criminal trials, peremptory challenges are not guaranteed by the United States Constitution. In courts-martial, an accused and the Government are entitled initially to one peremptory challenge of the members of the court under Article 41(b)(1), UCMJ, 10 U.S.C.S. § 841(b)(1). If challenges for cause reduce the court below the required minimum number of members, as occurred here, peremptory challenges are not exercised until additional members are detailed to the court. Article 41(a)(2), UCMJ, 10 U.S.C.S. § 841(a)(2). If, however, a peremptory challenge results in the court having insufficient members, then the parties may exercise another peremptory challenge against later-detailed members. Articles 41(b)(2) and 41(c), UCMJ, 10 U.S.C.S. §§ 841(b)(2), 841(c). Notwithstanding this statutory scheme, a military judge has discretion to grant additional peremptory challenges, and indeed has a duty to do so when necessary to ensure a fair trial. The denial of additional challenges is reviewed for abuse of discretion.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Capital Cases

Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

Criminal Law & Procedure > ... > Challenges to Jury Venire > Death Penalty > Tests for Excusal of Juror

HN10 **Bias & Impartiality, Capital Cases**

An accused facing the death penalty is entitled to attempt, through voir dire, to identify which prospective members have already determined whether or not to impose the death penalty prior to being presented with the evidence.

Criminal Law & Procedure > Counsel > Right to Counsel > Capital Cases

HN11 **Right to Counsel, Capital Cases**

An accused is entitled—at least in capital cases—to pose more specific questions to members beyond simply asking whether they will follow the law.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN12 **Capital Punishment, Aggravating Circumstances**

In order to obtain the death penalty, the Government must prove, beyond a reasonable doubt, the presence of at least one aggravating factor. R.C.M. 1004(c).

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts

Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN13 **Sentences, Deliberations, Instructions & Voting**

A military judge's decision to admit evidence is reviewed under the abuse of discretion standard. Relevant evidence is generally admissible, and evidence is relevant when it has the tendency to make a fact of consequence more or less probable. Mil. R. Evid. 401 and 402. Under R.C.M. 1001, the Government may present evidence in aggravation during the sentencing portion of an accused's court-martial. Evidence in aggravation includes that which pertains to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty and includes such matters as the psychological impact of the accused's offenses on a victim. R.C.M. 1001(b)(4). This rule requires the prerequisite showing that an accused caused a specific harm, which imposes a higher standard than mere relevance.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN14 **Relevance, Confusion, Prejudice & Waste of Time**

Evidence qualifying under R.C.M. 1001(b)(4) must also pass muster under Mil. R. Evid. 403. Under that rule, a military judge may exclude evidence if its probative value is substantially outweighed by such considerations as its tendency to result in unfair prejudice, confuse the issues, or mislead the members. A military judge has wide discretion in applying Mil. R. Evid. 403, and the appellate court exercises great restraint in reviewing such applications when the military judge articulates his or her reasoning on the record.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN15 **Capital Punishment, Aggravating Circumstances**

In order to adjudge the death penalty, the members must not only find the existence of one of the aggravating factors under R.C.M. 1004(c), they must also concur that any extenuating or mitigating circumstances in the case are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4). R.C.M. 1004(b)(4)(C).

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN16 **De Novo Review, Jury Instructions**

When an appellant preserves an allegation of error with respect to a military judge's instructions, the appellate court reviews the adequacy of those instructions de

novo. Military judges have wide discretion in fashioning instructions, but those instructions must provide an accurate, complete, and intelligible statement of the law.

HN17[] Res gestae evidence—evidence which is part and parcel of an offense—is generally admissible insofar as it enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation.

HN18[] Counsel may test a witness's opinion regarding the character of another person by asking have you heard or are you aware type questions which refer to specific instances of conduct—as long as there is a good faith basis for asking the question, and the question is otherwise permissible under the rules of evidence.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN19[] Courts Martial, Court-Martial Member Panel

Unless there is evidence to the contrary, an appellate court will presume court members follow the instructions they are given by the military judge.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN20[] Relevance, Confusion, Prejudice & Waste of Time

Under Mil. R. Evid. 702, expert witnesses may testify in the form of an opinion or otherwise. In doing so, expert witnesses may base their opinions on facts or data reasonably relied upon by experts in the particular field, even if such facts or data are not otherwise admissible. Mil. R. Evid. 703. Subject to the military judge's weighing of the probative value and the prejudicial impact of otherwise inadmissible matters, a party may cross-examine an expert witness regarding such matters in order to help members evaluate the witness's opinion. Mil. R. Evid. 703 and 705.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN21[] Standards of Review, Abuse of Discretion

An appellate court utilizes the abuse of discretion standard in reviewing the military judge's decision to permit trial counsel to use the slides as a demonstrative aid.

Criminal Law & Procedure > Trials > Judicial Discretion

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN22[] Trials, Judicial Discretion

It is within the military judge's discretion to permit trial counsel to test the opinion of an expert witness with not just un-admitted matters, but with matters which are inadmissible in their own right.

Criminal Law & Procedure > Trials > Jury Instructions > Limiting Instructions

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN23 **Jury Instructions, Limiting Instructions**

Military judges should give a limiting instruction when otherwise inadmissible information is used to cross-examine an expert to limit the likelihood that members will treat the information as evidence. When, however, an expert is asked about otherwise admissible information—such as matters contained in a learned treatise—that information is available for the factfinder to use for the truth of the matter asserted. Mil. R. Evid. 803(18).

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN24 **Evidence, Evidentiary Rulings**

The scope of and limits on cross-examination are within a military judge's discretion. An appellate court reviews a military judge's decision to admit evidence which is adduced through cross-examination for an abuse of discretion.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN25 **Courts Martial, Court-Martial Member Panel**

Military judges are advised to provide limiting instructions explaining how the members may consider such questions.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Prosecutorial Misconduct

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Prosecutorial Misconduct

Criminal Law & Procedure > ... > Reviewability > Waiver > Prosecutorial Misconduct

HN26 **Preservation for Review, Prosecutorial Misconduct**

An appellate court reviews claims of prosecutorial misconduct and improper argument de novo; when no objection is made at trial, the error is forfeited, and the appellate court reviews for plain error.

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN27 **Closing Arguments, Inflammatory Statements**

In presenting argument, trial counsel may argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence. Trial counsel may strike hard blows, but he is not at liberty to strike foul ones. Trial counsel commits error by making arguments that unduly inflame the passions or prejudices of the court members. With respect to sentencing arguments,

courts must be confident an appellant was sentenced on the basis of the evidence alone. Impermissible vouching occurs when the trial counsel places the prestige of the government behind a witness through personal assurances of the witness's veracity. In assessing the impact of improper sentencing argument on an appellant's substantial rights in the absence of an objection, the appellate court asks whether the outcome would have been different without the error.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN28[] **Effective Assistance of Counsel, Trials**

It is improper for a trial counsel to attempt to win favor with the members by maligning defense counsel.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

HN29[] **Criminal Process, Assistance of Counsel**

An appellant is entitled to competent appellate representation. An appellant does not have the right to select the attorney to represent him on appeal unless he provides that attorney.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN30[] **Procedural Due Process, Scope of Protection**

An appellate court reviews de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. There is a presumption of facially unreasonable delay when the convening authority does not take action within 120 days of sentencing, and when the Court of Criminal Appeals does not render a decision within 18 months of docketing. Where there is such a delay, the appellate court examines four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN31[] **Procedural Due Process, Scope of Protection**

Where an appellant has not shown prejudice from a speedy trial delay, there is no due process violation unless the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. There are three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing.

Counsel: For Appellant: Major Amanda E. Dermady, USAF; Mark C. Bruegger, Esquire; Brian L. Mizer, Esquire.

For Appellee: Lieutenant Colonel Amanda L.K. Linares, USAF; Lieuten-ant Colonel Matthew J. Neil, USAF; Lieutenant Colonel Dayle P. Percle, USAF; Major Alex B. Coberly, USAF; Major Kelsey B. Shust, USAF; Major Zachary T. West, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, KEY, and RICHARDSON, Appellate Military Judges. Senior Judge KEY delivered

the opinion of the court, in which Chief Judge JOHNSON and Judge RICHARDSON joined.

Opinion by: KEY

Opinion

KEY, Senior Judge:

I. Background

Seventeen years ago, in the early morning hours of 5 July 2004, Appellant murdered Senior Airman (SrA) AS and SrA AS's wife, Ms. JS, with a knife. Appellant attempted to murder another Airman, SrA JK, who survived despite suffering grievous wounds [*2] inflicted at Appellant's hands. Later that day, Appellant was apprehended by military law enforcement, and he subsequently confessed to the offenses. Appellant was charged with two specifications of premeditated murder and one specification of attempted premeditated murder, in violation of Articles 118 and 80, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 918*, *880*.[2] These specifications were referred as capital to a general court-martial, and just over a year after his attack, Appellant was found guilty of all three offenses and sentenced to death.

In August 2013—eight years after Appellant was sentenced—this court completed its *Article 66, UCMJ, 10 U.S.C. § 866*, review of Appellant's court-martial, affirming the findings of guilt but setting aside his sentence. *United States v. Witt, 72 M.J. 727 (A.F. Ct. Crim. App. 2013)* (en banc). Several of the judges assigned to the court did not participate in the opinion because they had joined the court after oral arguments had been heard but before the opinion was released. The court found Appellant's trial defense team deficient for not adequately investigating certain aspects of Appellant's case, including: the potential impact his motorcycle accident four months before the murders may have had on his mental [*3] processes; Appellant's mother's history of psychiatric issues and Appellant sharing, in part, the same diagnosis she had received; and the fact Appellant had expressed significant remorse for his conduct to a deputy sheriff tasked with guarding and escorting Appellant. Two judges dissenting in part agreed trial defense counsel were deficient but determined Appellant had not shown he was prejudiced. In setting aside Appellant's sentence, the court returned the case to The Judge Advocate General for remand to the convening authority with authorization for a rehearing on sentence. *Id. at 775*.

Once this court's opinion was published, the Government petitioned the court to reconsider it, and the court agreed to do so. In June 2014, the court issued a new opinion mirroring the views of the two dissenting judges in the first opinion. *United States v. Witt, 73 M.J. 738 (A.F. Ct. Crim. App. 2014)* (en banc). Importantly, three of the judges who declined to participate in the first opinion did participate in the second opinion. The effect of this new opinion was to affirm Appellant's originally adjudged death sentence. Two years later, however, the United States Court of Appeals for the Armed Forces (CAAF) concluded the three judges who declined to participate in [*4] the first opinion were disqualified from later participation in Appellant's case, and the fact they participated in the second opinion constituted error. *United States v. Witt, 75 M.J. 380 (C.A.A.F. 2016)*. The CAAF vacated the second opinion and returned the case for a sentence rehearing in accordance with this court's 2013 opinion. *Id. at 385*.

Despite Appellant's entreaties that his case be re-referred as non-capital, the convening authority signed a capital re-referral in January 2017. Appellant's sentencing rehearing was conducted over 35 days spread throughout the next year and a half, resulting in a 53-volume record of trial for the resentencing alone. On 6 July 2018, officer and enlisted members sentenced Appellant to confinement for life without eligibility for parole, along with a dishonorable discharge, forfeiture of all pay and allowances, reduction to the grade of E-1 and a reprimand. Appellant's case is now before us for the third time as we consider the 23 issues he raises with respect to his sentence rehearing, nine of which he raises personally pursuant to *United States v. Grostefon, 12 M.J. 431 1982)*.[3]

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[2] Unless otherwise noted, all references in this opinion to the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.), which was the version in effect at the time of Appellant's rehearing. The relevant punitive articles in this edition of the *Manual* are substantially the same as those in effect at the time of Appellant's offenses.

[3] The assignments of error (AOEs) raised through counsel, as well as the issues personally raised by Appellant pursuant to

II. Discussion

A. Issues Summarily Resolved

Appellant raises seven issues specific to capital punishment procedures under the Uniform Code of Military Justice (UCMJ).[4] We have [*5] carefully considered those issues and conclude that, because Appellant is no longer facing the death penalty, none of these issues warrants relief and we do not address them in this opinion. *See* United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987).[5]

Appellant also requests relief for cumulative error, but since we do not find a number of errors such that their combination would warrant relief, we do not analyze this allegation any further.[6]

Appellant has identified two minor errors in the court-martial order.[7] The Government concedes the errors and we direct corrective action in our decretal paragraph. Appellant invites us to reduce his sentence to life with eligibility for parole as a "stiff rebuke" of the Government's errors. After considering Appellant's arguments and the Government's response, we have determined that ordering a correction is the appropriate remedy.

B. Member Selection

Appellant was sentenced by a 12-member panel consisting of officer and enlisted members. Prior to the sentencing rehearing, the parties agreed to a lengthy questionnaire which the military judge directed each prospective member to complete and return.[8] At the rehearing itself, the military judge conducted initial voir dire of the members as a group. [*6] The parties did not conduct any group voir dire; instead they conducted voir dire of each member individually.

Appellant raises five issues on appeal with respect to the selection of the members who served on his court-martial. Appellant personally raises the following four issues: (1) trial counsel committed prosecutorial misconduct by failing to timely disclose their use of a government expert as a panel-selection consultant;[9] (2) the military judge erred by failing to grant a defense request for additional peremptory challenges;[10] (3) the military judge improperly rehabilitated potential panel members during voir dire;[11] and (4) the military judge erred by allowing trial counsel to ask improper and untimely submitted questions during voir dire.[12] Through counsel, Appellant asserts the military judge erred by not granting the Defense's challenges for cause of three members who ultimately sat on his sentence rehearing: Senior Master Sergeant (SMSgt) AK, SMSgt ML, and Master Sergeant (MSgt) SC.[13] We resolve each of these issues adversely to Appellant.

1. Additional Background

a. Panel-Selection Consultants

One year before voir dire in the rehearing began, the Defense requested the [*7] convening authority appoint Mr. JG as their expert consultant in the field of jury

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Grostefon, are listed in the Appendix to this decision.

[4] *See* Appendix, AOEs I through IV, and Grostefon Issues XV, XVII, and XXIII.

[5] In the issue raised in Grostefon Issue XXIII, Appellant broadly claims the military judge erred in not giving "various defense-requested instructions" and points us to a motion and argument made at trial covering numerous proposed instructions. Nearly all of those instructions were specific to the death penalty, which we do not address in this opinion. We have carefully considered Appellant's claims regarding the other requested instructions (e.g., that the members be allowed to call each other by their first names; that the members must not make comparative judgments between the victims' families and Appellant's family; and that the military judge identify specific questions asked of certain witnesses to test their opinions) and we conclude they warrant neither discussion nor relief.

[6] *See* Appendix, AOE XIV.

[7] *See* Appendix, AOE XI.

[8] The instructions told the prospective members that they "must answer each question completely and accurately."

[9] *See* Appendix, Grostefon Issue XX.

[10] *See* Appendix, Grostefon Issue XIX.

[11] *See* Appendix, Grostefon Issue XVIII.

[12] *See* Appendix, Grostefon Issue XXI.

[13] *See* Appendix, AOE V.

consultation based upon the fact the Defense wished to use a death penalty-specific approach to voir dire known as the "Colorado Method." Just over a month later, the convening authority denied the request. The Defense then made a motion requesting the military judge compel Mr. JG's appointment, noting, *inter alia*, that the Government had arranged for the services of a "presentation expert" for trial counsel's benefit and that this expert was well versed in jury-selection psychology. During a hearing on the motion, trial counsel told the military judge the government expert would not be providing jury-consultation services and pointed to the fact the Defense already had a forensic psychologist on their team who could assist in selecting a panel. The Defense conceded their detailed psychologist was capable in providing such jury-selection assistance, and the military judge denied the Defense's motion on 17 September 2017, finding as a fact that the Government was not using a jury consultant. There is no further discussion of the matter in the trial transcript, with the exception that on 23 May 2018—the [*8] day voir dire began—trial defense counsel stated that Mr. JG was sitting at the defense table in the courtroom and that he was the Defense's jury consultant who had been appointed by the convening authority.[14]

At the conclusion of the rehearing, Appellant submitted matters in clemency identifying a number of alleged errors with respect to his court-martial, one of which was that the Government "abruptly reversed course" and granted the Defense's request for Mr. JG "[m]ere weeks before the beginning of voir dire." According to Appellant, the Government communicated this reversal at the same time it notified the Defense that the Government's presentation expert would, in fact, be assisting with the Government's voir dire. Appellant asserts he was denied the ability to make full use of Mr. JG's expertise while trial counsel "surreptitiously expand[ed]" the scope of their own expert's services. Appellant asserts trial counsel committed prosecutorial misconduct by doing so, and he proposes we reduce his sentence to life with the possibility of parole as a remedy.

[14] According to documents attached to the record of trial, the convening authority's legal office recommended on 5 April 2018 that the defense expert be appointed because "the Government has requested a jury consultant expert as well. . . ." This request was granted on 12 April 2018. The documents do not indicate what prompted the Government's change in position.

b. Peremptory Challenges

Prior to Appellant's sentencing rehearing, trial defense counsel moved the military judge to grant the Defense [*9] additional peremptory challenges. They advanced several bases for this request, such as: that the Government effectively had unlimited peremptory challenges in light of the convening authority's ability to hand-pick all the potential members from the outset; that because a panel in a capital court-martial required at least 12 members while a non-capital court-martial required only 5, Appellant should be afforded a proportional increase in the number of peremptory challenges; and that because other jurisdictions provided for a significantly larger number of peremptory challenges, so should Appellant's court-martial. The Government opposed Appellant's motion and the military judge denied the request without setting out any particular rationale.[15] In his ruling, however, the military judge advised the Defense they could request additional peremptory challenges during the voir dire process, "should the need arise," but trial defense counsel never made a subsequent request.

The court-martial was initially assembled for the rehearing on Appellant's sentence with 18 members. Immediately before voir dire began, the members took an oath which included each member swearing or affirming that they [*10] would "answer truthfully the questions concerning whether [they] should serve as a member of this court-martial." Eventually, 10 of the 18 members were excused for cause, but as discussed in greater detail below, the military judge denied defense challenges of SMSgt AK and MSgt SC.

Eight additional members were detailed to the court-martial and sworn, and three of these eight were excused based upon defense challenges. The military judge denied a defense challenge to one member—SMSgt ML. With 13 members remaining, trial counsel elected not to exercise the Government's peremptory challenge, while the Defense used its peremptory challenge to excuse one of the newly detailed members, leaving a panel of 12. The military judge commented, "So I think we have our panel. Any concerns with that?" Trial defense counsel answered, "Only those previously made in the prior motion. We don't believe it's an issue at this point." Which motion trial defense counsel was referring to is unclear.

[15] The Defense also moved the military judge to prohibit the Government from exercising its peremptory challenge, but the military judge denied that motion as well.

c. Military Judge's Questions

Prior to the sentence rehearing, the Defense made a motion to prevent the military judge from "rehabilitating" members during voir dire. The basis for the Defense's motion was rooted [*11] in the claim that members would be less can-did when questioned by a judge, and would be more likely to give the judge the answers they believed the judge would want to hear rather than their honest opinions. The Government opposed the motion, and the military judge denied it, explaining he would not attempt to "rehabilitate" members and that any questions he asked would be in an "attempt to clarify a member's answer or position on an issue."

Midway through the voir dire of the initial 18 members, trial defense counsel objected to the military judge "rehabilitating" two members when he essentially asked them if they would follow the law. The first of these two members told trial defense counsel that while she understood the Defense did not have to present any evidence, if they wanted her to vote for a less severe punishment, the Defense would need to "help [her] understand." The military judge later asked that member to clarify whether or not she would automatically vote for the death penalty if the Defense put on no evidence. The member explained it was the Defense's right not to offer any evidence, and that she would still consider any mitigating or extenuating evidence, regardless [*12] of its source. The military judge asked the second member about his response to an item on his questionnaire, in which the member indicated the death penalty was the only appropriate punishment for killing more than one person. The member replied, "I believe so, yes. I think I also gave a verbal description afterwards as if—maybe as more middle-of-the-road answer instead of checking both boxes."[16] The military judge said, "I just want to make sure that—what your answer is to this and that is, do you believe that the death penalty is the only appropriate punishment for somebody who kills more than one person?" The member answered, "No." The military judge also asked the member if he would be willing to consider all the evidence and apply the law before deciding whether death was an appropriate punishment; the member said he would.

Trial defense counsel argued that the military judge was conducting "improper rehabilitation" by effectively asking the members if they would follow the law. The military judge said he disagreed with that view, and voir dire resumed. The two members trial defense counsel asserted had been improperly rehabilitated were ultimately excused for cause.

The root of the Defense's objection lay in trial defense counsel's overall voir dire strategy, which was to uncover the members' perspectives—primarily with respect to the death penalty—untainted by any explanation or guidance given by the military judge. As trial defense counsel explained to the military judge at one point, "We need to have the ability to go into their substantial beliefs, their core beliefs, what they value, what they don't value." This led to a series of defense voir dire questions posed in hypothetical terms, some of which called upon the members to "pretend we're just in a coffee shop, just chatting" and to disclose their "personal feelings on things." In light of this strategy, the Defense lodged periodic objections when the military judge or trial counsel would ask the members whether they would follow the law or not, [*14] under the theory that doing so interfered with the Defense being able to determine what the members "really" believed. As trial defense counsel explained to the military judge,

> We're in this avenue in which they've been told by the [c]ourt, they've been told by [trial counsel] and in this case told by the [c]ourt again, "You must consider everything." So when we ask them, can you consider something, the answer is automatically a rote response of, "I can consider that."
>
> . . . .
>
> . . . Before the members are even allowed to tell us their core beliefs the [c]ourt is telling them this is the law.

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[16] This item on the questionnaire, Question 105, contained four subparts calling for the person filling out the questionnaire to check either "yes" or "no" for each. Question 105 then asked "please explain," followed by five blank lines. The entire question reads as follows:

> Do you personally believe that death (and not confinement for life either with or without the possibility of parole) is the only appropriate punishment for a person who: [1] Intentionally kills another human being? [2] Intentionally kills more than one other person? [3] Intentionally kills another person with a knife? [4] Does all of the above? Please explain. [*13]

The member marked "yes" for the second and fourth subparts and wrote the following in the "explain" area: "With out [sic] details as to what may or may not have led to one killing another intentionally, it would be hard to give it a blanket yes. However if you intentionally killed several individuals with a knife it would be more of a yes than a no."

Trial defense counsel explained they were not contesting the authority of the court to ask such questions, but rather the timing of the questions: "So when it's occurring in the middle of the voir dire by the [D]efense it hampers our abilities to get to their personal opinions . . . because they're parroting back the [c]ourt's words, I can consider, I can consider, I can consider."

Regarding the objections the Defense made to questions posed by the military judge under the above theory, all but one of these members were subsequently excused and did not sit on Appellant's court-martial. The one member [*15] who did ultimately participate in Appellant's rehearing was SMSgt AK, whom trial defense counsel asked how he felt when someone "use[s] their background as a—as a way to maybe get away with something or reduce their culpability." SMSgt AK answered, "It's hard to describe how I feel about something I've not really experienced so um, I just think it's distasteful." When asked why he thought that, SMSgt AK said, "Dishonest." Trial defense counsel then sought to ask SMSgt AK whether or not "genetics, upbringing, circumstances of birth" would need to relate to the crime before SMSgt AK would consider them in determining an appropriate punishment, but trial counsel objected. Without ruling on the objection, the military judge engaged in the following colloquy with SMSgt AK:

> MJ [Military Judge]: Well, let me—let me tell you this Senior Master Sergeant, that is—as you've been told you are expected as a member to consider all of the evidence right? And then once you've considered it all determine what it means to you, how much weight you're going to give it, right?
> MBR [SMSgt AK]: Yes, sir.
> MJ: So you are expected to consider any evidence that's presented to you. Do you understand that?
>
> MBR: Yes, [*16] sir.
> MJ: Do you have the ability to do that?
> [Trial defense counsel]: Sir—Your Honor, I'm sorry. I just want to put on the record that we object to this per our previous motion.
> MJ: Do you have any problem in doing that?
> MBR: No, sir.
> MJ: Okay. So you can consider any evidence that's presented to you?
> MBR: Yes, sir.
> MJ: All right. So I think that counsel's question then is going to go to whether or not you can consider specific pieces of evidence, okay?
> MBR: Yes, sir.
> MJ: All right. You may continue.

Trial defense counsel then told SMSgt AK,

> I just want to make sure that I'm being clear with what I'm going at because a lot of the questions are: Can you follow the law? Can you follow the law? And I want to start a step back from that of just, what are your feelings? What do you think? How do you believe? And then, you know, depending on your answer we can certainly go back, you know, the judge—like the judge just did.

Trial defense counsel asked SMSgt AK about whether "genetics or upbringing, or environmental background" would have to relate to the crime before he would consider it, and SMSgt AK said "no," and that he would consider any such information, although he was not sure how much weight [*17] he would give it.

On appeal, Appellant adopts the arguments he made at trial regarding the military judge "asking the members rehabilitative questions." Appellant highlights SMSgt AK's presence on the panel as evidence of the prejudice he suffered by virtue of these questions being asked.

d. Trial Counsel's Questions

During the interim between the voir dire of the first 18 members and the later detailing of new members, the Defense submitted a motion asking the military judge to preclude trial counsel from asking "pre-scripted questions not included in their initial anticipated voir dire submissions."

Similar to their objections to the military judge's questions, trial defense counsel argued the Government's questions merely exhorted the members to "follow the law" and, further, that the questions were not provided in advance of voir dire as required by the military judge's scheduling order. This latter claim was premised on the fact that trial counsel had been asking the members questions not appearing in the Government's proposed voir dire questions which had been submitted in advance of the rehearing. These new questions largely asked the members to commit to considering all the evidence [*18] they were presented with—whether in aggravation, extenuation, or mitigation—in deciding on an appropriate punishment and to not prematurely decide on a sentence before all the evidence was presented.[17]

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[17] The military judge earlier told the parties he wanted the proposed voir dire submissions to include questions the parties intended to ask the members either individually or in a

Trial defense counsel wrote in their motion that the Defense needed to ascertain whether the members were "truly capable of giving meaningful consideration and effect to mitigation evidence," but trial counsel's approach to voir dire "tells [the prospective members] the law and then demands that they follow the law." Thus, the Defense argued, the prospective members were merely agreeing to consider evidence because they were being told to do so, not because they were actually capable of considering or willing to consider all the evidence.

Trial counsel responded to the motion orally, arguing they were only asking the members whether they would consider the range of sentencing options available to them, whether they would consider all the evidence, and whether they would follow the military judge's instructions to do those things. To this, trial defense counsel reiterated their chief complaint that they were "not able to determine [the members'] core beliefs and whether they are capable of [*19] following the court's instructions" because trial counsel's questions had the effect of telling the members what the law required of them. The military judge denied the Defense's motion, saying he did not find "anything improper about the questions that the [G]overnment was asking." Neither the military judge nor trial counsel made reference to the Defense's claim that trial counsel had failed to follow the scheduling order.

e. Challenge of SMSgt AK

The Defense challenged SMSgt AK on three grounds: (1) that he was biased in favor of law enforcement; (2) that he would not consider all mitigation evidence;[18] and (3) that he would require the Defense to establish a nexus between mitigation evidence and the crime.[19] The Defense argued SMSgt AK had demonstrated both an actual and implied bias with respect to the first ground and an implied bias with respect to the other two.

During voir dire, trial counsel asked SMSgt AK about the fact he had indicated on his pretrial questionnaire that he was more likely to believe a witness who worked in law enforcement. In the questionnaire, SMSgt AK answered, "Yes, in general, I believe law enforcement professionals are held to a higher standard and are considered [*20] honest and trustworthy." Trial counsel then asked SMSgt AK whether he would agree to not give law enforcement officers who testified any more or less credibility "off the bat" than other witnesses. SMSgt AK said he would so agree, and in response to questions from trial counsel, he further agreed he would consider any evidence provided by law enforcement witnesses along with all the other evidence in the case and "make a judgment as to whether [that is] supported or contracted by all the other evidence that may be presented in the case." Trial defense counsel also asked about the matter, and SMSgt AK said, in part, "Though I do believe that law enforcement does have some credibility over somebody that doesn't have that kind of background but I would still have to listen to all of the information before I could apply any kind of weight." Later, the military judge asked SMSgt AK, "Do you think the fact that you assign some credibility to law enforcement officers is going to prevent you from weighing a law enforcement officer's testimony the same as you would any other witness's testimony?" SMSgt AK responded, "No, sir," and told the military judge he would use the same standards for [*21] weighing a law enforcement officer's testimony as he would any other witness. The military judge then asked if there was any doubt in his mind about that, and SMSgt AK answered, "No, sir."

With respect to mitigation evidence, Question 106 on the questionnaire asked,

> Aside from the crime, do you believe that the background and life circumstances of a person guilty of killing another should play a part in the decision as to their punishment?

SMSgt AK circled "no" and wrote, "We are all a product of our background, however we all understand right from wrong, with very few exceptions." Trial counsel pointed to this questionnaire response and asked SMSgt AK whether or not—if he was given evidence of the background and life circumstances of a person convicted of murder—he would consider that evidence. Trial counsel also asked him if he would "seriously think about the evidence before [he would] assign it any weight or value." SMSgt AK answered both questions in the affirmative. Trial counsel further asked SMSgt AK if he had any doubt whether he would be able to "seriously think about" evidence of "the accused's background, how he grew up, . . . what he was like as a kid, what his family was [*22] like." SMSgt AK responded, "I have no doubts." Trial defense counsel

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group setting. He added that he would allow the parties to "follow up on certain questions if necessary."

[18] At trial, the Defense referred to this ground as "mitigation impairment."

[19] The Defense called this "mitigation nexus."

also asked SMSgt AK to elaborate on his answer to Question 106, and SMSgt AK explained, "I think just as you're brought up you are developed as a person based on your upbringing. And I understand that. Um, your parents affect you, your school, your community makes you the person that you are."

Question 107 on the questionnaire asked members,

> Some people feel the genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime. What are your thoughts?

In response to this question, SMSgt AK wrote that he did not agree with this proposition, "unless there is a proven mental health condition associated with the issue." Trial counsel asked SMSgt AK if he would be able to consider such evidence before deciding an appropriate sentence and whether he would "agree to hear it and seriously think about it" before assigning the evidence any weight or value. To both questions, SMSgt AK said he would. Trial defense counsel asked whether "genetics, upbringing, or circumstances of birth" would have to relate to the crime before SMSgt AK would consider [*23] it, at which point trial counsel objected and the colloquy quoted in Section II(B)(1)(c), *supra*, between the military judge and SMSgt AK followed. As explained above, SMSgt AK told trial defense counsel he would consider evidence about Appellant's background and upbringing "whether it was applicable to the case or not," but that he was not sure how much weight he would give it. He added, "If it's applicable to the individual it does tie to the case. I can see that."

Trial defense counsel also asked SMSgt AK about Question 108 on the questionnaire:

> In a sentencing-only case, what kind of information do you think would be important for you in determining an appropriate sentence?

SMSgt AK wrote, "The facts as to what happened, how it played out. Are there any proven mental health issues." Trial defense counsel asked SMSgt AK what he meant, and SMSgt AK said, "Anything that would prove that the individual had some sort of mental health issue that would have contributed towards the commission of the crime." Trial defense counsel then asked if it would be "on us" to prove mental health evidence, to which SMSgt AK said, "No, ma'am. . . . It's not on your side to actually prove anything." Trial [*24] counsel objected to a follow-on defense question as confusing at which point SMSgt AK volunteered, "If it makes it any easier for you, ma'am, if it's presented it will be considered." Shortly thereafter, he added, "I know that there are mental health issues that do affect people and their decision making."

Trial defense counsel never asked SMSgt AK whether he would automatically reject evidence related to Appellant's mental health which was unconnected to the crime, and SMSgt AK never said he would.

In lodging a challenge against SMSgt AK, trial defense counsel argued SMSgt AK had said he would give greater credibility to those in law enforcement, although trial defense counsel somewhat selectively quoted SMSgt AK's answers. For example, trial defense counsel asserted SMSgt AK had said, "I do believe that law enforcement has credibility over someone who doesn't have that . . . background," but omitted the rest of his answer in which he said, "but I would still have to listen to all of the information before I could apply any kind of weight." Trial defense counsel's primary contention was that SMSgt AK had maintained he would give law enforcement witnesses' credibility more weight up [*25] until the point where the military judge "asked him whether he could follow the law."

Trial defense counsel also argued SMSgt AK had "an impairment as to mitigation and particularly an impairment as to any mitigation if it's not directly tied to the offense." As an example, trial defense counsel asserted SMSgt AK said he would consider mental health issues, but only if they had "something to do with the crime." In seeking to clarify the Defense's challenge, the military judge asked, "am I hearing you right, that the mitigation impairment and the mitigation nexus all involved mental health evidence?" Trial defense counsel answered, "Well, Your Honor, that's the most clear instance in which he responded. . . . But specifically with mental health, those are the two—the only version of mitigation that he offered but it has to be mental health that is associated with the crime." In support of this contention, trial defense counsel pointed to SMSgt AK's discussion of Question 108, to which the military judge noted it was SMSgt AK who first suggested he would consider mental health-related evidence. Trial defense counsel argued SMSgt AK was "not acknowledging that he can consider mitigation [*26] that's not connected to the crime, mental health that's not connect [sic] to the crime." At this point in their challenge, trial defense counsel shifted to a broader attack on the voir dire process, asserting they were "significantly impaired by the 30 minutes of voir dire from the [G]overnment saying, 'this is the law, this is the law, this is the law' and

this [c]ourt itself saying, 'this is the law, this is the law.'" Trial defense counsel claimed these interjections interfered with the Defense's "ability to go into [the members'] substantial beliefs, their core beliefs, what they value, what they don't value."

After some discussion about the military judge's ability to ask the members whether they will follow his instructions, the military judge denied Appellant's challenge of SMSgt AK. He noted that being more likely to believe a person who works in law enforcement might not be "universally held," but was "not an unusual view," and that SMSgt AK had said he would weigh the testimony of law enforcement witnesses "along with all the other evidence in the case and using the same standards as any other witness." The military judge found no indication SMSgt AK held "law enforcement [*27] officers in such high esteem that he's going to be unable to follow [his] instructions to use the same standards in weighing and evaluating the testimony." The military judge further determined SMSgt AK "clearly indicated that he would consider mental health issues" and told the Defense, "there is no evidence here or no indication, as you've phrased it, mitigation impairment and mitigation nexus problems with respect to mental health evidence in this case." As a result, he found no actual bias on SMSgt AK's part with respect to either law enforcement or his ability to consider mitigation evidence. The military judge also explained he found no implied bias because he did not believe "that the average member of the public, somebody watching this trial would think that [SMSgt AK] was not able to perform his duties or that [Appellant] was not getting a fair trial," and that he was denying the challenge after considering the liberal grant mandate.

f. Challenge of MSgt SC

The Defense also challenged MSgt SC, advancing three main theories: (1) that she would automatically vote to impose the death penalty; (2) that she would shift the burden of proof to the Defense; and (3) that she had a poor [*28] ability to follow directions.

In her questionnaire, MSgt SC indicated that she supported the death penalty, that she believed it should be an option in the case of "heinous" crimes, and that factors such as whether an accused showed remorse or evidence of rehabilitative potential should be considered in deciding whether to impose such a sentence. Question 92 provided respondents the opportunity to pick from seven different answers to this question:

> Which of the following statements accurately represent the way you feel about the death penalty? (Select as many or as few of the following choices as you wish.)

Of the seven options, MSgt SC chose these three:

> (1) In a case in which the accused is convicted of murder and in which the death penalty is requested, I will always vote to impose the death penalty, regardless of the facts and the law in the case.
>
> (2) I am generally in favor of the death penalty, but I would base a decision to impose it on the facts and the law in the case.
>
> (3) I am generally opposed to the death penalty, but I believe I can put aside my feelings against the death penalty and impose it if it is called for by the facts and the law in the case.

When asked by the trial counsel [*29] about her selection of the first choice during voir dire, MSgt SC answered,

> Um, I was thinking that I would be weighing all of the evidence and depending on the circumstances of the evidence then it would either be a dead set we're going to go death penalty . . . or I think there's a different avenue we can take. And so it was—it's really just—there will be a consequence or rehabilitation possibility or it could be the death penalty.

MSgt SC also said that just by hearing the nature of the charges in Appellant's case, without having heard any evidence, she "would probably be leaning more towards the death penalty. . . . I wouldn't say it's necessarily automatic." Trial counsel reminded MSgt SC that the military judge had told her she would need to consider all the sentencing options, and then asked her if she thought "the death penalty is just kind of automatic." MSgt SC answered, "Yes, in this case, the way you just asked it, it would probably be an automatic for the death penalty because I don't know anything else. . . . And it's premeditated." Trial counsel then asked MSgt SC a series of questions related to evidence offered in extenuation and mitigation before asking MSgt SC whether [*30] she could "seriously think about and give meaningful consideration to a sentence of even life with the possibility of parole for somebody who's committed two counts of premeditated murder," to which MSgt SC responded, "Absolutely." Trial counsel asked why she was so confident she could do so, and MSgt SC said, "Because you just said that we—once I get all the evidence then I'm going to do the weight factor on this . . . so therefore, all options are still available . . . until I get everything." She also told trial counsel she would

consider all sentencing options, that she could not make a decision yet because she had not heard the evidence, and that she would keep an open mind.

Trial defense counsel followed up on MSgt SC's statement about voting for the death penalty based on the charges alone, and MSgt SC explained,

> Yes, and that's—that's still the same. If I have to give a choice and there's like no evidence and that's all I got is he's been found guilty for these then yes, I would be leaning towards the death penalty. But I mean, if—I mean, that's just the way I see it. [ ] But if I have the option now to ask questions [ ] and get [ ] more information [ ] then that's going to persuade. [*31]

MSgt SC went on to explain that while the death penalty would be "seriously considered but until you get all of the evidence I can't make that determination." Trial defense counsel asked whether there were any crimes in MSgt SC's mind which automatically warranted the death penalty, and MSgt SC answered that premeditated murder is "pretty heavy," but "there's still a lot of unanswered questions and so if we're going to go on I'm making sure that we've got all of the evidence." MSgt SC later said she would consider such factors as whether a person could be rehabilitated, whether a person is suffering from mental illness, and whether a person has shown remorse in deciding whether or not the death penalty was warranted. She also agreed that the death penalty would not be appropriate if the Government could not establish evidence in aggravation substantially outweighing mitigation evidence, that she would give meaningful consideration to all the evidence before deciding on a punishment, and that the Government had the entire burden in the case.

One of the questionnaire's questions asked MSgt SC what she understood the phrase "burden of proof" to mean. MSgt SC wrote, "I believe this to be [*32] where each party within the trial produced the evidence that will prove the claims they have made against the other party." When trial defense counsel asked her to elaborate, MSgt SC first noted that she was unfamiliar with the legal terminology and then explained that when she was completing the questionnaire, she was unaware the issue of Appellant's guilt had already been decided. Later, in response to trial counsel's questions, MSgt SC said that once she knew the case would be solely about sentencing, she understood "the evidence will just come from one side," that is, the Government. Trial counsel responded by telling her, "Your duty is to consider all the evidence that's presented in this case, no matter who it's presented by," and MSgt SC then said, "Okay. Then if that's the case then yes, I would take [evidence offered by either party] under consideration." Trial counsel emphasized this point again by specifically asking MSgt SC if she would consider whatever evidence the Defense offered, and she said she would. The military judge asked her if she understood the Defense did not have to actually present any evidence; that if the Defense did present evidence, she was bound to [*33] consider it; that the Government had the burden; and that she was required to consider all evidence, regardless of which party offered it. She said she understood each of those propositions.

In challenging MSgt SC, the Defense argued she had "an implied bias for the automatic death penalty" and that "she has a burden shift toward the [D]efense." The Defense essentially claimed MSgt SC's starting position was that the death penalty was warranted, and that she would require the Defense to prove a lesser sentence was appropriate by introducing evidence of such mitigating factors as remorse or rehabilitative potential. The Defense also said they had "a concern with her ability to follow directions" because MSgt SC left three questions on her questionnaire blank and answered others with only a "yes" or a "no," in spite of the military judge's instructions to fully answer every question. Finally, the Defense pointed to her demeanor during voir dire, saying that she was "repeatedly laughing and things like that."[20]

The military judge denied the Defense's challenge, explaining that MSgt SC did not exhibit actual bias because she said she would consider all punishment options and that she would [*34] consider all the evidence in deciding what punishment was appropriate. The military judge further said that, considering the totality of her answers, there was "nothing that indicated that she believes the death penalty is an automatic in any case, in fact, quite the opposite. She said she'll consider all the evidence." The military judge concluded the Defense had not established either actual or implied bias on MSgt SC's part and that he would not excuse her, even after considering the liberal grant mandate. The military judge did not comment on the Defense's concern about MSgt SC being able to follow directions.

g. Challenge of SMSgt ML

[20] Other than this comment by trial defense counsel, there is no indication in the record that MSgt SC was laughing at all, much less when or why.

The third member the Defense unsuccessfully challenged was SMSgt ML, whom the Defense argued was unwilling to consider evidence in mitigation that might not be directly tied to the crime at hand. This argument was rooted in both SMSgt ML's answers on her pretrial questionnaire as well as statements she made during voir dire.

SMSgt ML maintained that the death penalty was never an automatic sentence, but one item on the questionnaire asked whether "the background and life circumstances of a person guilty of killing another should play a part in the decision [*35] as to his punishment," and SMSgt ML answered, "I think that only information pertaining to this case should determine the outcome." The next question read:

> Some people feel that genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime. What are your thoughts?

SMSgt ML answered, "I disagree with this statement. The environment that I grew up in may have been consider[ed] one where teenage girls get pregnant and may not become productive citizens. However I think we choose our own paths and determine what we want our story to be." During voir dire, SMSgt ML said she could consider evidence regarding Appellant's upbringing and environment, and that she would "seriously listen to it" and consider it before deciding on a punishment. She further agreed to hear all the evidence before coming to any conclusions regarding an appropriate punishment and to keep an open mind.

When asked about the question on the questionnaire as to whether she thought the background and life circumstances of a person found guilty of murder should play a part in deciding that person's sentence, SMSgt ML referred to a prior [*36] court-martial she had been a member on. SMSgt ML said that family members had testified in the court-martial to matters which she felt "really didn't have to do with the case." She said that, as a result, she understood she "had to weigh [that testimony] based on the importance with the other evidence." She said she recognized she may hear evidence about Appellant's background and added, "But if it's not part of the actual circumstances around the case, then I need to figure out how to weigh that information." Trial defense counsel asked SMSgt ML if there was any evidence she would never give weight to, and she answered, "None of it would never have a weight because if it's presented to us, then obviously I have to consider it." Nevertheless, SMSgt ML answered a series of questions in which she told trial defense counsel that one's background does not "affect what you do later in life;" that if someone grew up in poverty on drugs, that would not mean anything regarding their punishment; and that if a person used alcohol or drugs at some point in their life, that would not mean anything to her.

Trial counsel asked SMSgt ML if she would consider evidence about Appellant's background if [*37] the military judge told her to do so, and she said she was "pretty confident" that she could seriously consider it. She explained,

> I just feel that I know I can listen to the information, whatever's presented here. And then I would take it back there and consider it. I'm not saying that I'm going [to] say no, his background is not important at that time, if it plays a part in the information that's presented to us. [ ] I think I could consider it.

Upon additional questioning by the military judge, SMSgt ML confirmed she would consider any mitigating evidence even if it had nothing to do with Appellant's crimes.

The Defense challenged SMSgt ML on an implied bias ground described by trial defense counsel as, "she would require [a] nexus between mitigation evidence and the crime." Trial counsel countered that SMSgt ML was only required to consider evidence, not necessarily give it any weight. The military judge denied the challenge, reasoning that there is a difference between having a "general view" that a person's upbringing does not have a large role in their life and being unwilling to consider such evidence when making a decision. The military judge noted SMSgt ML said she understood [*38] she must consider all the evidence in the case and that she would do so, leading him to conclude SMgt ML should not be excused under either actual or implied bias grounds, even in light of the liberal grant mandate.

2. Law

a. Prosecutorial Misconduct

HN1[↑] We review claims of prosecutorial misconduct de novo; when no objection is made at trial, the error is forfeited, and we review for plain error. *United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019)* (citation omitted). Under the plain error standard, such error occurs "when (1) there is error, (2) the error is plain or

obvious, and (3) the error results in material prejudice to a substantial right of the accused." United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted).

HN2[] "Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'overstep[ped] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" Id. at 178 (quoting Berger v. United States, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing Berger, 295 U.S. at 88) (additional citation omitted).

b. Voir Dire

HN3[] Military judges have discretion [*39] in controlling the nature and scope of voir dire. Rule for Courts-Martial (R.C.M.) 912(d), Discussion. "Generally, the procedures for voir dire are within the discretion of the trial judge." United States v. Jefferson, 44 M.J. 312, 318 (C.A.A.F. 1996). A military judge may permit counsel for the parties to conduct voir dire, or the military judge may conduct the examination him-or herself. R.C.M. 912(d). Military judges may also supplement questions asked by counsel. Jefferson, 44 M.J. at 318-19. Limitations placed by a military judge on the voir dire process are reviewed for abuse of discretion. United States v. Richardson, 61 M.J. 113, 118 (C.A.A.F. 2005). Military judges' decisions amount to abuses of discretion if their findings of fact are clearly erroneous, their decisions were influenced by an erroneous view of the law, or their decisions are "outside the range of choices reasonably arising from the applicable facts and the law." Finch, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019)).

c. Member Challenges

HN4[] An accused has the right to an impartial and unbiased panel. United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012) (citation omitted). A person detailed to a court-martial shall be excused whenever it appears he or she "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). Such is the case when a person "has a decidedly friendly or hostile attitude toward a party; or has an [*40] inelastic opinion concerning an appropriate sentence for the offenses charged." R.C.M. 912(f)(1)(N), Discussion. Potential court-martial members are subject to challenges for cause under actual bias and implied bias theories. United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020). Under the former, the question is whether the member personally holds a bias "which will not yield to the military judge's instructions and the evidence presented at trial." Nash, 71 M.J. at 88 (citation omitted). Claims that a military judge erred with respect to challenges alleging actual bias are reviewed for an abuse of discretion. Hennis, 79 M.J. at 384.

HN5[] Our superior court has framed the analysis of implied bias as: considering the totality of the circumstances and assuming the public is familiar with the military justice system, "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." United States v. Woods, 74 M.J. 238, 243-44 (C.A.A.F. 2015) (internal quotation marks and citation omitted). Our review of implied bias challenges is more deferential than de novo review, but less deferential than abuse of discretion. Hennis, 79 M.J. at 385. Implied bias, however, "should be invoked sparingly." United States v. Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006) (citation omitted).

HN6[] When an accused challenges members for cause, the military judge is required to liberally grant such [*41] challenges. United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005). Reasons for this include the fact that peremptory challenges in the military justice system are far more constrained than in the civilian criminal justice arena, as well as convening authorities' broad discretion to detail members to courts-martial. *Id.* (citations omitted). "Challenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations." United States v. Clay, 64 M.J. 274, 276-77 (C.A.A.F. 2007). Military judges who squarely address the liberal grant mandate on the record are given greater deference on appeal than those who do not. Id. at 277.

HN7[] An inelastic opinion regarding the appropriate punishment is grounds for an actual-bias challenge, while "a mere predisposition to adjudge some punishment upon conviction is not, standing alone, sufficient to disqualify a member. Rather the test is

whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *Hennis, 79 M.J. at 385* (quoting *United States v. McGowan, 7 M.J. 205, 206 (C.M.A. 1979)*) (additional citation omitted). When a potential member in a death-penalty case has expressed views on capital punishment, the standard for a causal challenge of that member "is whether the juror's views [*42] would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Morgan v. Illinois, 504 U.S. 719, 728, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)* (internal quotation marks and citation omitted). Thus, a member "who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Id. at 729*.

HN8[↑] The burden in establishing the grounds for the challenge of a member lies with the party making the challenge. R.C.M. 912(f)(3). When a basis for challenge is first raised on appeal, we review such claims for plain error. *United States v. Ai, 49 M.J. 1, 5 (C.A.A.F. 1998)* (citation omitted).

3. Analysis

a. Prosecutorial Misconduct

Although Appellant objected to the convening authority's initial decision not to appoint Mr. JG as a defense consultant and sought relief from the military judge from that decision, the Defense did not raise any concerns regarding Mr. JG's subsequent detailing until after the court-martial adjourned. Appellant's chief post-trial complaint is that he was denied the ability to utilize Mr. JG's expertise as much as he would have, had Mr. JG been appointed earlier. This may very well be true, but it was not raised to the military judge who [*43] would have had the ability to grant Appellant more tailored and relevant relief at the time as compared to the relief he seeks from us now: a reduction of his sentence. More saliently, had Appellant objected prior to or during the rehearing, we would have a more developed record on the matter indicating how the decision to detail Mr. JG came about and what role, if any, trial counsel played in the decision. The record is practically devoid of this information, and it is Appellant's inability to explain precisely what trial counsel did or did not do that is fatal to his claim of prosecutorial misconduct.

From the record, we know the convening authority initially denied the Defense's request for Mr. JG's services, and the military judge declined to overrule that decision because the Defense had another expert who could provide similar services, and because trial counsel asserted they had no jury consultant assigned to their team. About a month and a half before trial was set to begin, the convening authority's legal office reversed its recommendation and the convening authority reversed his earlier decision, resulting in the appointment of Mr. JG to the defense team. Almost immediately [*44] afterward, trial counsel notified the Defense that the Government's presentation expert would in fact be providing voir dire consulting services, after all. While it appears the convening authority appointed Mr. JG as a defense consultant because trial counsel made a decision to request their own panel-selection expert, Appellant has not demonstrated trial counsel did so in order to gain some improper tactical advantage. Indeed, it seems just as plausible that trial counsel belatedly realized they needed assistance in selecting a panel and recommended the convening authority grant the same assistance out of their concern that Appellant receive a fair rehearing. Moreover, nothing in the record explains whether or how trial counsel was able to capitalize on this reversal or its timing.

Appellant has not specified any particular legal norm or standard trial counsel purportedly violated, and we cannot identify one from the record before us. Thus, Appellant has not established error with respect to Mr. JG's detailing, much less plain error. While we agree the convening authority's late reversal, and trial counsel's expansion of their expert's role after telling the military judge they would [*45] not use their expert in such an expanded capacity, might appear suspicious, such suspicion is insufficient to support a finding of prosecutorial misconduct. Appellant, therefore, is entitled to no relief.

b. Peremptory Challenges

HN9[↑] Although a common feature of criminal trials, peremptory challenges are not guaranteed by the United States Constitution. *United States v. Martinez-Salazar, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)*. In courts-martial, an accused and the Government are "entitled initially to one peremptory challenge of the members of the court" under Article 41(b)(1), UCMJ, *10 U.S.C. § 841(b)(1)*. If challenges for cause reduce the court below the required minimum number of members, as occurred here, peremptory

challenges are not exercised until additional members are detailed to the court. Article 41(a)(2), UCMJ, 10 U.S.C. § 841(a)(2). If, however, a peremptory challenge results in the court having insufficient members, then the parties may exercise another peremptory challenge against later-detailed members. Articles 41(b)(2) and 41(c), UCMJ, 10 U.S.C. §§ 841(b)(2), 841(c). Notwithstanding this statutory scheme, a military judge has discretion to grant additional peremptory challenges, and indeed has a duty to do so when necessary to ensure a fair trial. United States v. Carter, 25 M.J. 471, 476 (C.M.A. 1988). The denial of additional challenges is reviewed for abuse of discretion. *Id.*

At trial, Appellant relied on Carter in support of his argument [*46] for additional peremptory challenges. In that case, the United States Court of Military Appeals concluded military judges must grant additional peremptory challenges after the original exercise of peremptory challenges results in new members being detailed to the court-martial; the holding in Carter led to the amendment of Article 41, UCMJ, to explicitly authorize additional peremptory challenges in such cases. *See, e.g.,* United States v. Thomas, 43 M.J. 550, 593 (N.M. Ct. Crim. App. 1995), *rev'd on other grounds*, 46 M.J. 311 (C.A.A.F. 1997). This *ability* of the military judge in Appellant's case to grant additional peremptory challenges is a far cry from a *requirement* to do so. Here, when denying the Defense's pre-trial motion, the military judge gave the Defense the opportunity to seek additional peremptory challenges during the voir dire process, but the Defense declined to do so. Even assuming Appellant has preserved this issue for appeal, he has failed to demonstrate that he was entitled to additional challenges, that the military judge's denial of additional challenges operated to deprive him of a fair trial, or that the military judge abused his discretion in this regard. His claim therefore warrants no relief.

c. Military Judge's Questions

As explained above, trial defense counsel sought to [*47] determine the members' personal views on various matters, and the counsel felt the members would be less likely to give complete or forthright answers after being told what was required under the law by the military judge. We recognize voir dire is a valuable tool in both determining whether or not potential members will be impartial, as well as assisting the parties in deciding how or whether to exercise peremptory challenges. *See, e.g.,* Jefferson, 44 M.J. at 318. Appellant has not, however, demonstrated that the fact the military judge explained the law to the members and then asked them if they would follow the law somehow circumvented either of these purposes. Similarly, Appellant has cited no legal authority prohibiting the military judge from asking the questions that he did.

The thrust of the Defense's objection at trial was that when a military judge tells court members what is expected of them under the law, the members will tell the military judge they will rigorously follow the law, regardless of whether they actually intend to do so. This claim fails on various fronts. First, the parties gave the members lengthy and in-depth questionnaires to complete in advance of Appellant's court-martial. That [*48] is, the members were required to answer a litany of questions regarding their perspectives on such matters as burdens of proof, the weight of certain types of evidence, and punishment well before stepping into the courtroom and being asked anything at all by the military judge. As a result, the Defense already possessed an extensive amount of information about the members' views uninfluenced by any questions posed by the military judge. Second, once at the court-martial, the members each took an oath that they would truthfully answer questions relating to whether they should serve as members or not, and the parties were given substantial leeway to ask the members about their views on a wide variety of topics. Indeed, trial defense counsel even exhorted some of the members to pretend they were just "chatting" with counsel in a coffee shop. Appellant has not alleged any of the members answered any questions falsely or otherwise violated their oath, and we therefore conclude he had ample opportunity and ability to elicit the members' actual beliefs even after they were instructed on the law by the military judge. Third, to the extent the members may have felt compelled to agree with the [*49] military judge's explanation of what the law expected of them, the natural extension of such a conclusion would be that the members would follow the law, as the military judge instructed them, and not that they would simply tell the judge what they thought he wanted to hear in voir dire and then go rogue once in the deliberation room. We think it more likely the members considered all the evidence they were presented, as the military judge told them they were required to do. Finally, the military judge was obligated to remove any members who were unwilling or unable to follow his instructions on the law, and the military judge's questions to the members directly sought to ascertain such willingness and ability. *See* Morgan, 504 U.S. at 729-30 (discussing a "trial judge's responsibility to remove prospective jurors who

will not be able impartially to follow the court's instructions and evaluate the evidence") (internal quotation marks and citation omitted).

Only one member subject to this objection, SMSgt AK, sat on Appellant's court-martial, and the military judge's actual questioning does not support Appellant's premise. When trial defense counsel asked SMSgt AK how he would feel if someone were to "use their [*50] background . . . as a way to maybe get away with something or reduce their capability," SMSgt AK first said it was "hard to describe," but then settled on "distasteful." After being asked to clarify, SMSgt AK added, "Dishonest." Immediately thereafter, the military judge secured SMSgt AK's commitment to consider all the evidence presented. Importantly, SMSgt AK had not indicated he would *not* consider any particular piece or type of evidence prior to the military judge's questions, so we are not faced with a situation in which the member said one thing and then reversed course upon questioning by the military judge. Instead, trial defense counsel had negatively framed an ambiguous question about people using their background "as a way to maybe get away with something," which SMSgt AK unremarkably responded to disapprovingly. We have considered, and we reject, Appellant's contention the military judge's questions were improper or somehow undermined his ability to exercise his challenges, and we do not find the military judge abused his discretion.

d. Trial Counsel's Questions

On appeal, Appellant continues his attack on trial counsel's voir dire questions, which he describes as "leading [*51] questions that conditioned the members to answer affirmatively vice providing truthful answers." Appellant also argues trial counsel asked questions which had not been divulged prior to the court-martial, as required by the military judge's scheduling order. The Government argues Appellant focused at trial on the nature of trial counsel's questions and thereby waived any post-trial complaint as to the timeliness of their submission. We find Appellant's position on neither front warrants relief.

HN10[↑] An accused facing the death penalty is entitled to attempt, through voir dire, to identify which prospective members have already determined whether or not to impose the death penalty prior to being presented with the evidence. *Morgan, 504 U.S. at 736*. In *Morgan*, the United States Supreme Court expressed doubt that simply asking members if they would be fair and if they would follow the judge's instructions would be effective in identifying "jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Id. at 734-35*. Appellant invites our attention to *Morgan*, arguing it highlights the harm caused by trial counsel's questions. But *Morgan* involved a trial in which counsel were not permitted to [*52] conduct voir dire at all and in which the judge declined to ask an additional question posed by defense counsel: whether the jurors would automatically vote to impose the death penalty, regardless of the evidence. *Id. at 723*. ***HN11***[↑] Thus, *Morgan* stands for the proposition that an accused is entitled—at least in capital cases—to pose more specific questions to members beyond simply asking whether they will follow the law. *Morgan* does not, however, say anything about the timing of such questions, or that "follow the law" questions may not be asked by trial counsel or the military judge—much less that asking such questions somehow prejudices the defense's own voir dire. Appellant has not identified any precedent holding otherwise. Moreover, unlike the situation in *Morgan*, Appellant's trial defense counsel were afforded extensive opportunities both before and during his rehearing to ask detailed questions about the members' views on a wide variety of topics, such as whether or not they believed the death penalty was employed too frequently, whether they thought a victim's family member should be permitted to serve as a juror, whether they thought it was "fair" that the Government had to secure a unanimous verdict with respect [*53] to the death penalty, and so on.

While we acknowledge the general soundness of Appellant's theory that a potential member who has already promised either trial counsel or the military judge that he or she will consider all the evidence is unlikely to admit the contrary under questioning by defense counsel, there is no legal requirement the military judge or trial counsel forego their own questions in order to present the members to the Defense in an untouched state.[21] What is required is that the military judge permit the Defense to identify any disqualifying biases the members may hold, and we see no indication he did not do so. Instead, the military judge afforded the Defense broad latitude in submitting an extensive pretrial questionnaire to the members and to engage in extended and often hypothetical discussions with each

[21] Midway through voir dire, the Defense asked the military judge to direct the parties to alternate who would start individual questioning of each member to address this concern; the military judge declined to do so.

member about an array of topics. We see no error in the military judge permitting trial counsel to ask the members whether they would follow the law or the military judge instructing the members they were required to do so.

With regard to the timeliness of trial counsel's submission of voir dire questions, Appellant did not waive this issue, contrary to the Government's [*54] position on appeal, simply because his counsel did not present oral argument on that portion of his motion. True, the military judge did not address the matter in his oral ruling denying the defense motion, but the Defense did not seek clarification or reconsideration on that point. Considering the military judge's broad discretion to control voir dire, we conclude the military judge's denial encompassed the Defense's timeliness claim, and that he did not abuse his discretion either by not specifically addressing the matter or in denying the Defense's motion. In analyzing this issue, we note that the members' questionnaire responses were submitted the same day the parties' proposed voir dire questions were due. Therefore, it would seem somewhat obvious that any questions asked during voir dire about those questionnaire responses would be absent from the proposed voir dire questions without either a modification of the military judge's scheduling order or a requirement that the parties submit a supplemental proposed voir dire incorporating matters raised by the questionnaire responses. A substantial number of the questions ultimately asked during voir dire were rooted in the questionnaire [*55] responses, and we conclude one reasonable view would be to see those questions as permissible follow-up questions to information provided by the members in advance of the rehearing—questions which did not need to be disclosed in advance. Moreover, even if the military judge had failed to rule on this particular component of the Defense's claim, we conclude Appellant suffered no prejudice. Had the military judge wanted to enforce his scheduling order on this point, we are confident he would have done so by either disallowing trial counsel's questions or taking other appropriate action.

e. Challenge of SMSgt AK

On appeal, Appellant argues the military judge erred by not granting the Defense's challenge of SMSgt AK. Appellant first renews his claim that SMSgt AK evinced a partiality in favor of members of law enforcement, pointing to SMSgt AK's questionnaire answer that he would more likely believe a witness who is a member of law enforcement because he believed "in general . . . law enforcement professionals are held to a higher standard and are considered honest and trustworthy." Appellant concedes SMSgt AK agreed during voir dire to weigh a law enforcement officer's testimony the same [*56] as he would any other witness's testimony, but argues SMSgt AK's other statements belie that agreement. Overall, Appellant's position is that SMSgt AK appeared poised to automatically give credit to any law enforcement witness prior to that witness testifying at all, so he held an actual bias. Appellant also argues that even if SMSgt AK did not have an actual bias in favor of law enforcement, a reasonable observer would question the fairness of Appellant's sentence rehearing, especially in light of the fact testimony from nine law enforcement officers was introduced in the Government's case.

Having carefully reviewed SMSgt AK's questionnaire and voir dire responses, we are unconvinced. As the military judge noted, a general belief in the credibility of law enforcement personnel is by no means unusual, and SMSgt AK explained in his own words that he would need to "listen to all the information" before he assigned it any particular weight. SMSgt AK was repeatedly asked by trial counsel, trial defense counsel, and the military judge whether he would assess law enforcement witnesses the same as other witnesses, and SMSgt AK consistently said he would. Considering SMSgt AK's voir dire answers [*57] in conjunction with the fact he completed his questionnaire in somewhat of a vacuum without any clarification from the military judge or the parties, we conclude the military judge did not err in denying the Defense's challenge under theories of either actual or implied bias. With respect to Appellant's assertion that any bias in favor of law enforcement was prejudicial, we note that, of the nine witnesses Appellant references, seven of them did not appear at Appellant's rehearing—instead, their prior testimony was simply read to the members, which is to say the Defense did not challenge them via cross-examination during the rehearing. Although some of the prior testimony included cross-examination from Appellant's original court-martial, the cross-examination was almost entirely geared towards eliciting additional information about the investigation, and did not involve any attempts at impeaching any of the witnesses. Of the two law enforcement witnesses who testified at the rehearing itself, the Defense did not meaningfully attack the credibility of the first and did not cross-examine the second at all. In other words, the credibility of witnesses who were members of law enforcement [*58] was largely immaterial to the Defense's case.

On appeal, Appellant somewhat merges and reframes the so-called "mitigation impairment" and "mitigation nexus" arguments he made at trial. Appellant's main contention now is that SMSgt AK was biased with respect to mental health evidence under the theory he would only consider such evidence if it was "connected to the crime." To arrive at this conclusion, however, we would have to adopt a rather cramped and one-sided view of SMSgt AK's actual statements, and we decline to do so. SMSgt AK repeatedly stated he would consider the background and life circumstances of someone convicted of murder before deciding on a sentence, and he volunteered on several occasions his view that people are shaped by a variety of influences as they grow up. On his questionnaire, which he completed prior to the rehearing, SMSgt AK wrote that he did not believe such factors should be considered when determining a punishment unless "a proven mental health condition associated with the issue" was shown. However, after the military judge told SMSgt AK he would have to consider all the evidence presented, SMSgt AK said he would do so, even later telling trial defense [*59] counsel, "if it's presented it will be considered." SMSgt AK also said he understood that mental health issues "do affect people and their decision making."

Taken as a whole, SMSgt AK's responses indicate he initially said that he believed a person's background would not factor into a decision on punishment, but once the military judge explained to SMSgt AK that he would have to consider all such matters, SMSgt AK said he would. We are disinclined to place a great deal of weight on what a lay person thinks should or should not qualify as evidence in extenuation and mitigation before that person is provided guidance from a military judge regarding the law on that point. The relevant question here is not what SMSgt AK subjectively thought the law was when he was filling out his questionnaire. Instead, the question under an implied bias theory is whether the public would perceive Appellant as receiving an unfair hearing as a result of SMSgt AK's service as a panel member. Once the military judge explained to SMSgt AK the scope of the evidence he was required to consider, SMSgt AK readily agreed he would consider all of it, and also said a person's upbringing and mental health would factor [*60] into his assessment—precisely what the public would expect him to do to ensure Appellant a fair hearing.

Finally, SMSgt AK's comment that he found it "distasteful" that a person might use their background "as a way to maybe get away with something or reduce their culpability" goes more to the weight he would give such evidence than whether or not he would consider it. What the law requires is that members be open to considering all the evidence in a case; what weight SMSgt AK ultimately decided to give such evidence, however, was squarely within his personal discretion. Because the military judge explained he factored the liberal grant mandate into his assessment, we give his ruling greater deference. Even considering the liberal grant mandate, we conclude the military judge did not err or abuse his discretion in rejecting the Defense's challenge to SMSgt AK.

f. Challenge of MSgt SC

Appellant argues on appeal that the military judge committed error when he denied the Defense's challenge to MSgt SC, claiming the member exhibited actual and implied bias. Appellant concedes that MSgt SC agreed to consider all the evidence and follow the military judge's instructions, but he submits that [*61] MSgt SC indicated she came to the rehearing with the presumption that death was the appropriate sentence before hearing any evidence. From that premise, Appellant argues MSgt SC was akin to a juror who would automatically vote for the death sentence, regardless of the evidence, and was therefore disqualified from service on the rehearing. We decline to make this leap of logic.

Before receiving any guidance from the military judge and before even understanding that Appellant's case was a rehearing which only pertained to sentencing, MSgt SC said she would vote for death in cases of premeditated murder regardless of the facts or law. However, as soon as she was asked to elaborate on that response during voir dire, MSgt SC said that her understanding was that she would be "weighing all of the evidence" and then determining whether the death penalty was appropriate or whether there was "a consequence or rehabilitation possibility." At no time during voir dire did MSgt SC suggest she would automatically vote for the death penalty. Rather, she said that based solely on the charges—without knowing more—she "would probably be leaning more towards the death penalty," but she also said that was [*62] not "necessarily automatic." When asked again if she thought the death penalty should be automatically adjudged in Appellant's case, MSgt SC said it "probably" should, but she added a critical caveat: "because I don't know anything else." After her obligation to consider all the evidence was explained to her, MSgt SC said she

understood that "all options are still available" until she hears all the evidence. When trial defense counsel questioned her, MSgt SC again said that based solely on the charges, she felt the death penalty was appropriate, but she reiterated that was only true because she knew nothing else about the case and added that if she was able to hear evidence and ask questions, "then that's going to persuade." She explained again she would not make a decision until she had heard all the evidence, and she offered up types of evidence which she felt would warrant a punishment less severe than death. She specifically mentioned rehabilitation potential, mental illness, and remorse—all three of which the Defense later offered in Appellant's case.

Contrary to Appellant's claim that MSgt SC arrived at Appellant's court-martial with the intent to impose death regardless of the [*63] evidence or the law, MSgt SC explained that—considering the charges without the benefit of any evidence—she felt that the offenses warranted the death penalty, but that when given evidence, she would carefully consider it before deciding on an appropriate punishment.

Appellant was not entitled to a panel of members entirely devoid of opinions about the relative severity of offenses or the appropriateness of certain forms of punishment. Instead, Appellant was entitled to an impartial and unbiased panel; that is, a panel composed of members who would consider the evidence in accordance with the military judge's instructions prior to arriving at a judgment. As MSgt SC repeatedly said during voir dire, her views on the appropriateness of the death penalty hinged on the fact she had received no evidence, but once she heard evidence, she would consider it in determining an appropriate sentence. Not only did MSgt SC demonstrate that she did not intend to automatically vote for the death penalty, we are convinced a person observing Appellant's court-martial would not conclude he received something less than a fair hearing by virtue of having a panel with MSgt SC on it.

We are similarly unpersuaded [*64] by Appellant's argument that MSgt SC did not understand the concept of the burden of proof. She acknowledged she was unfamiliar with such legal principles, but once the military judge explained to her that she was bound to consider evidence regardless of which party offered it, and that only the Government had the obligation to prove the matters required to adjudge the death penalty, MSgt SC indicated she understood and would follow those instructions. Regardless of MSgt SC's understanding of what a technical definition of "burden of proof" might be prior to Appellant's court-martial, the real issues were whether she understood the law as the military judge instructed her and whether she would follow those instructions. She told the military judge she did and she would, and we see nothing in the record warranting a contrary conclusion. Additionally, Appellant does not reassert on appeal his trial claim that MSgt SC was generally disinclined to follow directions. We conclude the military judge neither erred nor abused his discretion in declining to excuse MSgt SC on actual or implied bias grounds.

g. Challenge of SMSgt ML

On appeal, Appellant contends the military judge erred in not excusing [*65] SMSgt ML for actual and implied bias.[22] His argument is that despite SMSgt ML stating she would consider Appellant's background in arriving at an appropriate sentence, "the totality of her answers reveal a fundamental misunderstanding about her willingness to listen to certain evidence and her responsibility to meaningfully consider it." We take a different view and conclude SMSgt ML did not suggest she would not consider evidence about Appellant's background, but instead indicated she was not likely to give it a great deal of weight. We pause to note that it is not an unreasonable view, especially for someone who is not an expert in the criminal justice system, to be skeptical of the notion that some aspect of an accused's childhood might have any obvious bearing on a sentence for crimes he or she commits as an adult. SMSgt ML alluded to this view when she discussed the prior court-martial she served as a member on, wherein she assessed some amount of testimony from family members as not "hav[ing] to do with the case." But, significantly, SMSgt ML explained that even though she took a dim view of the relevance of the information, she understood she was required to weigh the evidence [*66] "based on the importance with the other evidence." In other words, SMSgt ML expressed that she would consider the evidence, even if its relevance was not particularly obvious. She elaborated that in such a case, she would "need to figure out how to weigh that information," which demonstrates SMSgt ML not only understood she was required to consider all the

[22] At trial, Appellant only challenged SMSgt ML on implied bias grounds. The military judge, however, ruled on both actual and implied bias bases.

evidence in the case, but that she would be called upon to assign a weight to that evidence in order to determine an appropriate sentence. She reemphasized this point when she explained that "[n]one of [the evidence] would never have a weight because if it's presented to us, then obviously I have to consider it"—that is, there was no evidence she would reject from the outset.

Appellant was entitled to a panel of fair and impartial members willing and able to follow the military judge's instructions and not possessing an inelastic attitude with respect to a particular punishment. *See, e.g.,* United States v. Schlamer, 52 M.J. 80, 93 (C.A.A.F. 1999) (citation omitted). Appellant was not entitled to a panel of members committed to viewing the evidence with the particular weight he believed it deserved. We also see no indication the military judge failed to adhere to the liberal grant mandate [*67] with respect to SMSgt ML, or any of the other challenged members, as evidenced by the fact he granted 13 challenges to the 25 potential members and denied only four—one of which was a Government challenge. Even assuming Appellant preserved his challenge for actual bias, we conclude the military judge did not abuse his discretion or otherwise err in denying the Defense's challenge of SMSgt ML.

C. Evidence Regarding Ms. JM's Skirt

Appellant argues the military judge erred by: (1) permitting the Government to introduce evidence about the removal of a skirt worn by Ms. JS, one of Appellant's victims; (2) instructing the members that the fact the skirt was removed was an aggravating circumstance[23] related to Appellant's offenses; and (3) allowing the Government to argue Appellant removed the skirt for a sexual purpose.[24] We disagree with Appellant on all three points.

1. Additional Background

Appellant had been socializing with SrA AS and Ms. JS along with others the evening of 3 July 2004. At some point that evening, Appellant and Ms. JS were alone and Appellant attempted to kiss Ms. JS. She rebuffed his advances, and the two went their separate ways. SrA AS, Ms. JS, SrA JK, and SrA JK's wife [*68] spent the next day together cooking out, drinking, and socializing at SrA JK's on-base house. Late that night, after SrA JK's wife had gone to bed, Ms. JS decided to tell SrA AS and SrA JK about Appellant trying to kiss her. This led to SrA AS and SrA JK making a series of heated phone calls to Appellant which included threats to both beat up Appellant as well as to report him to military officials for not only attempting to kiss Ms. JS but also for being involved with some other non-specific, but allegedly improper, relationship. Appellant, who lived off-base, put on his military fatigues, drove on base, and hid in bushes behind SrA JK's house where he could observe SrA AS, Ms. JS, and SrA JK.

At some point, the three decided to go to SrA AS's on-base house, and Appellant followed. Shortly thereafter, the Government contended, Appellant entered the house, and a scuffle ensued between Appellant and SrA AS in which Appellant stabbed SrA AS with a combat-style knife. SrA JK intervened, and Appellant stabbed SrA JK multiple times as SrA JK tried to disengage and leave the house. SrA JK succeeded in getting outside, but Appellant followed him and stabbed him again. Appellant left SrA JK, [*69] went back inside SrA AS's house, and killed both SrA AS and Ms. JS. Despite his wounds, SrA JK was able to make his way to a neighbor's house and seek help.

The Government's theory at the rehearing was that Appellant first stabbed SrA AS such that SrA AS was paralyzed but still conscious, so that when Appellant attacked Ms. JS a short distance away, SrA AS was forced to watch helplessly. The Government further theorized that Appellant killed Ms. JS in a back bedroom before returning to SrA AS and killing him. During the rehearing, the Defense disputed details of this proposed sequence of events regarding the attacks as well as the claim that SrA AS saw Appellant attack his wife.

After he killed SrA AS and Ms. JS early in the morning of 5 July 2004, Appellant left the house and threw his knife into a neighbor's yard before driving back off base and returning home. When medical responders and military law enforcement personnel entered SrA AS's house, they found Ms. JS's body behind the door of the back bedroom, out of the line of sight where SrA AS's body was found. She was still wearing her shirt and

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[23] In his assignment of error, Appellant states this error pertains to an "aggravating factor," a term of art in death penalty litigation we discuss later in this section. Based upon his exposition on his claim of error, however, we conclude Appellant intended to describe this as an "aggravating circumstance," and we reframe his assignment accordingly. We have further reframed this assignment based upon assertions he has made beyond the heading of the assignment itself.

[24] See Appendix, AOE VIII.

panties, but the denim skirt she had been wearing earlier in the evening was laying on [*70] the floor a few feet from her body, unbuttoned and unzipped. Subsequent analysis determined the skirt had a large blood stain on the back and a smaller, fainter blood stain near the front button. There was no evidence indicating specifically when Ms. JS's skirt was taken off or who took it off, although the blood stain on the back of the skirt and other aspects of the crime scene suggested the skirt was removed after she had been stabbed at least once—as the stain indicated her blood had flowed downwards into the skirt fabric—but before Appellant completed his attack. The Government contended SrA AS would have seen Ms. JS without her skirt on at some point during the attack.

Later that day, Appellant was riding in a vehicle driven by one of his friends. The friend decided to stop by SrA AS's house to see SrA AS and Ms. JS, unaware they had been killed. Once they arrived, law enforcement agents on the scene became suspicious of Appellant and took him in for an interview—during which Appellant confessed to the attacks. Appellant told investigators he stabbed SrA JK and SrA AS, then killed Ms. JS, and then returned to SrA AS to kill him. Appellant assisted the investigators in locating [*71] the knife and the clothes he had been wearing, but he never mentioned Ms. JS's skirt.

Via pre-rehearing motions, the Defense sought to preclude the Government from presenting evidence or argument with respect to the removal of Ms. JS's skirt, even though the fact Ms. JS was not wearing her skirt when her body was found had been proven during the findings portion of Appellant's original trial. The Defense further sought to preclude the Government from arguing that Appellant either attempted to sexually assault Ms. JS or had some sexual motive in attacking her. The Government opposed both motions.

HN12[] In order to obtain the death penalty, the Government must prove, beyond a reasonable doubt, the presence of at least one "aggravating factor." R.C.M. 1004(c). Pertinent here, the Government sought to prove that the murder "was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim." R.C.M. 1004(c)(7)(I). Part of the Government's theory was that Appellant inflicted mental pain on SrA AS by attacking his wife in front of him as she was only wearing her underwear below her waist, while he was paralyzed and unable to intervene. Trial counsel [*72] also told the military judge the Government intended to argue that SrA AS may have believed Appellant was raping Ms. JS during the portion of the attack occurring in the bedroom, where SrA AS would not have been able to see either Appellant or Ms. JS.

The Defense, meanwhile, contended that evidence regarding the skirt would invite the members to speculate that Appellant sexually assaulted Ms. JS or attempted to do so, in spite of the lack of direct evidence of any contemplated, attempted, or completed sexual assault. Seemingly acknowledging that some evidence regarding the skirt would be permitted, trial defense counsel asked the military judge to block the presentation of "excessive skirt testimony."

The military judge ruled that evidence of the removal of Ms. JS's skirt after she was initially stabbed was relevant and admissible as evidence in aggravation under R.C.M. 1001(b)(4) insofar as it tended to show Appellant continued his attack on Ms. JS while she was in her underwear, which Ms. JS was "certainly aware" of and SrA AS was "likely aware" of. Further, the military judge concluded the intervening removal of the skirt provided some evidence of the length of time spanned by the attack—that is, [*73] how long Ms. JS suffered before Appellant finally killed her. The military judge determined that there was "sufficient evidence to infer that [Appellant] is the person who removed the skirt, [but] it frankly does not matter" who removed it, because the fact she was being attacked in her underwear "adds to the psychological trauma that [Ms. JS] and [SrA AS] would have experienced." The military judge further concluded the evidence was relevant and admissible to prove the alleged aggravating factor regarding pain and suffering under R.C.M. 1004(c)(7)(I).

In performing his Mil. R. Evid. 403 analysis, the military judge explained the probative value of the evidence was high because of its direct relation to the impact on the victims, as well as it being directly related to the facts of the case. The military judge found that the risk of unfair prejudice was low and what risk there was could be cured through a limiting instruction, should the Defense request one. Based upon this analysis, the military judge declined to prohibit the Government from presenting additional evidence about the skirt or the impact it may have had on the victims.

The military judge did, however, prohibit trial counsel from arguing that Appellant attempted [*74] to commit any sexual misconduct against Ms. JS when he attacked her on 5 July 2004. He further prohibited trial

counsel from making any argument that Appellant had a "sexual purpose" for removing the skirt, in part because the Government never provided notice of a sexual offense prior to Appellant's original trial.

During opening statements, trial counsel told the members Appellant stabbed Ms. JS and then, "before receiving additional stab wounds," her skirt was "removed and tossed to the side." Various Government witnesses testified about the skirt, such as the fact Ms. JS had been wearing it earlier in the evening, where it was found, and the condition it was in. The pathologist testifying for the Government said she believed the blood stain and Ms. JS's wounds indicated Ms. JS was wearing the skirt when she was initially stabbed by Appellant, but not when she was subsequently stabbed—a view also held by the Government's bloodstain-pattern analysis expert. An agent from the Air Force Office of Special Investigations testified that the skirt was stained with blood, but did not appear to have been ripped, torn, or otherwise damaged. Although trial counsel did not make any explicit comments [*75] about Appellant attempting to sexually assault Ms. JS, they did present testimony from Appellant's original trial that Appellant underwent a sexual assault examination during the investigation.[25] Trial counsel also presented testimony from that trial in which a second witness made a reference to "the sexual assault kit" without specifying whether that was from an examination of Appellant or Ms. JS. Trial defense counsel did not object to either reference to sexual assault examinations.

Other than those two references, no witness testified about the possibility of either a sexual assault or a sexual motive on Appellant's part. On appeal, Appellant points to a comment made by one of SrA AS's brothers, who was a Federal Bureau of Investigations special agent, in which he volunteered in his testimony, "my brother knew what was going on in that house, and there is an ungodly amount of evidence to prove that." The comment was not in response to any question by trial counsel; trial defense counsel promptly objected, and the military judge both sustained the objection and told the members to disregard the comment.

Later in the rehearing, the military judge and the parties discussed proposed sentencing [*76] instructions. Trial counsel asked the military judge to identify specific matters in aggravation for the members to consider, which the military judge and the parties referred to as "aggravating circumstances." The Defense objected to several of these proposed aggravating circumstances, to include one that stated Ms. JS's skirt was removed during the commission of the offenses. Trial defense counsel argued the instruction was "raising this inference of some kind of sexual motive or sexual intent, or that [Appellant] is the one who removed the skirt." Trial counsel argued the fact the skirt had been removed pertained to "the emotional impact, the emotional distress" suffered by the victims. The military judge agreed with the Government, noting that the skirt's removal was relevant to the alleged aggravating factor and that it was "generally an aggravating circumstance that the murder occurred while she was in that particular state." The military judge then reminded trial counsel that they were not permitted to argue that Appellant had sexually assaulted Ms. JS, that he attempted to do so, or that he had any sexual motive. In his final instructions to the members, the military judge [*77] listed 11 aggravating circumstances the members "may" consider, to include "[e]vidence that [Ms. JS's] skirt was removed during the commission of the offense."

The military judge also gave the members a limiting instruction with regard to evidence about the skirt:

> You have heard some evidence regarding the removal of [Ms. JS's] skirt during the commission of the offenses. The accused was not charged with committing, or attempting to commit, any sexual offense against [Ms. JS]. You may consider evidence relating to the removal of [Ms. JS]'s skirt in determining whether the [G]overnment has proven the alleged aggravating factors, and as a possible aggravating circumstance. You may not consider this evidence as an allegation or proof of a sexual offense. Again, I remind you the accused is to be sentenced only for the offenses of which he has been found guilty.

In the Government's sentencing argument, trial counsel made a number of references to the skirt, such as: "[W]e know her skirt was removed;" "Did he take it off? Did he force her to take it off? How long? How long did that last?"; "[H]e stabs her in that hallway with her skirt off. With her skirt off;" and "He was in uniform. Her skirt [*78] was removed." In the Defense's argument, trial defense counsel posited Ms. JS might have taken the skirt off herself to locate or examine her wound and pointed to a lack of thorough DNA testing of the skirt.

[25] This testimony was read into the record from the transcript of the original trial.

2. Law

HN13[] A military judge's decision to admit evidence is reviewed under the abuse of discretion standard. Finch, 79 M.J. at 394 (citation omitted). Relevant evidence is generally admissible, and evidence is relevant when it has the tendency to make a fact of consequence more or less probable. Mil. R. Evid. 401 and 402. Under R.C.M. 1001, the Government may present evidence in aggravation during the sentencing portion of an accused's court-martial. Evidence in aggravation includes that which pertains to "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty" and includes such matters as the psychological impact of the accused's offenses on a victim. R.C.M. 1001(b)(4). This rule requires the prerequisite showing that an accused caused a specific harm, which imposes a higher standard than "mere relevance." United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995) (citations omitted).

HN14[] Evidence qualifying under R.C.M. 1001(b)(4) must also pass muster under Mil. R. Evid. 403. United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007). Under that rule, a military judge may exclude evidence if its probative value is substantially outweighed [*79] by such considerations as its tendency to result in unfair prejudice, confuse the issues, or mislead the members. A military judge has "wide discretion" in applying Mil. R. Evid. 403, and we exercise "great restraint" in reviewing such applications when the military judge articulates his or her reasoning on the record. United States v. Humpherys, 57 M.J. 83, 91 (C.A.A.F. 2002) (citations omitted).

HN15[] In order to adjudge the death penalty, the members must not only find the existence of one of the aggravating factors under R.C.M. 1004(c), they must also concur that any extenuating or mitigating circumstances in the case are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4). R.C.M. 1004(b)(4)(C); *see also* United States v. Loving, 41 M.J. 213, 278 (C.A.A.F. 1994).

HN16[] When an appellant preserves an allegation of error with respect to a military judge's instructions, we review the adequacy of those instructions de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006). Military judges have "wide discretion" in fashioning instructions, but those instructions must "provide an accurate, complete, and intelligible statement of the law." United States v. Behenna, 71 M.J. 228, 232 (C.A.A.F. 2012) (citations omitted).

3. Analysis

We first turn to Appellant's contention that the military judge erred by permitting the Government to present evidence of Ms. JS's skirt being removed during the attack. Appellant generally argues the matter had low probative [*80] value, and whatever probative value it had was substantially outweighed by the danger of unfair prejudice—that is, the threat the members would assume Appellant intended or attempted to sexually assault Ms. JS. HN17[] *Res gestae* evidence—evidence which is part and parcel of an offense—is generally admissible insofar as it "enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation." United States v. Metz, 34 M.J. 349, 351 (C.M.A. 1992). In this case, the members were presented with not only crime scene photographs depicting both Ms. JS's body without her skirt on and the blood-stained skirt itself, but also detailed evidence supporting theories about how the attacks unfolded. In our view, omitting evidence of the skirt itself, to include when it was likely removed, would have created far more confusion and squarely invited speculation by the members as to why Ms. JS was not wearing her skirt when her body was found. Moreover, the fact her skirt was removed at some point during the attack does provide insight into the length of Appellant's entire attack, which is to say, the amount of physical suffering Appellant inflicted [*81] upon Ms. JS before she died. It is also an indication of mental suffering she may have endured, as Ms. JS may have been all the more terrorized by the removal of an article of her clothing during Appellant's attack. Members very well may have concluded that Appellant took Ms. JS's skirt off her and that she spent her last moments trying to understand his reasons for doing so.

In short, the removal of Ms. JS's skirt during the attack—regardless of how it occurred—is squarely the type of evidence in aggravation contemplated by R.C.M. 1001(b)(4), as it demonstrated the pain and suffering Appellant inflicted on one of his victims beyond the sheer brutality of his offenses. To the extent there was a danger of the members misusing this evidence to inject a sexual offense into Appellant's case, the military judge told the members they could not use the evidence for that purpose. Without any evidence to indicate otherwise, we presume the members followed the military judge's instructions. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted). We

also note that the Government largely followed the military judge's ruling prohibiting trial counsel from raising the specter of sexual assault. Although trial counsel did introduce two statements [*82] indicating a sexual assault examination had been conducted—the relevance of which is not at all apparent from the record—those were two isolated statements during a lengthy rehearing and were introduced without objection from the Defense.[26] Given the brief and isolated nature of these statements, we conclude the military judge's limiting instruction to the members served to neutralize any potential unfair prejudice they may have had. Meanwhile, SrA AS's brother's testimony that there was "an ungodly amount of evidence to prove" that SrA AS "knew what was going on in that house" was too vague for us to give it the import Appellant calls upon us to give it. SrA AS's brother may have been suggesting Appellant attempted to sexually assault Ms. JS, but he also may have been suggesting that SrA AS was still alive and paralyzed on the ground while watching Appellant kill his wife. In any event, the Defense's objection to the comment was sustained, and the members were told to disregard it almost immediately after SrA AS's brother made it. In light of the foregoing, we conclude the military judge did not abuse his discretion by admitting evidence of Ms. JS's skirt, and the military judge's limiting [*83] instruction properly constrained the members' use of the evidence.

Appellant's next contention—that the military judge erred in instructing the members they could consider evidence that Ms. JS's skirt was removed during the offense as a matter in aggravation—is similarly unpersuasive. This aggravating circumstance was among 11 the military judge highlighted for the members, which included such other matters as the mental and physical pain suffered by SrA JK, the nature of the weapon Appellant used, and the fact the offenses occurred in base housing. Notably, these aggravating circumstances in the military judge's instructions were followed by 26 extenuating or mitigating circumstances requested by the Defense. Because the Government was seeking the death penalty, the members had to determine whether or not extenuating or mitigating circumstances were substantially outweighed by aggravating circumstances in the case in accordance with R.C.M. 1004(b)(4)(C). Thus, the issue of the need to weigh these circumstances was directly before the members and was an appropriate matter for a judicial instruction. Although military judges are not necessarily under any obligation to specifically identify discrete circumstances [*84] in aggravation or in extenuation and mitigation, doing so is not uncommon, especially in the context of capital litigation. *See, e.g., Loving v. United States*, 68 M.J. 1, 8-9 (C.A.A.F. 2009). Considering the degree of scrutiny of such cases, it seems entirely reasonable for a military judge overseeing a capital trial to explicitly specify such circumstances so that there is no later question as to what circumstances were considered by the members. Therefore, we conclude the military judge committed no error in instructing the members that the removal of Ms. JS's skirt was an aggravating circumstance which they could consider.

Finally, we have carefully reviewed the Government's closing argument and rebuttal argument, and we disagree with Appellant's claim that trial counsel argued Appellant removed Ms. JS's skirt for a sexual purpose. The Defense only objected twice during the Government's arguments, and neither objection pertained to the skirt. On appeal, Appellant argues "the connotation was clear from [trial counsel's] argument" that Appellant intended to sexually assault Ms. JS, and that trial counsel "insinuated" that SrA AS believed Ms. JS had been or was about to be sexually assaulted. We do not see any such connotations or insinuations. [*85] Rather, trial counsel argued—in accordance with the military judge's earlier ruling—that the fact Ms. JS's skirt had been removed may have made Appellant's attack all the more traumatizing for SrA AS and Ms. JS while they were still alive. This argument was proper and directly drawn from the evidence, and the military judge did not err by not *sua sponte* interrupting the argument.

D. Cross-Examination Lacking Good Faith Basis

The Defense sought to portray Appellant as a model prisoner at the United States Disciplinary Barracks, where he had been incarcerated since his original court-martial. Trial counsel, meanwhile, attempted to characterize Appellant's prison conduct as less than exemplary by asking one of the Defense's witnesses whether or not he was aware of misconduct purportedly committed by Appellant. On appeal, Appellant contends trial counsel lacked a good faith basis for asking the questions and thereby committed prosecutorial misconduct by doing so.[27]

[26] Because the statements were from prior trial testimony and marked as appellate exhibits, the Defense was on notice of the statements in advance of them being read to the members.

[27] See Appendix, AOE VI.

1. Additional Background

Mr. JL, a licensed clinical social worker, had been the Disciplinary Barracks' chief of assessment and was responsible for determining what risks inmates posed. He also became Appellant's counselor when Appellant [*86] transitioned from death row to the prison's general population in September 2016 after Appellant's death penalty was set aside by the CAAF, and he remained Appellant's counselor until he retired in November 2017. He described his role as "[d]ay-to-day case management, helping the people adjust, get along, make changes." He explained the opportunities prisoners have, the prison's disciplinary tools, and the informal hierarchy that existed among the prison population. He testified Appellant purposely sought to avoid disrupting that hierarchy when he was transferred to the prison's general population and participated in every program offered as soon as he was able to.[28] During his incarceration, Appellant received only a single disciplinary report. The report arose from him retaining tobacco products he had purchased from the prison commissary in his cell in 2008 after the Disciplinary Barracks adopted a facility-wide no-smoking policy. Mr. JL characterized the infraction as "very minor" and described Appellant as "certainly cooperative, very compliant. Follows the rules. Very eager to get involved in programs. Very motivated to figure out behaviors, and why he's in the situation he's in, [*87] why he did what he did."

Trial defense counsel asked Mr. JL whether Appellant had told him about "kind of a run-in he had with one of the other inmates, and an argument he had with him about who might run the pod" that Appellant was assigned to. Mr. JL agreed Appellant had, but said,

> [M]y take of it was the other inmate was intimidated. [Appellant] was not in a position where he was trying to take over, gain any power, any position in that respect. And was just wanting to go in there and be part of the unit. He wasn't as—he wasn't demanding to sit in the front row, if you will, or anything of that nature.[29]

At some later point, Appellant was moved to a different pod of prisoners. According to Mr. JL, Appellant would have received a disciplinary report if any incident "turned physical or violent, or even if it was loud—yelling or what have you."

On cross-examination and without objection, trial counsel asked Mr. JL if he was aware that once Appellant was in the new pod that Appellant had approached Inmate RC and "got into a shouting match" over whether Appellant should be allowed to be "the front row center." Mr. JL said he was unaware of this. The Defense subsequently called Inmate TS from [*88] this same pod who testified Appellant had told a particular inmate to stop attempting to exert so much control over the other inmates, but this simply amounted to a conversation, not an argument. Trial counsel asked Inmate TS whether this incident stemmed from Appellant wanting to sit in the front row, but Inmate TS said it had not. Another inmate said he had heard about a "conflict" between Appellant and two other inmates, but he provided no detail beyond acknowledging his awareness.

Trial counsel also raised the suggestion Appellant had acted inappropriately on another occasion by asking Mr. JL whether he had been approached by other staff members who expressed concern about Appellant's "aggressive interaction with a female biology instructor." Mr. JL said he had been so approached. Trial counsel asked whether Appellant "was angry about a grade he received on the first exam and confronted [the instructor] in a very aggressive manner." Mr. JL answered affirmatively. Both questions were asked without objection.

The Defense, however, called the biology professor who flatly rejected trial counsel's characterization, testifying that Appellant approached her after the exam to tell her he [*89] thought she was teaching the class at a graduate level. She said he "tapped the desk [and] waived his finger at [her] a little bit." Concerned Appellant was struggling with the material and that he may not have known he could drop the class at that stage without financial or academic penalty, she called the prison's academic point of contact, Mr. MM, to see if Appellant understood his options in this regard. The professor not only testified she did not feel threatened, but that she was "still very angry" the matter was

[28] While on death row, Appellant had far fewer opportunities to interact with other prisoners or to participate in programs offered by the prison. Although the members serving on the rehearing panel were made aware that Appellant had been subjected to some form of restricted incarceration prior to entering the general population, the fact Appellant had been previously sentenced to death and placed on death row was not revealed to them.

[29] When watching television, prisoners with higher status among the inmates get to sit in the front row of seats.

discussed beyond giving Appellant advice about his options. She also said she was "disappointed" to hear Appellant's conduct had been described as aggressive. The professor explained she gave Appellant a copy of one of her graduate-level exams for him to look at, after which Appellant apologized to her and the quality of his work "increased drastically" by the end of the semester. Mr. MM testified that he personally did not see Appellant's conduct as inappropriate, but that "someone" perceived it as overly aggressive.

In prison records admitted into evidence by the Defense, one of Mr. JL's counseling entries notes Appellant told Mr. JL that "he reacted to the instructor, [*90] venting his frustration about the test," but that "he did not believe he was overreacting or was in any way threatening towards her." Mr. JL further wrote in his notes:

> Discussed with [Appellant] his recent interaction with his biology instructor. Staff members from [the prison's Directorate of Correctional Programs] approached this counselor and were concerned about [Appellant's] aggressive interaction with the instructor. The staff members were told by the instructor that [Appellant] was angry about the grade he received on the first exam and confronted her about the exam in what she thought was a very aggressive manner. When this information was relayed to [Appellant] he was surprised. He did not believe he came across this way at all. . . . He stated he appreciated the feedback [ ]and will be more aware of this [in] interactions with her in the future.

Later in the rehearing, the military judge instructed the members that asking witnesses "have you heard" type questions was a permissible method of testing a witness's opinion and to enable the members to assess what weight the witness's testimony should be given. The military judge further explained, "If the witness admits knowledge [*91] of the matter, then you may also consider the question and answer to rebut the opinion given. . . . The question may only be considered for the limited purpose I stated."

None of these matters was referenced in the Government's sentencing argument; however, as discussed in greater detail in Section II(H), *infra*, of this opinion, trial counsel did ask the members what risk they would accept on a confinement officer's behalf if they did not sentence Appellant to death.

2. Law

HN18[↑] Counsel may test a witness's opinion regarding the character of another person by asking "have you heard" or "are you aware" type questions which refer to specific instances of conduct—as long as there is a good faith basis for asking the question, and the question is otherwise permissible under the rules of evidence. *United States v. Saul, 26 M.J. 568, 572 (A.F.C.M.R. 1988)*. The specific instances themselves are not offered to prove they did or did not occur, but rather to evaluate the proffered opinion. *United States v. Beno, 324 F.2d 582, 588 (2d Cir. 1963)*; *see also United States v. Anderson, No. ACM 39141, 2018 CCA LEXIS 122, at *5 (A.F. Ct. Crim. App. 28 Feb. 2018)* (unpub. op.).

3. Analysis

Appellant argues the Government attempted to portray him as "a violent, aggressive person" by asking misleading "have you heard" questions about events characterized by competing narratives or lacking evidentiary support. The main topics [*92] at issue here are the claims of confrontations between Appellant and other inmates and his interaction with his biology instructor.

Because Appellant did not object at trial to trial counsel's questions about his alleged confrontations with the other inmates, Appellant forfeited this issue, and we review for plain error. Due to the lack of a trial objection, we are somewhat hampered in our ability to assess what, if anything, formed the basis for trial counsel's suggestion that Appellant was embroiled in "a shouting match" regarding Appellant being "the front row center." It was clear from the testimony that Appellant had conversations and likely disagreements with at least two other inmates, but Mr. JL disavowed any knowledge of the situation trial counsel propounded, and no witness supported the version of events sugested by trial counsel.

Regardless of whether trial counsel had a good faith basis for asking the question, we conclude Appellant was in no way prejudiced for two reasons. First, the military judge told the members they could only consider the Government's questions if the witness admits to knowing about the matter, which Mr. JL did not do. ***HN19***[↑] Unless there is evidence to the [*93] contrary, we will presume court members follow the instructions they are given by the military judge. *United States v.*

Stewart, 71 M.J. 38, 42 (C.A.A.F. 2012) (citing *Taylor, 53 M.J. at 198*). Thus, the members should have ignored trial counsel's question to Mr. JL, and we see nothing to indicate that they did not do so. Second, even if the members did not and improperly concluded from the question that Appellant had gotten into a heated argument about the informal prisoner hierarchy, we find it implausible such a conclusion would have had any impact on the members' assessment of an appropriate sentence. That prisoners confined in close proximity to each other in a highly restrictive setting may have arguments—even heated ones—from time to time is hardly unexpected. Given the vastly more severe character of Appellant's charged offenses, any jailhouse arguments not significant enough to warrant intervention by the prison's staff could not reasonably be expected to have had any impact on the members' decision to not grant him a sentence involving the possibility of parole.

With respect to trial counsel's questions about Appellant's interaction with his biology professor, we conclude trial counsel had a good faith basis for his questions about this episode, and therefore [*94] we do not find prosecutorial misconduct. Because both Mr. JL and Mr. MM testified that at least someone on the prison staff was concerned Appellant had acted aggressively toward the professor, and Mr. JL's clinical notes offered in evidence by the Defense corroborate this, trial counsel had some basis for framing the question as they did, despite the fact the professor and Mr. MM saw the situation differently. Thus, we disagree with Appellant's contention that trial counsel lacked a good faith basis for asking the questions in the first place. Nevertheless, even if we were to conclude trial counsel lacked a good faith basis for asking about an "aggressive interaction," we would find no prejudice to Appellant in light of his attorneys' effective evisceration of the suggestion Appellant had behaved inappropriately. The professor's own testimony, along with the absence of disciplinary action and the fact Appellant stayed in the biology class, apparently successfully completing the semester, all substantially undermined the Government's attempts to frame the episode as misconduct. As a result, even if there was error here, the likelihood of the members drawing any negative connotation [*95] from trial counsel's questions was remote. If anything, Appellant's case was potentially bolstered by trial counsel's efforts, which demonstrated how far the prosecution team had to reach to imply Appellant was a problematic prisoner. The fact trial counsel did not reference the matter in the Government's sentencing argument suggests they also determined the claim was not worth revisiting.

E. Demonstrative Aid Used in Dr. TR's Cross-Examination

Appellant argues the military judge erred by permitting trial counsel to display several slides during the cross-examination of a defense expert witness, because the slides contained information which was never admitted into evidence.[30] We disagree.

1. Additional Background

The Defense called Dr. TR, an expert in the field of "prison risk assessment and inmate adjustment," to testify that—in his opinion—Appellant had adapted well to life in prison and posed a low probability of engaging in violent behavior while incarcerated. The Defense also admitted a report prepared by Dr. TR detailing his assessment of Appellant. The report indicates Dr. TR arrived at his opinion by considering: his interview with Appellant; his review of Appellant's prison record; [*96] his tour of the Disciplinary Barracks; briefings and interviews which Dr. TR participated in regarding the facility's population, policies, and procedures; and his review of "capital risk assessment scientific literature."[31] Significantly, Dr. TR explained in his report that he was asked to evaluate Appellant's risk of committing violence in confinement in the event he was sentenced to life without the possibility of parole.

Dr. TR testified that one challenge facing the scientific community in predicting future dangerousness of prisoners is that prison violence is relatively rare and is perpetrated by only a small percentage of inmates. He said that violence in the Disciplinary Barracks was minimal and rarely aggravated, and that there had only been a single case of a prisoner murdering another in the prison's history. Dr. TR testified that prisoners serving sentences to life without the possibility of parole are generally better behaved in prison than those with other sentences; that the severity of a prisoner's violence which originally resulted in his or her incarceration is not a good predictor of whether that prisoner will be violent in prison; and that a prisoner's propensity for [*97] violent jailhouse misconduct diminishes as he or she ages.

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[30] See Appendix, AOE IX.

[31] The version of the report admitted into evidence did not include citations to the studies and articles Dr. TR relied upon, but the parties possessed a version of the report which did.

In assessing Appellant, Dr. TR noted the Disciplinary Barracks staff considered Appellant to be "a model inmate," and that he had "continually and successfully participated in available programming, ongoing treatment, daily work, continued education, and [had] received consistently positive appraisals by [Disciplinary Barracks] staff." Dr. TR highlighted that Appellant had no violent infractions in his more than 12 years of incarceration and that his age of 35 at the time of his assessment made him statistically less likely to engage in prison misconduct of any sort. Dr. TR also explained Appellant's custody level had been upgraded twice, granting Appellant relief from certain prison restrictions.

During Dr. TR's direct examination, trial defense counsel used a series of 32 slides as a demonstrative aid. The slides contained a mixture of prison-violence statistics, risk-assessment concepts, and information specifically related to Appellant, including a summary of Dr. TR's conclusions. Various slides included citations to different articles; however, these citations were not discussed during the direct examination. Trial counsel [*98] planned to attack Dr. TR's assessment on cross-examination using their own 29-slide demonstrative aid. This aid primarily consisted of excerpts from various journals along with the scoring rubric for the Violence Risk Appraisal Guide and other assessment tools plus a list of ten "risk factors" pertaining to Appellant. Trial counsel averred that "every single one of these articles is taken from the sources that were cited in Dr. TR's report." The slides with the excerpts generally contained large passages from articles with small excerpts highlighted and called out to the left of the larger passages. For example, one slide contained an entire two-column page from a study with one 18-word sentence called out.

Outside the presence of the members, trial defense counsel objected to the slides, asserting that the Government was attempting to show the members information that had not been admitted into evidence. The Defense further specifically objected to one slide ("Slide 28") that contained an excerpt from an article suggesting that a comparison between misconduct by prisoners on death row and those not on death row was inapt due to the difference in the confinement conditions of those [*99] two populations.[32] The Defense's objection to Slide 28 was based on the premise that trial counsel was simply trying to telegraph to the members that Appellant had been previously sentenced to death, a fact which had not otherwise been disclosed to them.

After hearing the parties' arguments, the military judge had Dr. TR review trial counsel's slides and then asked him whether they contained the type of data he or other experts would rely upon in "in reaching the type of conclusions that [he] did" in Appellant's case. Dr. TR answered, "Generally speaking, that's true, Your Honor." The military judge overruled the Defense's objection, saying, "I don't find that the [G]overnment intends to use this for an improper purpose of announcing or presenting evidence of the prior sentence in this case. But instead, is presenting this information just to put in context the data that was provided by Dr. [TR] during his direct examination."

In the Government's cross-examination of Dr. TR, trial counsel asked him about various studies, some of which Dr. TR had co-authored. These studies identified different factors correlated to prison misconduct which Dr. TR either had not discussed or had found to [*100] be inapplicable to Appellant's situation. For example, some of the studies focused on the age of the prisoner at the time of the prisoner's conviction as opposed to the time of assessment. Dr. TR agreed with trial counsel in some respects and disagreed in others, often asserting that some of the studies cited by trial counsel had never been replicated or validated with respect to prison populations. A particular point of contention was that trial counsel often pointed to studies of assessment tools geared towards information known at the time an accused is being initially sentenced, while Dr. TR was assessing a person who had been in confinement for more than 12 years. In some cases, Dr. TR said he was unfamiliar with particular studies trial counsel asked him about, yet trial counsel showed excerpts from those studies and proceeded to ask Dr. TR questions about those studies without objection by the Defense.

Trial counsel sought to demonstrate that Appellant's risk of future dangerousness was higher than Dr. TR concluded it was by pointing to the scores Appellant would have received had Dr. TR used other assessment tools, such as the Violence Risk Appraisal Guide.[33] Dr. TR said he was [*101] aware of the tools, but explained he had not used them because he was not confident in

[32] The article was among those listed in the version of Dr. TR's report which contained citations to the studies and articles he had relied upon.

[33] The Violence Risk Appraisal Guide assigns points to the person being assessed based upon a variety of criteria, ranging from whether the person lived with both biological parents through the age of 16 or had ever been married, to whether the person met the criteria for personality disorders.

their applicability to Appellant's case. Some of trial counsel's slides depicted scoring sheets from these tools with hypothetical values assigned to Appellant—from which trial counsel argued Appellant was a higher risk than Dr. TR found him to be.

Regarding Slide 28, trial counsel said to Dr. TR, "you talk a lot about how capital offenders are not a disproportionate risk to offend in prison," and then he read the following quote from a larger excerpt displayed on the slide: "data from death sentence inmates are not directly comparable because those condemned inmates are held under super maximum conditions that are distinctly different from those that these inmates would have encountered had they been sentenced to capital life terms and placed in the general prison population." Trial counsel then pointed to Appellant's clean disciplinary record and asked, "Isn't it also correct that this same analysis regarding the type of maximum conditions apply to the accused in this case because he was held under maximum security conditions for the vast majority of his confinement at the Disciplinary Barracks[?]" [*102] Dr. TR answered, "Yes," and trial counsel moved on to other matters. On redirect, the Defense did not ask Dr. TR anything about this particular study or the context of the excerpted language quoted by trial counsel and included on Slide 28.

In the Government's sentencing argument, trial counsel used another slide presentation. Five of the slides in that presentation were duplicates of slides trial counsel used during Dr. TR's cross-examination. The Defense objected to these five slides prior to trial counsel's argument, four of which depicted the scoring system for a risk assessment tool Dr. TR did not use. The military judge overruled the objection, stating "they reflect his testimony and things that he testified about." Trial counsel proceeded to argue at length that the members should rely upon the score Appellant would have received had Dr. TR used the other risk assessment tool. Trial defense counsel did not specifically request a limiting instruction regarding the slides trial counsel used during Dr. TR's cross-examination and sentencing argument, and the military judge did not *sua sponte* give one.

2. Law

HN20[↑] Under Mil. R. Evid. 702, expert witnesses "may testify in the form of an opinion or otherwise." [*103] In doing so, expert witnesses may base their opinions on facts or data reasonably relied upon by experts in the particular field, even if such facts or data are not otherwise admissible. Mil. R. Evid. 703. Subject to the military judge's weighing of the probative value and the prejudicial impact of otherwise inadmissible matters, a party may cross-examine an expert witness regarding such matters in order to help members evaluate the witness's opinion. Mil. R. Evid. 703 and 705.

HN21[↑] Although trial counsel's slides were not admitted into evidence, we utilize the abuse of discretion standard in reviewing the military judge's decision to permit trial counsel to use the slides as a demonstrative aid. *See, e.g., United States v. Stark*, 24 M.J. 381, 385 n.2 (C.M.A. 1987) ("The decision to permit or deny the use of demonstrative evidence has generally been left to the sound discretion of the trial judge."); *Lowe v. State, 259 So. 3d 23, 39 (Fla. 2018)*; *Sheffield v. United States, 111 A.3d 611, 625 (D.C. 2014)*; *United States v. Palazzo, 372 Fed. Appx. 445, 452 (5th Cir. 2010)* (unpub. op.) (per curiam).

3. Analysis

Appellant contends the military judge erred in permitting the Government to display excerpts from articles during Dr. TR's cross-examination which were not admitted in evidence. The vast majority of the articles referenced on trial counsel's slides were included in the list of articles Dr. TR indicated he had relied upon—a list which had been [*104] provided by the Defense to the Government.[34] Thus, the Defense can hardly claim surprise. In addition, after being given the opportunity to review the slides trial counsel planned to use, Dr. TR said that "[g]enerally speaking," it was true that the slides contained the sort of data that either he relied upon or experts in his field would rely upon.

To the extent Appellant argues trial counsel should not have been permitted to cross-examine Dr. TR by asking him about studies not admitted into evidence, we disagree. ***HN22***[↑] It is within the military judge's discretion to permit trial counsel to test the opinion of an expert witness with not just un-admitted matters, but with matters which are inadmissible in their own right. *See, e.g., United States v. Jackson, 38 M.J. 106, 110 (C.M.A. 1993)*. Thus, trial counsel was permitted to ask Dr. TR about other studies and assessment tools in

[34] Based upon our review of the record, we have determined trial counsel's slides included portions of at least two studies which Dr. TR had not included in his list of articles.

order to test the basis for his opinion. HN23[] Our superior court has cautioned that military judges "should give a limiting instruction" when otherwise inadmissible information is used to cross-examine an expert to limit the likelihood that members will treat the information as evidence. *United States v. Neeley, 25 M.J. 105, 107 (C.M.A. 1987)*. When, however, an expert is asked about otherwise admissible information—such as matters [*105] contained in a learned treatise—that information is available for the factfinder to use for the truth of the matter asserted. Mil. R. Evid. 803(18); *Jackson, 38 M.J. at 110* (footnote and citation omitted).

Ostensibly, the members could have considered the matters trial counsel questioned Dr. TR about as evidence, assuming trial counsel adequately laid a basis for their admissibility. *See, e.g., United States v. Coleman, 41 M.J. 46, 49 (C.M.A. 1994)* (discussing foundational requirements for cross-examining witness on matters in learned treatise). But trial defense counsel's objection did not go to whether the members could not treat the matters as evidence—instead, the Defense's objection was that the matters should not be visually broadcast to the members via trial counsel's slides. Notably, trial defense counsel never objected to the Government asking the questions they did, nor did trial defense counsel ask the military judge to preclude the Government from asking questions about the articles and assessment tools. Considering that trial counsel could read out loud a section of a relevant article to an expert witness and ask the witness if he or she was aware of it, agreed with it, or considered it, we are unclear—and Appellant has not explained—why it would not be within a military [*106] judge's sound discretion to permit counsel to post the text of such a section on a slide and then display that to the members as part of counsel's cross-examination.

The instant case is more complicated, however, because the cross-examination slides did not simply include the portions of the articles quoted in trial counsel's questions. Instead, they included large portions of the articles with the quoted material highlighted. In other words, trial counsel's slides included a substantial amount of information never posed to Dr. TR (or any other witness) or read to the members. The purpose behind including such unreferenced information in the slides is not clear to us. The military judge's basis for permitting trial counsel to broadcast this extraneous information to the members is equally elusive. We cannot tell if the military judge permitted Slide 28 to be used because he believed the Government had adequately laid the foundation for its admissibility, whether under a hearsay exception or otherwise. Similarly, we are unable to discern whether he concluded it was an inadmissible matter Dr. TR had based his opinion on—but that its probative value substantially outweighed its prejudicial [*107] effect under Mil. R. Evid. 703.[35] All the military judge said about Slide 28 was that he believed it "put in context the data that was provided by [Dr. TR] during his direct examination." Other than saying he was overruling the Defense's objection, the military judge said nothing at all about the extraneous verbiage on the other slides. We note that at the time the military judge ruled, he did not know what trial counsel specifically intended to ask Dr. TR when the slides were displayed; however, it was highly unlikely trial counsel intended to read the entirety of the slides to Dr. TR, given the volume of information printed on them.

We are not convinced the military judge did not abuse his discretion with respect to the extraneous information on the slides. Although Dr. TR's comment that the information in the slides was "generally speaking" the sort experts in his field relied upon was hardly an authoritative endorsement, Dr. TR's testimony indicated he was aware of most of the studies and had opinions as to their applicability to Appellant's case. Moreover, Dr. TR had personally authored or co-authored many of the studies and he was able to cogently discuss the studies he said he was unfamiliar with, [*108] so the information was likely admissible under the learned treatise hearsay exception. Even if inadmissible under that rule, the information would have still been available to test the basis of Dr. TR's opinion, even though the military judge never specifically instructed the members as to that limitation. Arguably, the fact trial counsel elected to place the information on a visible slide rather than simply read it to the witness is a distinction without a difference, because the information would be in front of the members in either case, had trial counsel questioned Dr. TR about it. The problem with this analysis, however, is that trial counsel never asked Dr. TR about the extraneous information on the slides, and Dr. TR did not testify about any of it. Instead, the material was simply displayed to the court members without instruction or context, leaving the members free to read the information and incorporate it into their analysis of the case as they saw fit.

In general, a demonstrative aid "illustrates or clarifies

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[35] To the degree the military judge so balanced the probative value of Slide 28, he made no reference to his analysis on the record.

the testimony of a witness." *United States v. Heatherly, 21 M.J. 113, 115 n.2 (C.M.A. 1985)*. We are unable to determine how unquestioned-about and untestified-to text from unadmitted documents accomplished either of those functions [*109] during Dr. TR's cross-examination. We conclude the military judge abused his discretion in permitting this information to be displayed to the members without at least providing an instruction to the members on its permissible use.

Despite concluding the military judge abused his discretion with respect to the extraneous information on the slides, we conclude Appellant was not materially prejudiced based upon our review of the record.

We first note that the matters on trial counsel's slides did not substantively impact the effectiveness of the cross-examination one way or the other. Trial counsel effectively demonstrated the arguable shortcomings in Dr. TR's analysis as well as the fact that different assessment tools might lead to different conclusions. Trial counsel made these points during the verbal cross-examination, and the slides—at most—served to drive those points home. With respect to the extraneous information on the slides, Appellant has not indicated, nor have we been able to identify, any specific language contained therein which might have had an impact on his case.

The nature of Dr. TR's testimony also leads us to conclude Appellant was not prejudiced. Through Dr. TR's [*110] testimony, the Defense sought to portray Appellant as being unlikely to engage in any violent conduct while in confinement. The Government, on the other hand, sought to undermine this portrayal, suggesting to the members that Appellant did pose a risk in confinement. The framing of this debate, however, was not that Appellant did or did not pose a risk to the outside community or that he was more or less likely to commit other crimes upon release from confinement, but rather, whether he would be violent *in prison*. Whether Appellant would pose some sort of elevated risk to the *outside community*, should he be released, was never part of Dr. TR's testimony. As Dr. TR explained, the Defense asked him to analyze Appellant's risk should he receive a sentence of life *without* the possibility of parole. Somewhat in line with this framing, neither party made any significant effort to argue Appellant should or should not be sentenced to life *with* the possibility of parole; instead, the central theme of the rehearing was whether or not Appellant should be sentenced to death.

The logical importance of Appellant's dangerousness in confinement bears on the question of whether or not Appellant would [*111] pose a threat to other inmates and the confinement facility's staff. If he did pose such a threat, one could argue Appellant should be executed in order to permanently eliminate that threat. Indeed, during the Government's sentencing argument, as discussed in greater detail in Section II(H), *infra*, of this opinion, trial counsel attempted to persuade the members to sentence Appellant to death rather than accept the risk that Appellant might harm prison staff. The inverse of this proposition would also be true: if Appellant did not pose a risk of danger to his fellow inmates or the prison staff, then Appellant was suited for a lengthy, even life-long, term of confinement. Beyond this construct, Appellant's likelihood of presenting a future danger while in confinement was of negligible relevance, especially given the limited sentencing options in his case. Appellant sought to demonstrate that he was a model prisoner who could quietly spend the rest of his life in a confinement facility, and there was therefore no reason to shorten his life out of concern for the safety of the prison staff or other inmates. The Government, meanwhile, sought to undermine that premise in order to support [*112] the argument that Appellant should be executed, effectively reducing the period of time he remained in prison.

The members sentenced Appellant to life without the possibility of parole, a sentence which necessarily contemplates spending as much time in confinement as possible. That is, whatever weight the members gave to trial counsel's attempt to portray Appellant as posing a risk of danger in confinement, they apparently did not find that portrayal so compelling as to warrant the death sentence.

Once the members decided not to sentence Appellant to death, the only decision for them to make regarding his confinement was whether it would be with or without eligibility for parole. The relevance of Appellant's future inprison dangerousness to this question approaches non-existence; a sentence that allows for parole and thus less time in prison has no obvious logical connection to a determination that the prisoner has a higher or lower risk of prison misconduct.[36] Thus, we conclude that whatever can be said of Dr. TR's opinion on Appellant's risk of future dangerousness, the

[36] Conceptually, one might conclude a person's likelihood of in-prison misconduct correlates to his or her likelihood of committing misconduct once released from prison, but no witness testified on this point and neither party argued it.

likelihood it impacted the members' decision on whether to grant Appellant the possibility of parole was negligible. [*113] Similarly, to the extent trial counsel was able to capitalize on any error regarding the display of the slides, we see no convincing argument that this led to a different sentence. Thus, even though we find error regarding trial counsel's slides, Appellant was not prejudiced.

F. Appellant's Updated Risk Assessment

Appellant contends the military judge erred in permitting trial counsel to demonstrate that an assessment produced by prison officials had not been properly prepared when Dr. TR—unaware of the assessment's shortcomings—relied upon it in preparing for his testimony.[37] Appellant also argues the military judge erred when he denied the Defense's request to withdraw the assessment from evidence. We conclude the military judge did not err.

1. Additional Background

Early in the Defense's case, just after the Government rested on 18 June 2018, trial defense counsel sought to admit several documentary exhibits into evidence. Once the military judge agreed to relax the rules of evidence, trial counsel indicated they had no objections, and the exhibits were admitted. One of the exhibits, Defense Exhibit 7, included a document titled "Updated Risk Assessment." The assessment was dated 1 May [*114] 2018 and signed by Ms. AD, who had taken over as Appellant's prison counselor after Mr. JL retired. The assessment concluded Appellant's "internal risk" at the time was "low," as he had "proven to be compliant and cooperative" and had not exhibited any traits suggesting he would be a dangerous threat to other inmates or prison staff. The assessment further noted Appellant's custody level had been upgraded to "Minimum Inside Only."

On 19 June 2018, after several witnesses testified, the military judge instructed the members—pursuant to a defense request—to spend the rest of the day reviewing Defense Exhibit 7 along with two other exhibits, and the court recessed at 1448 hours. When the court reconvened the morning of 20 June 2018, the military judge asked the members if they had been able to read through the exhibits, and they said they had. Dr. TR was then called to testify.

Dr. TR did not mention Ms. AD or her assessment during his testimony on direct, but one of the slides used during that testimony was titled "Institutional Appraisals" and referenced Ms. AD. The slide contained three main headings—one each for the Disciplinary Barracks' deputy commandant, Appellant's counselors, and [*115] the education supervisor. The second heading is relevant here, as it identified Mr. JL and Ms. AD as licensed clinical social workers. Beneath that heading, the first bullet read, "Average risk assessment 2016—[Mr. JL]," while the second read, "Provide monthly therapy sessions."

Midway through Dr. TR's cross-examination, early in the afternoon of 20 June 2018, trial counsel asked Dr. TR about Ms. AD's assessment, drawing an objection by trial defense counsel who argued the assessment had not been mentioned in Dr. TR's report or his testimony. Trial counsel pointed out that Ms. AD was referenced on the one slide and, moreover, that her assessment was a defense exhibit. The military judge overruled the objection, at which point the Defense requested an Article 39(a), UCMJ, *10 U.S.C. § 839(a)*, hearing outside the presence of the members.

During that hearing, the Defense produced an email showing that one of the trial counsel had contacted the Disciplinary Barracks' deputy staff judge advocate on 8 June 2018. In the email, the trial counsel asserted the Defense had just provided notice of their intent to introduce Ms. AD's risk assessment, and that trial counsel would need Ms. AD's notes and related documents. Ten days later, [*116] in the evening of 18 June 2018—the day before the members were told to review Defense Exhibit 7—the deputy staff judge advocate responded to the email with a short message stating that the risk assessment was "unauthorized and invalid," that he needed to talk to trial counsel at his earliest convenience, and that "[t]his is going to get ugly." The one trial counsel that the deputy staff judge advocate emailed, however, had been temporarily excused from the proceedings due to a medical emergency, and he was not released from the hospital until around noon on 19 June 2018. At some point after being released, this trial counsel saw the email and forwarded it to trial defense counsel at 1514 hours on 19 June 2018 without any discussion about the assessment, simply noting, "see below." Thus, this email had been sent about 30 minutes after the military judge told the members to start reviewing the defense exhibits.

[37] See Appendix, AOE VII.

In discussing their objection, trial defense counsel characterized Ms. AD's risk assessment as having not been "validated." The military judge asked what that meant, and trial defense counsel answered they were not sure, saying, "[W]e were just told by the [G]overnment something [*117] was wrong with the report. We found out yesterday after the conclusion of court. And we haven't had the opportunity to sort of figure out what's going on with that report." The military judge turned to Dr. TR and asked if he had relied on Ms. AD's assessment in reaching his conclusions. Dr. TR said that although he received it after he wrote his own report, he intended to include it in his "presentation," but that he heard for the first time on the day before—19 June 2018—that "there's some problem with it." Dr. TR maintained his conclusions would be no different even if he had not considered the assessment. Trial counsel then told the military judge that Ms. AD's assessment had not been properly coordinated and that Ms. AD did not have a reason to prepare the assessment in the first place.

Trial defense counsel said they believed it was "appropriate" for trial counsel to "attack the validity of the report," because "[i]t is evidence," but they contended Dr. TR was not the appropriate witness to question about the assessment's validity because he lacked any knowledge on that point. The military judge said he would allow trial counsel to ask Dr. TR the limited questions of: (1) whether [*118] he relied on the assessment, and (2) whether he was aware it was not issued in accordance with Disciplinary Barracks policies and procedures. The Defense argued trial counsel should only be allowed to ask the first question, because Dr. TR had just explained the assessment did not change his opinion. The military judge responded that the Defense would "get a chance to do redirect," and he allowed trial counsel to ask both questions.

When cross-examination resumed, Dr. TR said he had reviewed Ms. AD's assessment and relied on it in his preparation for his testimony, but that he only became aware that it had not been issued in accordance with Disciplinary Barracks' policies and procedures moments earlier. Trial defense counsel did not ask Dr. TR anything about Ms. AD's assessment during redirect examination.

One week later, on 27 June 2018, trial defense counsel asked to withdraw Defense Exhibit 7. Trial defense counsel asserted that, over the preceding week, they had determined the assessment had not, in fact, been appropriately routed for approval, and that if they had known that earlier, they never would have sought admission of the exhibit. Trial counsel opposed the Defense's request, [*119] and the military judge denied it, because the exhibit had already been admitted into evidence, referred to in Dr. TR's cross-examination, and considered by the members.

The following week, during the Government's case in rebuttal, trial counsel called Mr. WG, the Disciplinary Barracks' new assessment chief, the position Mr. JL had once filled.[38] Mr. WG testified that Appellant had not been due for a risk assessment in May 2018, and that Ms. AD had told him she updated the risk assessment because Appellant was being resentenced, which would ordinarily not be a reason for a reassessment. On cross-examination, Mr. WG admitted that risk assessments can be prepared to meet administrative needs, and the fact Appellant's custody level had been upgraded in 2017 "very well could" be such an administrative need that would call for a new risk assessment. Trial defense counsel asked whether, in light of Mr. JL's retirement, Appellant had a counselor at the time of the change in Appellant's custody level. Mr. WG, however, said he did not know whether Appellant had a counselor then, when Ms. AD took over as Appellant's counselor, or whether an updated risk assessment had been completed when Appellant's [*120] custody level was changed. Mr. WG admitted he had not checked to see if an updated risk assessment was prepared in 2017.

Trial counsel engaged in a colloquy with Mr. WG about prisoners manipulating prison staff members before asking if the risk assessment had been given directly to Appellant. Mr. WG initially said it had been, but when asked a non-leading follow-up question, Mr. WG said he had been told the assessment had been given to the defense team. During cross-examination, Mr. WG conceded the assessment had only been provided to Appellant's counsel and that he had never been told the assessment was given to Appellant himself. Mr. WG further admitted he had no knowledge of Appellant trying to manipulate Ms. AD into creating the assessment in the first place. Ms. AD was not called to testify by either party.

During the Government's sentencing argument, trial counsel did not refer to Ms. AD's risk assessment or Dr. TR's reliance on it.

2. Law

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[38] Mr. WG started in this position in February 2018.

HN24[] The scope of and limits on cross-examination are within a military judge's discretion. *See, e.g.,* United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017). We review a military judge's decision to admit evidence which is adduced through cross-examination for an abuse of discretion. *See* United States v. Piren, 74 M.J. 24, 27 (C.A.A.F. 2015).

3. Analysis

[*121] Appellant's argument is essentially that he should have been able to have confidence in the validity of the updated risk assessment by virtue of the fact it was given to the Defense by Ms. AD, a government employee. By extension, Appellant argues the military judge should have both precluded trial counsel from cross-examining Dr. TR about the assessment and allowed the Defense to withdraw the exhibit once that validity was called into question. Had the military judge done so, Appellant contends the Government would not have not been permitted to elicit Mr. WG's rebuttal testimony on the matter. The crux of Appellant's argument is that the Government (via Ms. AD) misled the Defense by providing them with an unapproved assessment—an assessment which the Defense subsequently relied on in their case.

Appellant would have us analogize this situation to government agents intentionally withholding or mischaracterizing the nature of exculpatory evidence. Based upon the record before us, however, we find this analogy inapt because there is no indication Ms. AD had any inkling there was anything amiss with her assessment. Moreover, the Defense obtained the assessment directly from Ms. AD, outside [*122] the normal discovery procedures, thereby depriving trial counsel the ability to ascertain the legitimacy of the document before turning it over to the Defense. From the record, it appears trial counsel first learned the assessment existed at all on the Friday before the parties gave their opening statements that Monday. Considering the manner in which the Defense obtained the assessment and the compressed timeline the parties were operating under, trial defense counsel were best-positioned to investigate the legitimacy of the document in their possession before offering it as an exhibit if they wanted to be certain it was valid.

We recognize Ms. AD was a government employee. At the same time, the notion that government employees might make administrative errors is hardly far-fetched. Given the stakes of the case, and considering the manner in which trial defense counsel obtained the assessment prior to offering it into evidence, we would have expected the Defense to seek confirmation of the assessment's legitimacy. That being said, we also would have expected the Government to have investigated and revealed the infirmities of the assessment much sooner than it did, especially in a case [*123] wherein the Government was seeking the death penalty. Nonetheless, other than demonstrating an arguable error on Ms. AD's part and apparent delay on the Government's part in discovering and disclosing that error, the Defense has not shown any conduct rising to the level of prosecutorial misconduct. We also see no basis for concluding the military judge abused his discretion in not taking the extraordinary measure of withdrawing an admitted exhibit days after the members had been told to review it. Similarly, we find no error in the military judge permitting the Government to ask Dr. TR whether he relied on the assessment and whether he knew its validity had been questioned. This, of course, is a standard practice with expert witnesses. *See* Mil. R. Evid. 705.

Even if we were to find error on the military judge's part, which we do not, we fail to see how Appellant suffered any prejudice. Defense Exhibit 7 was extremely favorable to Appellant, essentially portraying him as a model prisoner with little risk of committing jailhouse misconduct. While the Government sought to show the assessment was invalid and that Appellant had nefariously procured it, trial defense counsel undercut both lines of attack [*124] to the point that all that could be said of the assessment's origins was that it did not go through the ordinary staffing process. Despite the controversy about the creation of the assessment, the Government never established there was anything incorrect in the assessment itself or that Ms. AD had disavowed her conclusions in any way. The members were never told they could not rely on the assessment and neither party argued they could not do so. Thus, Appellant was in a better position by virtue of the assessment being admitted than he would have been had the Defense's request—which sought to remove the assessment and all references to it from the rehearing—been granted. The assessment also bolstered Dr. TR's testimony, even though trial defense counsel failed to elicit the fact his opinion would have remained the same without it. Based on the Government establishing, at most, an administrative anomaly with respect to the assessment, we conclude its admission—along with Mr. WG's rebuttal testimony—did not operate to prejudice Appellant, and he is entitled to no relief.

G. Cross-Examination of Defense Forensic Psychiatrist

Appellant argues on appeal that the military judge erred by permitting [*125] trial counsel to ask a defense expert witness about a document found on Appellant's computer, despite the fact trial defense counsel never objected to the line of questioning.[39]

1. Additional Background

The Defense called Colonel (Col) SM, an Army forensic psychiatrist, who testified he had diagnosed Appellant with four disorders. In forming his diagnoses, Col SM interviewed Appellant and reviewed such items as the transcript of Appellant's original court-martial, his medical records, recordings of his phone calls from the Disciplinary Barracks, and notes from interviews with other mental health professionals.

One of Col SM's diagnoses pertained to a traumatic brain injury he concluded Appellant had sustained in a motorcycle accident, which happened in late February 2004, approximately four months before his crimes. At the time, Appellant had been dating another Airman, MM. Col SM explained that MM found Appellant to be "a completely different person after the motorcycle accident," as he became more aggressive, disrespectful and verbally abusive, and she broke off the relationship with him in March or April of 2004 as a result. Col SM compared MM's assessment with others' impressions from [*126] before the accident which described Appellant as caring, sweet, and "never aggressive." Col SM said a declaration written by MM was "one of the best examples" of the purported change in Appellant's behavior, because MM was in a months-long intimate relationship with Appellant at the time. Col SM also testified that he had not seen any evidence that Appellant had been "abusive or nasty to anybody else" prior to the accident.

Although it is not entirely clear from the record how it was obtained, the Government possessed a word processing document found on a computer owned or used by Appellant. The document seemed to have been created prior to the motorcycle accident, and it appeared to be a letter to MM in which Appellant catalogued his sexual "grievances" with her. The document, which trial counsel referred to as "the break-up letter," discussed Appellant's frustrations with his relationship with MM, couching some of those frustrations in misogynistic and demeaning, but not aggressive, terms. There was no evidence the document had ever been sent to MM or anyone else.

During the Government's cross-examination of Col SM, trial counsel read seven passages from the document and asked whether [*127] each was "correct" after reading them one-by-one. Col SM answered "yes" to each, and the Defense never objected during the exchange. Trial counsel later asked Col SM whether it was possible that Appellant's post-accident behavior, as described by MM, was due not to a motorcycle accident but was the product of Appellant simply being a misogynist. After Col SM agreed that was a possibility, trial counsel asked whether it was true that Ms. JS's wounds were more severe than SrA AS's and SrA JK's. Trial defense counsel objected and the military judge sent the members to lunch and convened an Article 39(a), UCMJ, session. After resolving the Defense's objection regarding the wound question, the military judge told the parties that when the members returned, he intended to give the members "a better instruction about 'have you heard/did you know'-type questions."

Just before the members were called back in, the military judge provided his draft instruction to the parties, and the Defense indicated they had no objection to it. The military judge then told the members the following before the Government was permitted to continue its cross-examination of Col SM:

> When a witness testifies about his or her opinion, [*128] it is permissible to ask that witness, during cross-examination, whether he or she knew, had heard, or was aware of certain matters beyond those matters to which the witness testified on direct examination. Such a question is permitted to test the basis of the witness's opinion and to enable you to assess the weight you accord his or her testimony. You may consider the question for this purpose.
> If the witness admits knowledge of the matter, then you may also consider the question and answer to rebut the opinion given.
> You may not, however, infer from this evidence that the accused is a bad person or has criminal tendencies. The question may only be considered for the limited purpose I stated.

Trial defense counsel did not ask about MM or the

[39] See Appendix, *Grostefon* issue XXII.

document in the Defense's re-direct examination of Col SM. Later in the rehearing, during the Government's rebuttal case, trial counsel sought to admit the document as substantive evidence in support of a theory that Appellant targeted Ms. JS based upon her gender. The Defense opposed admission of the document, and the military judge denied the Government's request, explaining that while the contents of the letter may have been relevant to Col SM's [*129] formulation of his opinion, they did not have any independent relevance. In the instructions he later gave to the members, the military judge repeated the above instruction about "have you heard" questions.

Trial counsel only briefly referred to the document during the Government's sentencing argument when he said:

> You heard the cross-examination of [Col SM] about "Hey, did you consider this letter he wrote?" "Yes, I did." "Did you consider the fact that he wrote this letter before the motorcycle accident?" "Yes, I did." "Is that really a change of behavior?" "Oh yeah, I think so." You can consider that. As the judge instructed you, you can consider what he—what that letter was and when it was written in evaluating [Col SM's] testimony.

2. Law and Analysis

Had trial defense counsel objected to the questions posed to Col SM by trial counsel, we would review the military judge's decision to permit them for an abuse of discretion. Because there was no such objection, the matter is forfeited, and we review for plain error, which we do not find here.

As an expert witness who offered his professional opinion, Col SM was subject to being asked about not only the information he relied upon in forming [*130] his opinion, but also about additional information which—if true—might impact his opinion. Mil. R. Evid. 703, 705. ***HN25***[⬆] Military judges are advised to provide limiting instructions explaining how the members may consider such questions, as the military judge did here. *See, e.g., Neeley, 25 M.J. at 107*. During direct examination, Col SM's testimony characterized Appellant's pre-accident demeanor as caring, sweet, and unaggressive. The caustic tone of Appellant's computer document seemed counter to this characterization and trial counsel fairly used it to test, if not undermine, Col SM's opinion—especially considering Col SM testified he was already aware of the document's contents. Although there was no evidence Appellant actually sent the document to anyone, we conclude the document's contents carried some relevance to Col SM's overall opinion. Apparently perceiving the inflammatory nature of the questions that trial counsel asked Col SM about the document, the military judge *sua sponte* gave a limiting instruction to the members in the middle of trial counsel's cross-examination—an instruction which he repeated before the members began their deliberations. Trial counsel's later sentencing argument on the matter was consistent with [*131] that instruction, and we identify no error on this issue, plain or otherwise.

H. Trial Counsel's Sentencing Argument

On appeal, Appellant launches a multi-faceted attack on the Government's sentencing argument, asserting trial counsel committed prosecutorial misconduct in several aspects. Specifically, he claims trial counsel improperly used personal pronouns, offered personal views on the evidence, maligned defense counsel, maligned defense theories, and inflamed the passions of the members by making various comments described in greater detail below.[40]

1. Additional Background

The senior trial counsel on Appellant's case gave the Government's sentencing argument which lasted a little over two hours. He also gave a very brief rebuttal to the defense argument. His approach to the argument was to repeatedly ask the members what they "stand for" and where they would "draw the line." Indeed, in his opening lines to the members, he said,

> [W]hen you go back into the deliberation room and you're deciding on what your sentence will be, I want to [sic] ask yourselves what will you stand for. From E-6 to O-6, as an individual, what will you stand for as an individual, as an Airman? Where will you [*132] draw the line?

By the time trial counsel concluded his argument, he had asked the members what they would stand for and where they would draw the line nearly 30 times each. In addition, trial counsel repeatedly asked the members "what risk" they would "allow" in addition to asking them what they would "allow to exist." The following excerpt is an example:

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[40] See Appendix, AOE X.

> When you're deliberating on a sentence—and make no mistake, the [G]overnment is asking you for a sentence of death—ask yourself, "Where will I draw the line? What will I stand for?" What will you stand for? Base housing. Took one of our own. Committed in uniform. What will you allow? What will you stand for in the future?

Trial counsel characterized the members' sentencing decision in terms of the members accepting risk on others' behalf multiple times. For example, when discussing evidence of Appellant's potential for future prison misconduct, he asked the members, "What risk will you accept on some confinement officer's behalf? What risk?" He later asked, "What risk will you accept on another family's behalf? On a correction officer's behalf?" In the 256 slides trial counsel displayed during his closing argument, the next to last slide [*133] read: "What risk will your sentence accept on someone else's behalf?"

Although trial counsel's argument did discuss the specifics of the offenses in the case, his presentation was heavily focused on his entreaty to the members to send a message about what they would personally stand for both regarding Appellant's case and in the future. For example, trial counsel asked the members several times if they did not adjudge the death sentence in Appellant's case, "where would you ever?" Building on this theme, trial counsel suggested if the members did not sentence Appellant to death, "we'll never draw [the line] ever, ever." After describing Appellant's crimes, trial counsel asked, "What will you stand for? Will you stand for this when you're deciding on your sentence? Will you stand for this? Will you allow it, or will you draw a line as an individual, as an Airman? Will you draw a line?" Near the end of his argument, trial counsel asked the members, "Where will you stand for with your sentence? . . . If not here, where? If not in this case, when would you ever? When would you ever?"

Trial counsel described the members' obligations in notably personal terms, such as when he asked the members, [*134] "From E-6 to O-6, where else in your career will you have the opportunity to draw the line as an individual, and as an Airman on what you will allow?" Trial counsel further told the members their sentence will tell the victims' families "where you stand as an individual . . . where you stand as an Airman."

The Defense only objected twice during the argument, both times near the very end of trial counsel's argument. The first objection, which was overruled, was on a point which the Defense argued amounted to a comparison of Appellant to one of his victims. The second objection—also overruled by the military judge—came when trial counsel implied Appellant posed a risk to others; the Defense's argument was that there was no evidence of future dangerousness.[41]

Trial defense counsel opened the Defense's argument with the following:

> In this case, and in any case any jury ever sits on in a death penalty case, their job is not to draw a line. Their job is not to say what we do and don't stand for. Their job is to make an individual moral decision based on the facts before them, and not just the facts of the crime, but all the facts in the case. That is your job. That is the job of this panel. Not [*135] to draw a line, not to stand for something. The law has already said we don't stand for murder. No one in this room will ever say we stand for murder. The law drew a line when it convicted him 14 years ago and said that this is absolutely wrong. It held him accountable, it held him responsible when he was convicted.

In the Government's short rebuttal, trial counsel again told the members their sentence "will send a message about you as an individual, and what you as an Airman will accept. It will—it will tell everyone where you draw the line, and what you will stand for." He concluded, "Anything less than the death penalty is a message you cannot send. What will you stand for?"

The military judge instructed the members about their individual discretion regarding sentencing Appellant to death:

> Members, even if you have found, in accordance with the instructions I have given you, that an aggravating factor exists, and that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, each member still has the absolute discretion to not vote for a death sentence. Even if death is a possible sentence, the decision to vote for death is each member's [*136] individual decision.

During other parts of the Government's argument, trial counsel arguably denigrated certain aspects of the

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[41] By the point of the Defense's objection, trial counsel had already repeatedly suggested Appellant posed a danger to others and asked the members if they were willing to accept that risk.

Defense's case. For example, when dismissing any correlation between Appellant's mental health and his family history of mental health issues, trial counsel argued, "This is hokum," and, "The family history means nothing." At another point, trial counsel sought to undermine the Defense's evidence suggesting Appellant might have suffered from mental illness or a brain injury by telling the members, "Obviously—I mean, if you couldn't tell it then. This is ridiculous." When discussing Dr. TR's opinion that Appellant did not pose a significant risk of committing prison misconduct, trial counsel told the members, "Base rates, base rates—nobody cares about base rates."[42] Without specifically accusing trial defense counsel of misconduct, trial counsel implied the Defense had been deceitful in their opening statement and in presenting evidence. Trial counsel did so by asking the members, "Why these misrepresentations? . . . Why misrepresent that? . . . . Why do that?" Trial counsel later described trial defense counsel's characterization of the evidence surrounding the [*137] number of phone calls to Appellant the night of the murders as "a blatant mischaracterization. Blatant." In addition, five of trial counsel's slides carried the title, "Misrepresentations and Trivialities."

Based upon Appellant's offenses, the members were required to sentence Appellant to at least life in prison, but they could qualify that prison term as being either with or without eligibility for parole. They also had the option of sentencing Appellant to death. Trial counsel argued the only appropriate sentence was the death penalty, while the Defense—without taking any particular stance on the possibility of parole—asked the members to sentence Appellant to confinement for life. After deliberating for about seven and a half hours, the members sentenced Appellant to life without eligibility for parole. When the court-martial president announced the sentence, he said it was with "all of the members concurring."[43]

2. Law

[42] Dr. TR had explained predicting prison misconduct was difficult because serious prison misconduct is rare, despite how prison life is typically portrayed in popular media; thus, the "base rate" of serious prison misconduct is very low.

[43] On the sentencing worksheet the members used, the president crossed out the language "at least three-fourths" so that the relevant sentence read, "all of the members concurring" as opposed to the alternative, "at least three-fourths of the members concurring."

HN26[↑] We review claims of prosecutorial misconduct and improper argument de novo; when no objection is made at trial, the error is forfeited, and we review for plain error. *Voorhees, 79 M.J. at 9* (citation omitted).

HN27[↑] In presenting argument, trial counsel may "argue the evidence of record, as well [*138] as all reasonable inferences fairly derived from such evidence." *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)* (citation omitted). Trial counsel "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger, 295 U.S. at 88*. Trial counsel commits error by making arguments that "unduly inflame the passions or prejudices of the court members." *United States v. Marsh, 70 M.J. 101, 106 (C.A.A.F. 2011)* (internal quotation marks, alterations, and citation omitted). With respect to sentencing arguments, we must be confident an appellant "was sentenced on the basis of the evidence alone." *United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)* (quoting *United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013)*). Impermissible vouching "occurs when the trial counsel 'plac[es] the prestige of the government behind a witness through personal assurances of the witness's veracity.'" *Fletcher, 62 M.J. at 180* (quoting *United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993)*). In assessing the impact of improper sentencing argument on an appellant's substantial rights in the absence of an objection, we ask whether the outcome would have been different without the error. *United States v. Norwood, 81 M.J. 12, 19-20 (C.A.A.F. 2021)*.

3. Analysis

We disagree with Appellant's claim that trial counsel improperly used personal pronouns by saying, "we know," when describing certain matters. Trial counsel would comment that "we know" some proposition and rhetorically ask, "[H]ow do we know that?" He would then summarize the evidence supporting the proposition. [*139] We do not find this style of argument amounts to impermissibly vouching for the evidence, as it is simply one manner of flagging a conclusion then introducing the support for that conclusion. Similarly, references to the victims SrA AS and SrA JK as "our own" were not inappropriate, especially in light of the fact those victims, the parties, Appellant, and all of the members involved in the rehearing were in the Air Force.

Although trial counsel disparaged the Defense's evidence as being "hokum" and "ridiculous," those

comments were isolated, infrequent, and limited in scope, such that even if they amounted to error, they did not prejudice Appellant. We decline Appellant's invitation to read these comments as attacks on trial defense counsel; rather, in the context they were made, they were characterizations as to the believability of the evidence. Nonetheless, we do not endorse trial counsel's comments insofar as they may have amounted to impermissible "substantive commentary on the truth or falsity of testimony or evidence." *Fletcher, 62 M.J. at 180* (quoting *United States v. Washington, 263 F. Supp. 2d 413, 431 (D. Conn. 2003)*).

We find indications that trial counsel accused trial defense counsel personally of making "a blatant mischaracterization" of certain matters and misrepresenting [*140] others more concerning. ***HN28***[ ] As our superior court has held, it is "improper for a trial counsel to attempt to win favor with the members by maligning defense counsel." *Id. at 181* (citations omitted). On the one hand, trial counsel made these comments before the Defense's sentencing argument, so such comments could be seen to refer to the overall defense presentation of evidence at the rehearing and their description of the evidence during the opening statement rather than a personal censure of the defense counsel. On the other, such comments could be seen as an attack on trial defense counsel for misrepresenting the facts because the Defense case was weak. We note trial defense counsel did not object, and while perhaps close to the line, we conclude these comments did not amount to plain error, mainly due to the vague manner in which trial counsel made them and the context of his entire argument.

We do find error, however, in trial counsel repeatedly asking the members what their sentence would say about them personally. Trial counsel not only invited the members to consider how they themselves would be seen by others based upon their sentence, he told the members that their sentence would communicate [*141] to the victims' families where they stand "as an individual . . . as an Airman." Asking members to consider how they would be judged by others by virtue of the sentence they mete out amounts to "an inflammatory hypothetical scenario with no basis in evidence" and is improper. *Norwood, 81 M.J. at 21*. In *Norwood*, trial counsel asked the members how they—upon returning to their normal duties—would answer questions about what sentence they gave the accused. *Id. at 19*. The CAAF found this comment amounted to prejudicial plain error because it violated the prohibition against threatening court members "with the specter of contempt or ostracism if they reject [trial counsel's] request." *Id. at 21* (quoting *United States v. Wood, 18 C.M.A. 291, 40 C.M.R. 3, 9 (C.M.A. 1969)*). In Appellant's case, trial counsel specifically placed on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment. Given the lengthy and emotional nature of the rehearing, which many of those family members observed from the courtroom gallery, asking the members to consider what those understandably invested observers would think of them as a result of their sentence was an inappropriate appeal to the members' emotions for an improper purpose. While criminal sentences serve a great [*142] number of objectives, sending a message about an individual member's personal threshold for certain types of crimes to victims' relatives is not one of them.

Trial counsel compounded his error by repeatedly asking the members how much risk they would personally accept by virtue of the sentence they adjudged. While Appellant's future risk of misconduct—an issue introduced by the Defense—was an appropriate consideration in fashioning Appellant's sentence, the suggestion that the members would be personally responsible for any such misconduct was not. Although trial counsel could properly ask the members to sentence Appellant in such a way as to specifically deter him from committing future misconduct and to protect society, it was entirely inappropriate to tell the members they would be accepting the risk of a future victim by sentencing Appellant to something less than death. Arriving at a proper sentence tailored to the facts of any case is challenging enough, but injecting capital proceedings with the specter that individual members might be personally responsible for some indeterminate future harm would lead observers to question whether an accused was sentenced based upon his or [*143] her actual offenses or upon the members' desire to be free from blame.

Trial counsel did not stop at portraying the members' sentence as reflecting upon them personally—he invoked their professional roles as well by saying their sentence would broadcast where each member stands "as an Airman." Trial counsel even couched the sentencing process as a once-in-a-career "opportunity" to "draw the line as an individual, and as an Airman on what you will allow[.]" In doing so, trial counsel shifted the members' focus from determining an appropriate sentence for Appellant to using the sentencing proceedings as an opportunity to make individual statements about each member's sense of professional military standards and obligations. We see no proper

purpose in injecting such considerations into any court-martial presentencing proceedings, much less into highly visible and intensely scrutinized capital proceedings. Indeed, the considerations seem to have been raised in an effort to have the members think less about determining an appropriate sentence based upon the evidence before them and more about making a public statement about how they would have their sense of personal and professional obligations [*144] be judged by others.

Finding error, we turn to the question of prejudice. Trial counsel's entire argument was premised on his singular recommendation that Appellant be sentenced to death. At no point did he discuss the possibility of Appellant receiving anything less, which is to say he did not talk to the members about making a distinction between life with the possibility of parole and life without it. By not sentencing Appellant to death, the members declined to adopt trial counsel's sentencing recommendation. Moreover, by announcing that all members concurred with the sentence of life without eligibility for parole, the panel indicated it was unanimous in rejecting trial counsel's call for the death penalty. In other words, trial counsel's argument did not drive a single panel member to agree with his recommendation. Given this clear rejection, we are hard-pressed to find that trial counsel's improper arguments resonated with the members at all. We further consider the brutal nature of Appellant's offenses, in which his sanguinary attack cut short two young lives and tragically—and potentially permanently—derailed the forward trajectory of another. The impact to the victims' families [*145] is as extensive and indelible as Appellant's crimes were senseless and inexcusable. Appellant's case in extenuation and mitigation did not highlight Appellant's ability to integrate back into society, but concentrated on whether he could live an existence in prison without posing a threat to others. Appellant's own trial defense counsel did not make a plea for a sentence including eligibility for parole, which is a strong indication that Appellant's own defense team saw the true debate in the case as being between life and death—not whether parole should be available. Having considered the entirety of this case, we see Appellant's sentencing proceedings in the same light, and we are convinced that even in the absence of trial counsel's improper argument, the members would have adjudged the sentence they did. We therefore decline Appellant's request to reduce his sentence to life with eligibility for parole.

I. Appellant's Request for Individual Military and Appellate Counsel

Appellant raises two issues with respect to his legal representation. First, he personally asserts the military judge erred in denying his request for a military counsel of his own selection pursuant to Article 38(b)(3)(B), UCMJ, *10 U.S.C. § 838(b)(3)(B)*, at his [*146] rehearing. Second, he asserts through counsel that the Government improperly interfered with his appellate counsel with respect to this post-rehearing appeal.[44]

1. Additional Background

a. Rehearing Counsel

In March 2017, before his sentencing rehearing began, Appellant requested Mr. Brian Mizer be detailed as his individual military defense counsel (IMDC) for the rehearing. The next day, Appellant moved the military judge to compel Mr. Mizer's appointment, noting that Mr. Mizer had served as Appellant's appellate defense counsel before the CAAF in the hearing which resulted in Appellant's case being returned for new sentencing proceedings. *See* *Witt, 75 M.J. at 380*.[45] In his IMDC request, Appellant explained he trusted Mr. Mizer and was confident in his legal skills. At the time, Mr. Mizer was a civilian attorney employed as a senior appellate defense counsel in the Air Force's Appellate Defense Division; he was also a traditional reservist in the United States Navy. In his reserve capacity, then-Commander Mizer was assigned as an appellate defense counsel at the United States Court of Military Commission Review.

A few days after Appellant submitted his IMDC request, Mr. Mizer's supervisor sent a memorandum [*147] to Appellant's trial defense counsel stating Mr. Mizer was "not reasonably available to serve as IMDC" due to R.C.M. 506(b)(1)(D), which specifically identifies appellate counsel as being categorically unavailable to serve as such. Appellant's motion to compel Mr. Mizer as his IMDC largely focused on the complexities involved in capital litigation and argued his detailed counsel did not have the degree of experience with such

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[44] See Appendix, AOE XII and *Grostefon* issue XVI, respectively.

[45] Mr. Mizer was apparently uninvolved with either Appellant's first appeal to this court or the ensuing reconsideration. *See* *Witt, 72 M.J. at 727*; *Witt, 73 M.J. at 738*.

cases that Mr. Mizer did. While acknowledging R.C.M. 506 appeared to mandate the conclusion that Mr. Mizer was not reasonably available, trial defense counsel asserted the rule was "illogical and anachronistic." The Government opposed Appellant's motion, pointing to trial defense counsel's collective experience and training, the R.C.M. 506 restriction, and the fact that Mr. Mizer was a civilian employee and not "military counsel"—at least while he was not on military orders.[46] The military judge denied Appellant's motion, finding that R.C.M. 506 prohibited Mr. Mizer's service as an IMDC due to his employment as an appellate counsel, regardless of his military status.

b. Appellate Counsel

After the conclusion of his rehearing, Appellant's case was re-docketed with this court on 3 September 2019. At the [*148] time, Mr. Mizer had been serving on active duty orders with the Navy since May 2018 and performing counsel duties in one of the military commission cases regarding a detainee at Guantanamo Bay, Cuba. Believing his orders would expire in early March 2020, and that he would then return to his Air Force appellate duties full time as a civilian, Mr. Mizer was assigned to Appellant's appeal before this court. Mr. Mizer's orders did not, however, expire as anticipated. Instead, he was indefinitely recalled to active duty on 10 February 2020 to continue his commission-related duties. Over Appellant's opposition, Mr. Mizer sought to withdraw from Appellant's case on 21 February 2020. In his request, Mr. Mizer noted Mr. Mark Bruegger, also an Air Force senior appellate defense counsel, had been assigned to represent Appellant. Six days later, the Government notified this court it did not oppose Mr. Mizer's request, and we approved his withdrawal on 18 March 2020.[47]

While waiting for his orders to expire, Mr. Mizer requested four enlargements of time to submit assignments of error on Appellant's behalf, signing each in his reserve capacity. These requests—all of which were granted over the Government's [*149] objection—extended Appellant's deadline to file his assignments of error from 2 November 2019 to 31 March 2020. The fourth request, which extended the deadline from 1 March 2020 to 31 March 2020, was filed after Mr. Mizer sought permission to withdraw but before the Government responded. None of the requests indicates Mr. Mizer performed any work on the instant appeal; instead, they note Appellant's case would be Mr. Mizer's third priority once he returned to his civilian Air Force position.

On 2 June 2020, then-Captain (Capt) Amanda Dermady, Air Force appellate defense counsel, entered a notice of appearance in Appellant's case, and both she and Mr. Bruegger ultimately signed Appellant's assignments of error, which were filed on 15 January 2021. Both Capt Dermady and Mr. Bruegger had other cases they were responsible for resolving before turning their attention to Appellant's case.

2. Law

Under Article 38(b)(3)(B), UCMJ, an accused may be represented at trial by a military counsel of his or her own selection, subject to that counsel's availability and applicable regulations. Article 70, UCMJ, which discusses appellate counsel, contains no such provision, and instead directs The Judge Advocate General to detail commissioned [*150] officers who shall represent appellants requesting appellate representation. *10 U.S.C. § 870*.[48] An appellant also has the right to be represented by a civilian counsel "if provided by" that appellant. Article 70(d), UCMJ, *10 U.S.C. § 870(d)*.[49]

3. Analysis

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[46] Shortly after the Government filed its response, the convening authority formally denied Appellant's IMDC request on the grounds that Mr. Mizer was a civilian as well as not reasonably available under both R.C.M. 506 and a related service regulation.

[47] Appellant submitted a sworn declaration from Mr. Mizer regarding his assignment to and subsequent withdrawal from Appellant's appeal. Because the details of Mr. Mizer's role in Appellant's case were captured in Appellant's motions for enlargements of time, our rulings, and Mr. Mizer's request that we permit him to withdraw from the case, we neither rely on Mr. Mizer's post-trial declaration nor decide whether we would be permitted to consider it under our superior court's ruling in *United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020)*.

[48] *See also* *United States v. Patterson, 22 C.M.A. 157, 46 C.M.R. 157, 161 (C.M.A. 1973)*; *United States v. Bell, 11 C.M.A. 306, 29 C.M.R. 122, 125 (C.M.A. 1960)*.

[49] The constitutional right to trial defense counsel does not extend to appellate proceedings. *Martinez v. Court of Appeal, 528 U.S. 152, 160, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000)*.

We have carefully considered Appellant's claim the military judge erred in denying his IMDC request for Mr. Mizer with respect to representation at his rehearing, and we conclude it warrants neither discussion nor relief. *See* Matias, 25 M.J. at 363.

Appellant's claim regarding his appellate representation is that the Government improperly infringed upon his right to appellate representation by involuntarily extending Mr. Mizer's active duty orders, thereby rendering him incapable of assisting with Appellant's case. Appellant acknowledges he has no right to choose his appellate counsel, but he argues Mr. Mizer's expertise "cannot be replicated" and that Capt Dermady and Mr. Bruegger were inadequate substitutes. Notwithstanding this claim, Appellant has not identified any particular appellate issues he was unable to raise, nor does he cite any specific shortcoming of his appellate team. Appellant asserts Mr. Mizer's extension on active duty resulted in Appellant's case being delayed, and that this delay [*151] was exacerbated both by Mr. Bruegger's caseload and "the Government's failure to properly staff" the appellate defense office.[50] According to Appellant, an appropriate remedy would be the reduction of his sentence to life with eligibility for parole.

HN29[↑] An appellant is entitled to competent appellate representation. United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Article 70, UCMJ, however, does not vest Appellant with the right to select the attorney to represent him on appeal unless he provides that attorney. The CAAF has suggested The Judge Advocate General may direct the assignment of substitute appellate counsel, at least when the originally assigned counsel "appears to be unresponsive." United States v. Roach, 66 M.J. 410, 418 (C.A.A.F. 2008). From this proposition, the Government argues The Judge Advocate General can replace Appellant's appellate counsel "at any time" so long as Appellant is represented. We are not convinced the proposition in Roach reaches as far as the Government suggests, because we can easily imagine a case wherein repeatedly replacing an appellant's counsel erodes the quality of the legal representation to the point where an appellant has been denied effective counsel. That, however, is not the case here. Mr. Mizer withdrew from Appellant's case when it became apparent he would [*152] be unable to effectively represent Appellant in addition to performing his military duties. Even though one could argue the Government effectively forced Mr. Mizer's withdrawal by virtue of extending his orders, there is no evidence Mr. Mizer performed any work at all on this appeal other than requesting four extensions of time and to withdraw from the case. We recognize Mr. Mizer represented Appellant in his appeal to the CAAF, but that appeal was argued and decided in 2016, prior to Appellant's rehearing which is the subject of the instant appeal. Thus, we see no indication Mr. Mizer's withdrawal from the case rendered Appellant's subsequent representation any less effective. At the most, Appellant's case arguably stalled for the five months' worth of extensions Mr. Mizer sought and received, but any claim of harm arising from that delay is unavailing in light of the fact there is no indication Mr. Mizer intended to start working on Appellant's case until he both returned to his civilian Air Force position *and* completed work on two other cases he was assigned to. If anything, Appellant's case was delayed because Mr. Mizer was assigned to it in the first place, not because he withdrew [*153] from it.

Appellant does not argue either Capt Dermady or Mr. Bruegger was unable to competently represent him, instead focusing on his claim that Mr. Mizer has more experience in capital litigation than they do. Even assuming that is true, Appellant was not sentenced to death at his rehearing, so the argument that Appellant's appeal calls for such specific experience has lost its force. Having reviewed the entire record in this case, our assessment of the rehearing is not that it presents novel or complex issues so much as it is voluminous by virtue of the parties' aggressive litigation of nearly every aspect of the case. Appellant's assigned appellate counsel submitted over 200 pages (plus attachments) to this court, covering 23 discrete issues and demonstrating a mastery of not only the record of trial but also the legal issues raised therein.

We further find nothing nefarious with respect to Mr. Mizer's extension on active duty. Appellant contends his case was more deserving of Mr. Mizer's skills than the military commissions, but we decline to substitute our judgment for the military officials tasked with determining how to allocate personnel resources to accomplish specific missions. [*154] [51] We note it is not

[50] We address the delay arising from Mr. Bruegger's caseload and alleged staffing issues in our analysis of Appellant's overarching complaint of delay in Section II(J), *infra*, of this opinion.

[51] In light of Capt Dermady's later appearance, we do not determine whether or not Mr. Mizer's initial assignment to Appellant's case met the requirements of Article 70, UCMJ,

uncommon for military appellate counsel to request to withdraw from cases for any number of reasons flowing from routine aspects of military service, such as reassignments, deployments, and separations. Absent any evidence Mr. Mizer's orders were extended for the purpose of hampering Appellant's appeal, we decline to read anything into the extension beyond our assumption that military authorities concluded Mr. Mizer's service was needed elsewhere.

Thus, we conclude that while Appellant was deprived of his preferred counsel, he had no right to compel the military to afford him that particular attorney. Appellant was provided substitute counsel in accordance with Article 70, UCMJ, and he has not demonstrated he was prejudiced by the substitution. This claimed error warrants no relief.

J. Post-Trial Delay

Appellant contends he has suffered unreasonable delay in the post-rehearing processing of his case.[52] He points to two specific delays: (1) the period between the end of his rehearing and the convening authority's action, and (2) the period between his case being docketed with this court and our decision.

1. Additional Background

The charges against Appellant were originally preferred [*155] on 8 July 2004. As detailed earlier in this opinion, Appellant's case took various turns on appeal before eventually being returned for a rehearing on sentence. That rehearing concluded on 6 July 2018, and the convening authority took action on the new sentence 392 days later, on 2 August 2019. Because some of the victims' relatives had not been able to provide their input prior to action, the convening authority rescinded this action, obtained that input, provided the victim input to Appellant, allowed Appellant to amend his clemency petition, and took new action on 16 August 2019-406 days after the end of the rehearing.

Appellant's case was docketed with this court 18 days later, on 3 September 2019, which was 424 days after the rehearing concluded. As noted above, Mr. Mizer was assigned to Appellant's case, but he later sought to withdraw on 21 February 2020—a request which we granted on 18 March 2020, 197 days after docketing. Appellant filed his assignments of error on 15 January 2021-500 days after docketing—after requesting and obtaining 14 enlargements of time, all over government objection. Once his assignments were filed, the Government filed its answer 68 days later, on 24 [*156] March 2021, after obtaining a single enlargement of time over defense objection. Twenty days later, Appellant filed his reply to the Government's answer. We are now issuing our opinion about 26 and a half months from the date this case was docketed with the court.

All told, once Appellant's rehearing ended, the Government took 492 days to docket the case and answer Appellant's assignments of error; Appellant took 520 days to file his assignments and reply brief; and we took just under 225 days to deliver our opinion. For context, since charges were originally preferred in this case, about 6,350 days—that is, 17 years and 4 months—have passed.

The record for the rehearing alone spans 53 volumes with a transcript nearly 5,000 pages long. With the prior court-martial proceedings attached, the record of trial swells to 98 volumes with 773 appellate exhibits, 106 prosecution exhibits, and 60 defense exhibits. The record further includes numerous discs containing digital evidence, various sealed items, and audio recordings. multiple court reporters were involved transcribing the proceedings and preparing the record. Based upon chronologies prepared by the court reporters, the rehearing court [*157] proceedings were transcribed, reviewed, and coordinated in stages, from late March 2018 through the middle of March 2019.[53] In other words, the transcription was completed about eight and a half months after the rehearing concluded. While this was being done, the court reporters assigned to

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which specifically contemplates the detailing of commissioned officers as appellate counsel.

[52] *See* Appendix, AOE XIII.

[53] The Government's answer and Appellant's reply brief both reference chronologies prepared by court reporters which were included in the record of trial docketed with our court. The parties have not taken a position as to whether these chronologies are part of the "record" as defined in R.C.M. 1103(b)(2), matters "attached to the record" as defined in R.C.M. 1103(b)(3), matters that we may consider because both parties have referenced them in their briefs, without objection, or something we may not consider on appeal under *Jessie, 79 M.J. at 440-41*. We assume without deciding that we may consider the chronologies, as neither party objected to them at any point. *See* *United States v. Stanton, 80 M.J. 415, 417 n.2 (C.A.A.F. 2021)*.

Appellant's case performed court-reporting duties for other courts-martial and hearings they were detailed to. The remainder of the post-trial processing was finished in the following five months, which at a minimum included: compiling, reproducing, and distributing the record; completing the staff judge advocate's review; receiving and reviewing both victim input and Appellant's clemency submission; preparing an addendum to the staff judge advocate's recommendation; and obtaining convening authority action.

Throughout the processing of this case, Appellant asserted his right to speedy post-trial processing, although once his case was docketed with this court, he agreed to his counsel's requests for enlargements of time to file his assignments of error and reply brief.

2. Law

HN30[] "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." [*158] *Moreno, 63 M.J. at 135* (first citing *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)*; and then citing *United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003)*). In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the convening authority does not take action within 120 days of sentencing, and when the Court of Criminal Appeals does not render a decision within 18 months of docketing. *63 M.J. at 142*. Where there is such a delay, we examine the four factors set forth in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Moreno, 63 M.J. at 135* (first citing *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)*; and then citing *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004)*). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id. at 136* (citing *Barker, 407 U.S. at 533*).

HN31[] Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an Appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's grounds for [*159] appeal or ability to present a defense at a rehearing. *63 M.J. at 138-39* (citations omitted).

3. Analysis

Both periods of delay cited by Appellant—from sentencing to action and from docketing to our opinion—are facially unreasonable under *Moreno*. The first period's standard is 120 days, and 406 days elapsed here. The second period's standard is 18 months, and 26 months have elapsed.

a. Sentence to Action

The period between sentencing and convening authority action was more than triple the standard, but the overarching reason for this is apparent from the sheer size of the record in this capital murder trial—which had already traveled through this court to our superior court and back to the convening authority for new proceedings. The rehearing, which only pertained to sentencing, was so comprehensively litigated that it resulted in nearly 5,000 pages of trial transcript—a size rarely seen by our court even for proceedings including findings and sentencing. Because the record must include prior proceedings, the entire record is now nearly 100 volumes.

Approximately 250 days were spent by various court reporters simply transcribing the proceedings of Appellant's rehearing, which took place over 35 different days [*160] spread over a year and a half. From their chronologies, we see the reporters would complete segments of the transcription, then send those to the parties and later to the military judge for review. By staging the transcription coordination process in this manner, the court reporters were able to avoid a significant delay at the tail end of the transcription process by not electing to simply provide the parties and the military judge with the entire complete transcript at once for their respective reviews. Appellant suggests court reporters should have been exclusively detailed to Appellant's case and relieved of their existing caseloads, but such an extraordinary move would have resulted in other appellants suffering delays in their cases after the reallocation of limited court-reporting resources.

In the following five months, the staff judge advocate had to review the entire case in order to prepare his written recommendation and then consider Appellant's comprehensively detailed clemency submission. We note that two weeks of this time involved the late submission of victim inputs with the resulting withdrawal of the convening authority's action and Appellant's amendment of his clemency [*161] petition. However, we view the relatively short additional delay in order to ensure both that the victims were reasonably heard and that Appellant had the opportunity to respond to be an appropriate reason for extending the processing period.

We also considered how the size of Appellant's record of trial compares to the 120-day *Moreno* standard when that standard is applied to the size of a record we more commonly see. A typical "large" record reviewed by this court averages approximately 10 volumes. Applying the 120-day *Moreno* standard to a record of that size yields a processing rate of 12 days per volume before the processing time becomes facially unreasonable. Considering the processing of Appellant's rehearing record took 406 days and involved 53 volumes, the rate in this case works out to less than eight days per volume. Thus, Appellant's case was processed at a speed notably quicker than the speed allotted before a typical large case's processing time becomes facially unreasonable. We acknowledge 406 days is a lengthy period of time to execute what are generally administrative processing tasks, but we also recognize that not all cases are the same. When compared to more typical cases, we [*162] conclude the rate at which Appellant's case was processed does not indicate any dilatory conduct on the Government's behalf.

Appellant did assert his right to speedy post-trial processing at various points between his sentence being adjudged and action being taken. He, however, has not shown the delay during this period has prejudiced any of the interests cited by the CAAF in *Moreno*. Appellant seems to suggest the post-trial processing delay resulted in him losing out on Mr. Mizer's assistance, however, the evidence does not support such a claim. Mr. Mizer had been on active duty orders since before Appellant's rehearing concluded, and he remained on such orders through his eventual withdrawal. Other than submit requests for enlargements of time and his eventual withdrawal, Mr. Mizer does not appear to have performed any substantive work on Appellant's case. All of which is to say that even if Appellant's post-trial processing had been completed instantaneously, Appellant still would not have had the benefit of Mr. Mizer's assistance because Mr. Mizer was never released from his active duty obligations during the time periods relevant to Appellant's post-rehearing appeal.

Appellant has not [*163] alleged he has suffered from oppressive incarceration; he has not asked for a rehearing and we are not granting him one on our own accord; he has not asserted any grounds for appeal have been impaired. Although we recognize the extraordinary length of time that has elapsed since charges were first preferred in his case, Appellant has not demonstrated the delay during the period discussed here has operated to impose anxiety and concern. We do not minimize the deprivations inherent in being incarcerated, but our review of the record leads us to conclude much of Appellant's reasons for anxiety and concern were lifted once he was removed from death row and even more so once the members at his rehearing determined he would no longer face the death penalty. In addition, Appellant's convictions ensured he would be sentenced to life in prison; thus, the only available modification to the sentence he faced at this stage would have been to grant him eligibility for parole—a modification which, even if we directed it, would have not likely resulted in any change to Appellant's confinement situation during the 406-day period at issue here. We have also considered whether—in the absence of any [*164] cognizable prejudice—the delay in this case was so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system and thereby amount to a violation of Appellant's due process rights, and we conclude it was not.

b. Docketing to Opinion

In producing this opinion, we exceeded the 18-month standard by eight and a half months. We again highlight the size and complexity of the record in this case as well as the number and breadth of issues raised by Appellant resulting in a lengthy opinion from the court. While this total period lasted just over 800 days, a full 520 of those days are attributed to Appellant filing his assignments of error and his reply brief, largely due to delays his counsel sought on his behalf. Even if we subtracted the 171 days Mr. Mizer was assigned to Appellant's case from the date of docketing to the date he sought to withdraw, 349 days of the period would still be pursuant to Appellant's submissions. By comparison, the Government took 68 days for its answer, and we took just under 225 days to produce our opinion. Appellant contends that if the appellate defense office

had been more robustly staffed, he would have [*165] been able to file his assignments of error sooner under the theory he could have been assigned counsel who were not already encumbered with significant caseloads. That very well may be true, but it was the appellate defense office which assigned Mr. Mizer to Appellant's case even though he was not expected to return to his appellate duties for a full six months following the docketing of Appellant's case. We will not second-guess that office's selection of Appellant's attorneys, nor will we attribute such delay to the Government under the facts presented here.

For the reasons noted above related to the period of post-trial processing, we conclude Appellant has likewise not shown prejudice warranting relief for the period between docketing and this opinion, nor has he demonstrated delay with respect to the processing and review of this rehearing to the degree it would adversely affect the public's perception of the military justice system.

c. Relief Under Article 66(c), UCMJ

Recognizing our authority under Article 66(c), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See* *United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002)*. After considering the factors enumerated in *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*, and the [*166] particular facts presented by Appellant's case, we conclude it is not.

III. Conclusion

The findings of guilty with respect to the specifications and the charges were previously affirmed by this court. The sentence adjudged by the court-martial and approved by the convening authority is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the approved findings and sentence are **AFFIRMED**.[54]

[54] The court-martial order in this case incorrectly indicates Appellant was sentenced by a military judge when he was, in fact, sentenced by members. The order also omits the reprimand which the members adjudged and which the convening authority specified in his action. We direct the publication of a corrected court-martial order to remedy these errors.

Appendix

Assignments of error raised by Appellant through appellate counsel:

I.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SET ASIDE THE CAPITAL INSTRUCTION DUE TO THE OVERBREADTH OF R.C.M. 1004?

II.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SET ASIDE THE CAPITAL INSTRUCTION DUE TO THE GOVERNMENT'S FAILURE TO REFER THE AGGRAVATING FACTORS?

III.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SET ASIDE THE CAPITAL INSTRUCTION DUE TO THE IMPROPER DELEGATION OF R.C.M. 1004 TO THE PRESIDENT OF THE UNITED STATES?

IV.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SET ASIDE THE CAPITAL INSTRUCTION DUE TO THE DEATH PENALTY VIOLATING THE *EIGHTH AMENDMENT* AND ARTICLE 55, UCMJ?

V.

WHETHER THE MILITARY JUDGE ERRED BY NOT GRANTING THE DEFENSE'S CHALLENGES FOR CAUSE AGAINST [*167] SENIOR MASTER SERGEANTS AK AND ML, AND MASTER SERGEANT SC?

VI.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY ASKING "ARE YOU AWARE" TYPE QUESTIONS WITHOUT POSSESSING A GOOD FAITH BASIS REGARDING THE UNDERLYING ALLEGATIONS?

VII.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO UNDERMINE

THE DEFENSE'S CASE THROUGH ITS REFERENCES TO AN UNAUTHORIZED AND UNOFFICIAL RISK ASSESSMENT REPORT THAT A GOVERNMENT EMPLOYEE PROVIDED TO THE DEFENSE AND WHICH THE DEFENSE, IN GOOD FAITH, BELIEVED WAS LEGITIMATE?

VIII.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO ADMIT EVIDENCE OF [APPELLANT'S] PURPORTED REMOVAL OF JS'S SKIRT AND BY INSTRUCTING THE PANEL MEMBERS THAT THE REMOVAL OF JS'S SKIRT WAS AN AGGRAVATING FACTOR?

IX.

WHETHER THE MILITARY JUDGE ERRED BY PERMITTING THE GOVERNMENT TO PUBLISH EVIDENCE TO THE PANEL THAT WAS NOT PROPERLY ADMITTED?

X.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY USING PERSONAL PRONOUNS TO ALIGN HIMSELF WITH THE PANEL, OFFERING PERSONAL VIEWS ON THE EVIDENCE, MALIGNING DEFENSE COUNSEL AND THE DEFENSE THEORIES, AND INFLAMING THE PASSIONS OF THE PANEL BY REPEATEDLY ASKING THEM "WHAT WILL YOU STAND FOR," "WHERE WILL YOU DRAW [*168] THE LINE," AND "IF NOT NOW, THEN WHEN," OR WORDS TO THAT EFFECT?

XI.

WHETHER THE GENERAL COURT-MARTIAL ORDER IS INCORRECT?

XII.

WHETHER THE GOVERNMENT IMPROPERLY INTERFERED WITH [APPELLANT'S] ATTORNEY-CLIENT RELATIONSHIP BY INVOLUNTARILY RECALLING TO ACTIVE DUTY HIS CIVILIAN APPELLATE DEFENSE COUNSEL?

XIII.

WHETHER [APPELLANT] IS ENTITLED TO SENTENCE APPROPRIATENESS RELIEF RESULTING FROM THE GOVERNMENT'S POST-TRIAL DELAY?

XIV.

WHETHER THE CUMULATIVE EFFECT OF THE ERRORS IN [APPELLANT'S] CASE DENIED HIM A FAIR REHEARING?

Issues personally raised by Appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*:

XV.

TWO MONTHS PRIOR TO THE REFERRAL OF [APPELLANT'S] SENTENCE REHEARING, THE GOVERNMENT—THROUGH ITS REPRESENTATVE, GB—INFORMED THE VICTIMS' FAMILIES THAT THE CASE WOULD BE REFERRED CAPITALLY. DID THE GOVERNMENT'S PRIOR KNOWLEDGE OF THE CAPITAL REFERRAL DEMONSTRATE THAT EITHER THE CONVENING AUTHORITY HAD ALREADY PREDETERMINED HE WOULD REFER THE CASE CAPITALLY, OR WAS UNLAWFULLY INFLUENCED BY GOVERNMENT PRESSURE?

XVI.

WHETHER THE GOVERNMENT IMPROPERLY DENIED [APPELLANT'S] REQUEST FOR INDIVIDUAL MILITARY DEFENSE COUNSEL?

XVII.

WHETHER THE GOVERNMENT IMPROPERLY DENIED [APPELLANT'S] REQUEST FOR LEARNED COUNSEL?

XVIII.

WHETHER THE MILITARY [*169] JUDGE ERRED BY IMPROPERLY REHABBING POTENTIAL PANEL MEMBERS DURING VOIR DIRE?

XIX.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO GRANT THE DEFENSE ADDITIONAL PEREMPTORY CHALLENGES?

XX.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY FAILING TO TIMELY DISCLOSE THE USE OF ITS EXPERT FOR VOIR DIRE?

XXI.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING TRIAL COUNSEL TO ASK IMPROPER AND UNTIMELY SUBMITTED QUESTIONS DURING VOIR DIRE?

XXII.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING TRIAL COUNSEL TO ASK COLONEL SM ABOUT A LETTER THAT [APPELLANT] PURPORTEDLY WROTE, BUT NEVER SENT, TO A PARAMOUR?

XXIII.

WHETHER THE MILITARY JUDGE ERRED BY DECLINING TO PROVIDE VARIOUS DEFENSE-REQUESTED INSTRUCTIONS?

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel on October 20, 2022.

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