IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39825
	)	
Airman First Class (E-3)	)	USCA Dkt. No. 22-0100/AF
SEAN W. HARRINGTON, USAF	)	
Appellant.	)	13 May 2022

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Airman First Class (E-3)	)	USCA Dkt. No. 22-0100/AF
SEAN W. HARRINGTON, USAF	)	
Appellant.	)	13 May 2022

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR COMMUNICATING A THREAT.

II.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY REFUSING TO INSTRUCT THE MEMBERS OF THE MAXIMUM CONFINEMENT FOR EACH OFFENSE, WHICH ULTIMATELY RESULTED IN AN EXCESSIVE 14-YEAR SENTENCE?

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING THE VICTIM'S PARENTS TO TAKE THE WITNESS STAND AND DELIVER UNSWORN STATEMENTS IN

QUESTION-AND-ANSWER FORMAT WITH TRIAL COUNSEL.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d)(1), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is correct.

STATEMENT OF FACTS

Additional facts necessary to answer each issue are included in the Argument section below.

SUMMARY OF ARGUMENT

This Court should affirm AFCCA's decision. The Air Force Court's analysis was grounded in law and logic. Appellant has established no particularized error committed by AFCCA, nor pointed to any new law or precedent contrary to the Court's opinion.

Communicating a Threat

Viewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of communicating a threat to Senior Airman AB beyond a reasonable doubt. Appellant threatened to "kill" the person who hogtied him and "go easy" on AB if she told him who was responsible

for the hogtying. A reasonable person in AB's situation—knowing that Appellant took cocaine, was angry, drunk, had a handgun, and believed she was responsible for hogtying him—would find it threatening when Appellant said he was "dead serious" about his plan to kill. Appellant's unequivocal words conveyed an intent to take violent action against AB, and the charge is legally sufficient. Moreover, AFCCA correctly considered the totality of the circumstances – including Appellant's behavior after the threat – in assessing legal sufficiency.

Sentencing Instructions

The military judge did not abuse his discretion in applying the plain language of R.C.M. 1005(e) to reach a predictable conclusion: in a unitary sentencing system, the military judge should not instruct the members on the maximum punishment for each separate finding of guilt.

Appellant argues the military judge abused his discretion by denying a defense request to instruct the members on the maximum confinement for each offense. Appellant relies exclusively on an outdated Court of Military Appeals case, United States v. Gutierrez, 11 M.J. 122 (C.M.A. 1981), where a similar instruction was allowed. But Gutierrez interpreted the now-obsolete 1969 version of the Manual for Courts-Martial (MCM). Id. at 124. The 2016 Amendment to R.C.M. 1002(b) was in effect at the time of Appellant's court-martial. That Amendment clarified the military's unitary sentencing concept. *See* R.C.M.

1002(b). Moreover, the Analysis to R.C.M. 1002 specifically referenced, and limited, Gutierrez. Drafter's Analysis, MCM, United States A21-73 (2016 ed.)

Finally, in a unitary sentencing system, it is not advisable to instruct court members about the maximum punishments for separate offenses. This practice would "confuse them" and distract from their duty to adjudge a single sentence for the offenses for which the accused has been found guilty. Gutierrez, 11 M.J. at 125 (Everett, J., concurring). The military judge did not abuse his discretion by refusing to give the members a confusing and distracting instruction.

Victim Unsworn Statements

Trial counsel facilitating an unrepresented victim's oral unsworn statement by asking perfunctory questions is not unreasonable within the meaning of the "right to be reasonably heard." Article 6b(a)(4)(B), UCMJ; R.C.M. 1001(c)(1). The victims in this case chose to present their oral unsworn statements aided by trial counsel. The plain language of R.C.M. 1001(c) did not specifically provide for that method, but it did not prohibit it. Absent any specific prohibition, an unrepresented victim's choice to present victim impact in this way falls within the victim's statutory and regulatory right to be reasonably heard and was not error.

Trial counsel properly facilitated the unrepresented victims' right to be reasonably heard through a question-and-answer format. The trial counsel did not misappropriate the victim's right to be heard when they asked open-ended

questions, such as "what?" (JA at 261), "describe" (JA at 261), "how?" (JA at 262), and "when?" (JA at 262.) These questions prompted long, narrative responses in the victims' own words. Trial counsel merely made it easier for the unrepresented victims to have a voice in sentencing.

Even if the military judge abused his discretion, Appellant suffered no prejudice from the admission of the parents' unsworn statements, since any error was in trial counsel's perfunctory questions and not the parents' substantive answers, which were admissible.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR COMMUNICATING A THREAT WAS LEGALLY SUFFICIENT.

Additional Facts

Senior Airman AB moved in with Appellant and another roommate, Senior Airman BI, on 15 June 2017. (JA at 149.) AB was aware Appellant owned a Glock .45 pistol. (JA at 149-150.) On 23 July 2017, AB returned home around 0330 after a night out with friends. (JA at 023.) Upon her return, AB saw Appellant snort cocaine. (JA at 023.) AB then went to bed around 0400. (JA at 023.) When AB woke the next day, the "house was kind of chaotic." (JA at 151.)

"There was liquor all over the house." (JA at 152.) Appellant had been up all night drinking "heavily" and using cocaine. (JA at 151-52.)

BI asked AB to take him to an Alcoholics Anonymous ("AA") meeting. (JA at 151.) She agreed. (JA at 151.) AB and BI left the house around 1900. (JA at 152.) The AA meeting started at 1930. (JA at 151.) Appellant stayed home. (Id.) During the AA meeting, Appellant sent AB a series of erratic text messages interrogating her about what happened the night before while Appellant was drunk and high:

> Appellant: Don't duck with me right now I'm tripping balls so hard I called everyone knowone will talk to me that duck is going on.
>
> Appellant: Please don't bs me wtg
>
> AB: We tried to get you to come with. You said you were good, do you need help are you
> Okay***
>
> Appellant: I'm tripping balls right now dafuw happen last night I'm hearing shit you are my light right now what happened
>
> AB: You did cocaine with Mario, and drank. That's all I saw.
>
> Appellant: I'm outside damn near naked wtf happened
>
> AB: Go inside, grab some water, and lay down on your stomach.
> . . .
> Appellant: All right where is everyone

AB: [BI] and I are at the AA meeting.

Appellant: Cool when you get home help me get out of the table I Would greatly appreciate it and good on him for maybe giving [f*ck] I called him he didn't answer so good on you but seriously please whoever the sick sadistic mf who did this I'm going to kill.

AB: What

Appellant: Tell me who did it and I'll go easy on you.

Appellant: Who the [f*ck] hog tied med

Appellant: And who the [f*ck] took a bath probably [BI] you bastard

Appellant: Who in the [f*ck] went into my room and took my shit And tied me with it I'm [f*cking] dead as serious who did it or who did you hit up

AB: Wtf are you talking about

Appellant: Who tied me up

AB: On my way home

Appellant: For you did anyone come over

(JA at 069-072.)

AB explained that her first reaction to the texts was she thought Appellant was "coming down from a cocaine high." (JA at 152, 166.) Prior to that day, AB had never seen Appellant use drugs. (JA at 157.) When AB started getting the text messages she appeared upset." (JA at 189.) From BI's perspective, she looked "annoyed." (JA at 189.) AB told BI Appellant "was being rude" and "an asshole."

(JA at 189.) AB appeared "frustrated." (JA at 194.) Neither AB nor BI knew why Appellant thought was "hogtied." (JA at 023.) Neither AB nor BI hogtied Appellant. (JA at 166.) They did not know of anyone who did. (JA at 166.) They never saw Appellant "hogtied," and neither AB nor BI had any reason to believe Appellant was ever hogtied. (JA at 166.)

Approximately one hour and fifteen minutes passed between when AB and BI left for the AA meeting and when they returned to the house. (JA at 153.) When they returned home, the front door was locked. (JA at 153.) AB did not have a key. (JA at 153.) They walked to the side of the house where they saw Appellant sitting in a lawn chair, with his Glock handgun, and extended clip on a barstool next to him. (JA at 023.) There was "twine thrown everywhere." (JA at 154.) AB described the twine as "plastic string" that was "thrown about the yard." (JA at 154.)

Appellant then told AB he would give her "one more chance to tell him who [AB] had sent to the house." (JA at 155.) As Appellant said this, he looked down at the gun, grabbed the handle, and turned the barrel towards AB. (JA at 156; 166-67.) AB "backed up." (JA at 155.) In that moment, "it suddenly became real, all of the text messages that [she] was getting and kind of understanding what was going on, just clicked." (JA at 155.) Because of this realization, AB "freaked out." (JA at 155.) She could see the barrel of the gun pointed at her. (JA at 156.)

AB "made sure [her] life was still there" and "screamed." (JA at 156.) She was "scared" of Appellant. (JA at 167.)

BI intervened and took Appellant's gun from him. (JA at 183.) AB took Appellant's clip and hid it from him. (JA at 156-57.) That night, AB texted an OSI agent about what Appellant did. (JA at 157.) After Appellant pointed the firearm at AB, she locked herself in her bedroom. (JA at 157.) She felt like her "safety zone was threatened" and she was "terrified to be in [her] own house." (JA at 157.)

Appellant was charged, among other charges, with one specification of wrongfully communicating a threat to AB:

> In that AIRMAN FIRST CLASS SEAN W. HARRINGTON, United States Air Force, 27th Special Operations Maintenance Squadron, Cannon Air Force Base, New Mexico, did, at or near Clovis, New Mexico, on or about 23 July 2017, wrongfully communicate to [AB] a threat to injure her by stating, 'whoever this sick sadistic mf who did this I'm going to kill,' and 'Tell me who did it and I'll go easy on you,' or words to that effect, and that said conduct was to the prejudice of good order and discipline in the armed forces.

(JA at 060.)

Standard of Review

This Court reviews issues of legal sufficiency *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

A conviction is legally sufficient when, "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. Young, 64 M.J. 404, 407 (C.A.A.F. 2007) (quotation and citations omitted). Under this standard of review, this Court must draw every reasonable inference from the evidence in favor of the prosecution. United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The standard for legal sufficiency is "a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

Here, the elements of communicating of a threat under Article 134, UCMJ are that: (1) at or near Clovis, New Mexico, on or about 23 July 2017, Appellant communicated certain language, to wit: "whoever the sick sadistic mf who did this I'm going to kill," and "Tell me who did it and I'll go easy on you," or words to that effect, expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future; (2) the communication was made known to AB; (3) the communication was wrongful; and

(4) Appellant's conduct was prejudicial to good order and discipline in the armed forces. MCM, pt. IV, para. 110.b.[1]

The first element is an objective measure that evaluates the existence of a threat "from the point of view of a reasonable person." United States v. Rapert, 75 M.J. 164, 168 (C.A.A.F. 2016) (citations and alterations omitted). The third element is a subjective measure of the accused's true intent. Id. at 169. To establish that the communication was wrongful, the accused must have sent the communication for the purpose of issuing a threat, with the knowledge that the communication would be viewed as a threat, or acted recklessly regarding whether the communication would be viewed as a threat. MCM, pt. IV, para. 110.c. But it is not necessary to establish that the accused actually intended to do the injury threatened. Id.

Communicating a threat is not a specific intent crime. Rapert, 75 M.J. at 174-75 (quoting United States v. Humphrys, 22 C.M.R. 96, 98 (1956)). A threat exists "so long as the words uttered could cause a reasonable person to believe that he was wrongfully threatened." United States v. Shropshire, 43 C.M.R. 214, 215 (C.M.A. 1971). Even when the literal language appears to constitute a threat, "the surrounding circumstances may so belie or contradict the language of the

[1] Appellant does not dispute the sufficiency of the terminal element, so it will not be discussed further.

declaration as to reveal it to be a mere jest or idle banter." United States v. Gilluly, 32 C.M.R. 358, 461 (C.M.A. 1963).

In United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017), this Court held that it could consider the underlying facts of acquitted offenses in determining the legal sufficiency of convicted offenses:

> When the same evidence is offered at trial to support two different offenses, a Court of Criminal Appeals is not necessarily precluded from considering the evidence that was introduced in support of the charge for which the appellant was acquitted when conducting its Article 66(c), UCMJ, legal and factual sufficiency review of the charge for which the appellant was convicted. Defendants are generally acquitted of offenses, not of specific facts, and thus to the extent facts form the basis for other offenses, they remain permissible for appellate review.

In United States v. Gutierrez, this Court concluded the members could consider evidence contributing to a rape charge of which the accused was acquitted in convicting him of stalking, given that the events surrounding the alleged rape were also part of a course of conduct that contributed to the stalking charge. 73 M.J. 172, 176 (C.A.A.F. 2014).

Analysis

Appellant urges this Court to elevate semantics over substance by reading his two text threats separately from one another, divorced from context and circumstance. He also urges this Court to dismiss Appellant's violent behavior

toward AB that occurred shortly after sending the threats as not indicative of his intent. This Court should find Appellant's arguments unpersuasive.

A. Appellant's language, taken as a whole and charged together in a single specification, expressed a threat to injure AB.

Appellant argues that the CCA erred when it concluded "it could interpret both messages together." (App. Br. at 23.) But, legally, the two threats were encompassed in a single specification on the charge sheet, rather than two separate specifications. (JA at 58.) The specification indicated that both statements were part of the same threat to injure AB. Factually, the two threats were intrinsically linked. The CCA aptly found the two statements related to one another:

> A reasonable reading of the text messages…is that Appellant was going to kill those who tied him up; that he demanded AB provide him information about who besides her was involved in tying him up; and that AB providing him that information would result in her injury being less severe than death.

(JA at 25.)

"Words are used in context. Divorcing them from their surroundings and their impact on the intended subject is illogical and unnatural." United States v. Brown, 65 M.J. 227, 231-32 (C.A.A.F. 2007). The surrounding context added to the threatening nature of the charged messages. Just before sending the messages, Appellant told AB he was "tripping balls so hard" and demanded information. (JA at 070.) When he expressed an intent to kill "the sick sadistic mf who did this," he

prefaced the statement with "seriously please." (JA at 071.) After sending the charged messages, Appellant repeated his demand for information and said he was "[f*cking] dead as serious." (Id. at 4.) Throughout the message exchange, Appellant's syntax was erratic, his tone angry, and the pace of his messages frenetic. Appellant's text messages were "threatening in tone." Brown, 65 M.J. at 231. And AB knew Appellant had a handgun. (JA at 149.)

"Conduct takes its legal color and quality more or less from the circumstances surrounding it, and the intent or purpose which controls it, and the same act may be lawful or unlawful as thus colored and qualified." United States v. Schmidt, 36 C.M.R. 213, 216 (C.M.A. 1966) (quoting People v. Hughes, 137 NY 29, 32 NE 1105, 1107 (N.Y.S.2d 1893)). Appellant's initial threat to kill whoever hogtied him gave criminal "color" to the second declaration that Appellant would "go easy" on AB.

The CCA did not err when it considered both threats together. If detached from the first threat, the second threat makes no sense. In a vacuum, the phrase "I'll go easy on you" means nothing. Easy how? Easy as compared to what? When the threats are read together, it becomes obvious "I'll go easy on you" meant Appellant might not kill AB if she told him what he wanted to know.

Appellant also argues that because he directed his first threat at the person who hogtied him, and not AB, it could not have been a threat to injure AB. (App.

Br. at 23.) But a threat need not be directed at a specific individual—it is sufficient that it is directed at a particular group or type of victim. MCM, Part IV, ¶ 110(b)(1) (2016); *see* Gilluly, 32 C.M.R. at 461-62 (finding a threat to harm "his buddies" at the Officers and Noncommissioned Officers Clubs sufficient to identify the potential victims of the threat).

Here, the individual Appellant threatened to harm was the person who hogtied him. A rational factfinder could have concluded from Appellant's messages that he believed AB was a conspirator in the hogtying scheme. Appellant sent the charged messages to AB's phone, circumstantially proving he thought she was responsible. (JA at 069-072.) Appellant specifically accused AB of going into his room or knowing who tied him up. (JA at 072.) After claiming he would "go easy" on AB if she told him "who did it," Appellant then returned to his emphatic refrain of asking AB who hogtied him three more times. (JA at 071-72.) In fact, Appellant at one point implied AB was responsible for the hogtying: "Who in the f*ck…tied me with it I'm f*cking dead as serious who did it *or who did you hit up*" (JA at 072) (emphasis added.) And a reasonable factfinder could find that Appellant's later conduct—confronting AB in the backyard while holding his handgun and telling her she had "one more chance to tell him who [she] had sent to the house"—corroborated he thought she was responsible and thus was directing his threat at her. (JA at 155.)

Since both threats were charged together, occurred within short succession, and were part of the same communication string, this Court should logically consider them tethered together. Taken together, the messages conveyed an unmistakable threat to injure AB.

B. A reasonable person would have perceived Appellant's text messages as a threat.

A reasonable person in AB's position, knowing Appellant had been heavily consuming alcohol and drugs and had a firearm, would have perceived the text messages as angry, erratic, and frightening. Appellant stated he would kill whoever hogtied him and then implied he believed AB was involved by saying "who did you hit up." (JA at 072). He described himself as being "dead serious." (JA at 072.) There is nothing "confusing" about threatening to kill someone. (App. Br. at 26.) A reasonable person under the circumstances would have perceived Appellant's profanity-laced words, delivered in a highly agitated state and specifically mentioned killing someone, to be threatening.

Appellant's argument that the context of his relationship with AB undermined the seriousness of his threat is unconvincing. (App. Br. at 24.) There was no evidence Appellant routinely threatened to kill AB in their relationship as roommates. Nor were the words Appellant used mere "braggadocio." Shropshire, 43 C.M.R. at 216. Appellant's later confrontation of AB while holding his handgun proved he was not making idle banter. And AB's reaction—that the

charged text messages had "suddenly become real" causing her to "freak out"—showed the text message exchange with Appellant both scared and threatened her. (JA at 155.) Objectively, a reasonable person in AB's position would have evaluated Appellant's messages as a threat – even if the two were roommates and friends. When this Court considers the evidence in the light most favorable to the government, a reasonable factfinder could have found the objective element of the specification beyond a reasonable doubt.

C. Appellant subjectively intended to threaten AB.

Appellant argues that his "disoriented" state and "confusing" messages are properly understood as merely "seeking answers." (App. Br. at 26.) Therefore, he did not have the subjective intent to threaten. (App. Br. at 27.) But the intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. Humphrys, 22 CMR 96. Further, Appellant is guilty of communicating a threat if he "acted recklessly regarding whether the communication would be viewed as a threat." MCM, pt. IV, para. 110.c.[2] Appellant was reckless when he conveyed to AB a sinister sentiment:

[2] Appellant's contention that this Court could not affirm his conviction based on recklessness is incorrect. (App. Br. at 27-28 n.8.) Rapert's analysis about recklessness is inapplicable because it evaluated the 2012 version of communicating a threat. 75 M.J. at 165. In the amended 2016 version of the offense, the President specifically allowed for a conviction based on recklessness, whereas the prior version evaluated in Rapert did not.

"do this or else certain violence will happen." Finally, communicating a threat is not a specific intent crime. Rapert, 75 M.J. at 174-75. Even if Appellant subjectively never intended to harm AB, as long as the trier of fact is satisfied that his avowal of threatened injury was willful and intentional, then the third element of the crime is satisfied. *See* United States v. Sturmer, 1 C.M.R. 17, 18 (C.M.A. 1951).

The literal meaning of Appellant's utterances was apparent. Appellant's subjective intent "relates to whether the speaker intended his or her words to *be understood as sincere*." Rapert, 75 M.J. at 169 n.10 (emphasis in original). Appellant satisfied that standard. He told AB he was angry. He told AB he was "[f*cking] dead as serious." (JA at 072.) He told AB he wanted information. There was no sign that he was joking. And when he did not get that requested information, he confronted AB with a handgun.

Appellant relies heavily on the fact that he consumed "alcohol and drugs" as if that somehow transforms his utterances into a joke or innocent behavior. (App. Br. at 26-7.) For support, Appellant cites *dicta* from a concurring opinion from 1956 in Humphrys, 22 C.M.R. 96, 101. Specifically, Appellant argues that "ostensibly threatening language" can be deemed "nonthreatening because witnesses concurred that when the appellant made the statements he was "in a

highly emotional, almost irrational state." (App. Br. at 25.) But Appellant's reliance on Humphrys is misplaced.

Appellant's argument rephrases in new terms old claims that this Court has consistently rejected since 1955. In United States v. Davis, the appellant argued that his statement was made when he was "emotionally upset and that it was, therefore, not made in earnest." 19 C.M.R. 160, 163 (C.M.A. 1955). This Court rejected that argument: "It seems to us that the converse is clearly true. Threats are most likely to be made while the speaker is in an emotional state, and those are the threats most likely to speak the truth about the speaker's seriousness." Id. at 163. Here, Appellant's level of intoxication is a fact that supports the unpredictability of his temper. *See* Brown, 65 M.J. at 232 ("Moreover, at the time of the incident Appellant was drinking (and had imbibed an unknown amount.")).

Appellant's insistent messages, riddled with profanity and accusations hurled AB's way, conveyed a subjective intent to threaten violent action against her – threat of violence that Appellant had the means (firearm) to carry out if AB did not comply with his "dead…serious" demands for information. Appellant's expressed desire to know who hogtied him gave him a motive to threaten AB to get her to provide information. His true intent is evident from the language and context of his messages. A rational factfinder could have easily determined based on the facts that Appellant subjectively intended to threaten AB.

D. The CCA did not err in considering logically-connected, post-threat behavior as part of the circumstances surrounding the threat.

Appellant argues the CCA erred in considering AB's allegation that Appellant confronted her with a loaded firearm after the communicated threat since Appellant was acquitted of that offense. (App. Br. at 28.) This is not the law. "Defendants are generally acquitted of offenses, not of specific facts, and thus to the extent facts form the basis for other offenses, they remain permissible for appellate review." Rosario, 76 M.J. at 117.

In Brown, the appellant was likewise acquitted of some of the violent acts proximate to the contested threat. Specifically, he was acquitted of two specifications of strangling the victim immediately prior to threatening her. Brown, 65 M.J. at 232 n3. This Court noted, without deciding, "the fact that the Government was unable to show Appellant committed these acts beyond a reasonable doubt may not necessarily mean that the acts could not meet a lower standard of proof allowing their use in analyzing their impact on making the surrounding context of a statement threatening." Id. And for good reason.

This Court has long held that legal analysis of a threat must take into account the totality of the surrounding circumstances. *See* Gilluly, 32 C.M.R. at 461. While the literal "words communicated certainly matter because they are the starting point in analyzing a possible threat…words are used in context." Brown,

65 M.J. at 231-32. Put simply: "Context gives meaning to literal statements." Id. at 231.

The CCA properly evaluated the totality of the circumstances surrounding the threat: the context before, during, and after. (JA at 25.) This was not error.[3] Appellant's post-threat menacing of AB with a gun "colored and qualified" Appellant's threatening statements that began approximately one-half hour earlier. Schmidt, 36 C.M.R. at 216. Appellant contends the threatening text messages and the drawing of the gun occurred "hours apart." (App. Br. at 34.) They did not. AB and BI left the house for the AA meeting at 1900. (JA at 152.) They were only gone approximately one hour and fifteen minutes. (JA at 153.) This means they returned to the house around 2015. Appellant began texting AB at 1949. (JA at 069.) The time stamps on the text messages do not show what time Appellant's last text message to AB was before she came home. (JA at 072.) This means when AB returned home to face Appellant, less than a half-hour elapsed since Appellant started his barrage of text-threats.

[3] The United States acknowledges a lone CCA case where the court declined to consider the fact that the appellant retrieved a pistol *after* he threatened the victim in determining whether the words of the threat expressed a *present* determination or intent to wrongfully injure the victim. United States v. Hall, 52 M.J. 806, 809 (N-M Ct. Crim. App. 2000). The Court provided no rationale for why it declined to consider the fact that the appellant retrieved a pistol after he spoke the words of the threat. Id. Therefore, the opinion is not particularly persuasive.

To divorce what happened once Appellant and AB came face-to-face shortly after the text message threats would be "illogical and unnatural." Brown, 65 M.J. at 232. "[T]he circumstances of the communication may be significant in contradicting or belying the language of the declaration." Shropshire, 43 C.M.R. at 215. But this proposition "cuts both ways." Brown, 65 M.J. at 231. If the Court can look to post-threat conduct to determine if the utterance was in jest or not, so too can the Court look to post-threat conduct to bolster the seriousness of the threat. Appellant's "activities after the threat give meaning to the words and imply that he meant serious business when he made the threat." People v. Martinez, 53 Cal. App. 4th 1212, 1221, 62 Cal. Rptr. 2d 303, 309 (1997). So even if Article 134 requires "present determination or intent" to injure, Appellant's actions after making the statements can still illuminate his state of mind at the time he made them.

Here, Appellant's acquitted aggravated assault was "part of a course of conduct" that contributed to the threat charge. Gutierrez, 73 M.J. at 176. After sending the threatening text messages, Appellant "continued [his] agitated behavior…and remained focused upon the victim" culminating in drawing a gun on her. Hall, 52 M.J. at 808. Having received no response to his question of who hogtied him, Appellant retrieved his gun and an extended clip and waited for AB to return home. (JA at 153-54.) He knew she was on her way because she texted

him: "On my way home." (JA at 072.) Immediately, Appellant continued his threatening attack by giving AB "one more chance to tell him who [she] had sent to the house" while grabbing his gun. (JA at 155.) The identity of the person who hogtied him was the same topic of conversation less than a half-hour before over text when Appellant ceaselessly interrogated AB. He had not let the hogtying incident go. Nothing interrupted Appellant's determined train of thought. This was a continuation of the agitation from the previous text message fight. So when AB showed up to the house, Appellant was still as agitated, if not more so, than he was minutes before when he sent the threatening texts. Moreover, Appellant grabbed the firearm as he challenged AB to tell him who the hogtying culprit was. (JA at 155-56.) Appellant's statement, coupled with the simultaneous act of grabbing the gun, evinced a present determination to injure AB. And it defies law and logic to ignore this conduct when evaluating the threat offense merely because Appellant was acquitted of aggravated assault.

As Appellant made the "one more chance" statement, he grabbed the gun and turned towards AB. (JA at 156; 166-67.) In that moment, "it suddenly became real, all of the text messages that [she] was getting and kind of understanding what was going on, just clicked." (JA at 155.) Because of this realization, AB "backed up" and "freaked out." (Id.) She could see the barrel of the gun pointed at her. (JA at 156.) AB "made sure [her] life was still there" and

"screamed." (JA at 156.) She was "scared" of Appellant. (JA at 167.) The backdrop of this significant violent exchange between Appellant and AB provides further basis for a reasonable person to consider the previous statement threatening. *See* Brown, 65 M.J. at 232.

Appellant next argues that the evidence is legally insufficient because AB was not a credible witness. (App. Br. at 36.) Appellant claims there was "ample evidence to either contradict AB's story or undermine her truthfulness." (App. Br. at 36.) But the factfinder may "believe one part of a witness' testimony and disbelieve another." United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979). The fact that the members convicted Appellant for the threat against AB, but not the aggravated assault against her, does not "strongly suggest they disbelieved AB's testimony that Appellant pointed the gun at her." (App. Br. at 35.) There are any number of reasons why the members may have acquitted Appellant of aggravated assault for pointing a firearm at AB. For instance, the members could have believed BI "stepped in" so quickly moving in front of the gun that Appellant never managed to take aim at AB. (*See* JA at 156.) This reason would have nothing to do with AB's credibility. Equally plausible, the members could have believed AB's narrative, but found the Government simply could not meet its burden of proof beyond a reasonable doubt for whatever reason.

In sum, a reasonable factfinder could find Appellant's activities with his Glock in the backyard gave meaning to his earlier words and implied "he meant serious business." Martinez, 53 Cal. App. 4th at 1221. AFCCA appropriately considered Appellant's post-statement actions in finding the conviction for communicating a threat to be legally sufficient.

Conclusion

Considered in the light most favorable to the prosecution, a reasonable factfinder could have determined the Government proved Appellant sent the charged language to AB and that a reasonable person in her situation would find it threatening. Appellant's words were inherently menacing: they conveyed to AB that Appellant would kill the person responsible for hogtying him, he suspected her of being involved, and that he would hurt AB if she withheld information. The words communicated and the surrounding circumstances of pointing a firearm at AB shortly after threatening her demonstrated Appellant intended his words to threaten AB. Especially considering the low standard for legal sufficiency, a reasonable factfinder could have found all these elements beyond a reasonable doubt based upon the evidence presented.

Appellant's conviction for communicating a threat is legally sufficient, and this Court should affirm the decision of the Air Force Court.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN INSTRUCTING ON UNITARY SENTENCING.

Additional Facts

During an R.C.M. 802 conference prior to sentencing instructions, "the defense made a request that in the section of the instructions where the court instructs the members on confinement…that the court insert in that paragraph an explanation of the maximum punishment for each offense that the accused has been convicted of." (JA at 274.) The military judge denied that request citing "our current system of unitary sentencing" and the fact that he was "not aware of any case law that would support such an instruction." (Id.) The military judge then asked directly if the defense had any law to support their request. (Id.) The defense did not. (Id.) The military judge gave the defense an opportunity to be heard. (Id.) The defense then stated, "We would certainly not oppose an immediate instruction to the members that says 'hey, just to be clear, you are doing one unitary sentence, however, this is information you should be aware of.'" (JA at 275.) The military judge found "no requirement that I'm aware of in the law that the members must give more weight to one offense over another offense or less weight to one offense over another offense simply based on a maximum punishment theory." (Id.) Ultimately, the military judge declined to provide the

members "any kind of direction that interferes with their ability, their independent ability, to decide an appropriate sentence in this case based on their interpretation of the evidence, matters in aggravation and the matters in mitigation, as long as that sentence falls underneath the maximum punishment." (JA at 276.)

The military judge rooted his ruling in R.C.M. 1005(e), which enumerated the military judge's required instructions. (JA at 276.) The Rule did not permit instructing the members on the maximum confinement segmented by specification. *See* R.C.M. 1005(e). The military judge also cited United States v. Purdy, 42 M.J. 666 (A. Ct. Crim. App. 1995), as "a little bit of legal authority to back up the court's thoughts on that." (JA at 276.) At no point did the defense offer a specific tailored or special instruction, submit a written proposed instruction, object to the Court's consideration of Purdy, or offer any additional case law to support its position. (*See* JA at 274-276.)

Standard of Review

This Court reviews a military judge's refusal to give a defense-requested instruction for an abuse of discretion. United States v. Zamberlan, 45 M.J. 491, 493 (C.A.A.F. 1997).

To determine whether error exists when a military judge fails to give a requested instruction, this Court applies a three-pronged test: (1) the instruction requested by counsel is correct; (2) it is not substantially covered in the main

instruction; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation. United States v. Damatta-Olivera, 37 M.J. 474, 487 (C.M.A. 1993) (internal quotation omitted).

Law

At the time of Appellant's court-martial, the Rules for Courts-Martial employed a unitary sentencing procedure; that is, the court-martial was directed to "adjudge a single for all the offenses of which the accused was found guilty." R.C.M. 1002(b)(2016).[4] This rule prohibited the imposition of separate sentences for each finding of guilty and required a "single, unitary sentence covering all of the guilty findings in their entirety." Id. The Supreme Court has long approved this practice. Jackson v. Taylor, 353 U.S. 569, 574 (1957); Carter v. McClaughry, 183 U.S. 365, 393 (1902).

Military judges are required to instruct members on "the maximum authorized punishment that may be adjudged." R.C.M. 1005(e)(1)(2016). The maximum punishment is the total punishment permitted "for each separate offense of which the accused was convicted" unless the court-martial has a lower jurisdictional limit. R.C.M. 1002(b)(2016), Discussion.

[4] Since all of Appellant's offenses occurred before 1 January 2019, he was sentenced under the "old" sentencing rules in effect prior to the Military Justice Act of 2016 taking effect. *See* Executive Order 13825, 83 Fed. Reg. at 9890.

"While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give." Damatta-Olivera, 37 M.J. at 478; *see also* R.C.M. 920(c), Discussion.

Analysis

Appellant argues that the military judge abused his discretion by relying on a non-binding Army case, Purdy, in denying the defense instruction. (App. Br. at 40.) But the military judge cited the plain language of R.C.M. 1005(e) as his primary rationale. (JA at 276.) The Rules for Courts-Martial are promulgated in the MCM by the President under his rule-making authority granted to him under the UCMJ and, thus, are binding upon military courts and personnel. Article 36(a), UCMJ, Exec. Order No. 12473, 3 C.F.R. 201 (1985), as amended; MCM, 1984, Part I, § 4. Therefore, it was not an abuse of discretion to rely on the plain language of R.C.M. 1005(e) that did not allow for the defense's requested instruction. The military judge additionally cited a published Army case that the military judge found persuasive. (JA at 276.) But Purdy did not establish any new law—it merely regurgitated binding precedent from this Court's predecessor:

> Court members should not be informed of the reasons for the maximum period of confinement. They should only be concerned with the maximum imposable sentence and not the basis for the limitation. *See United States v. Frye*, 33 M.J. 1075, 1079 (A.C.M.R. 1992); *United States v. Eschmann*, 11 U.S.C.M.A. 64, 28 C.M.R. 288, 291 (1959).

Purdy, 42 M.J. at 671.

In Eschmann, this Court's predecessor held that "[t]he members of the court are concerned only with the maximum imposable sentence and not the basis for the limitation it places upon them." 28 C.M.R. at 291. This is precisely the same proposition Purdy merely repeated.

Appellant relies heavily on Gutierrez, a Court of Military Appeals case from 1981 that interpreted the 1969 version of the MCM. 11 M.J. at 124. But "the Gutierrez opinion was based on a provision which has not been part of military jurisprudence for decades." United States v. Blackburn, 2021 CCA LEXIS 212, at *52 (A.F. Crim. App. 30 April 2021) (unpub. op.). Furthermore, the 2016 Amendment to R.C.M. 1002(b) clarified the military's unitary sentencing concept. The Analysis to R.C.M. 1002 specifically referenced, and limited, Gutierrez. Drafter's Analysis, MCM, United States A21-73 (2016 ed.): "*2016 Amendment:* R.C.M. 1002(b) clarifies the military's unitary sentencing concept. *See United States v. Gutierrez*, 11 M.J. 122, 123 (C.M.A. 1981); *see generally Jackson v. Taylor*, 353 U.S. 569 (1957)."

Appellant argues that the Air Force Court in Blackburn "recognized that Gutierrez was consistent with the military judge's ability to instruct the members on maximum punishments by offense, although it held it was not mandatory." (App. Br. at 41; JA at 335-36.) This is incorrect. The Air Force Court in Blackburn stated: "The Court of Military Appeals [in Gutierrez] did *not* conclude

advising members as to individual maximum sentences was required or even advisable, only that doing so was not prohibited by the law *in force at the time*." (JA at 335) (emphasis added.) Indeed, as the concurrence in Gutierrez aptly stated: "Advice to the court members about the maximum punishments for the separate offenses tends to confuse them and divert them from [their] objective." 11 M.J. at 125 (Everett, J., concurring).

Appellant speculates the military judge was "apparently unaware of Gutierrez." (App. Br. at 40.) But the military judge was under no obligation to be aware of, or rely on, a case that was abrogated by the promulgation of the 1984 MCM and was plainly in contrast to the then-existing iteration of R.C.M 1002(b). *See* Blackburn, 2021 CCA LEXIS, at *52.

At bottom, this Court cannot find an abuse of discretion for a military judge failing to instruct contrary to the plain language of the Rules for Court-Martial. A military judge abuses his discretion when he "uses incorrect legal principles." United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted). So, if anything, the military judge would have abused his discretion if he *gave* the defense-requested instruction without any basis in law to do so.

Conclusion

The military judge did not abuse his discretion in rejecting a defense-requested instruction that defied the plain language of R.C.M. 1002(b). Since the

instruction requested by the defense was not "correct," he cannot meet the first prong of the Damatta test and his claim must be rejected. 37 M.J. at 487.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY PERMITTING A VICTIM UNSWORN STATEMENT THROUGH QUESTION-AND-ANSWER FORMAT, AND APPELLANT SUFFERED NO PREJUDICE.

Additional Facts

Appellant shot Airman First Class MJ, a fellow airman, in the head. (JA at 003.) MJ died four days later. (JA at 003.) Upon an unopposed Government request, the military judge appointed MJ's mother, MH, as MJ's legal representative "for purposes of assuming her [sic] rights" under Article 6b, UCMJ. (JA at 142.) Neither MH or MJ's father were represented by a Special Victims' Counsel (SVC) at trial. (JA at 250.) They were not eligible. *See* 10 USC § 1044e (limiting SVC eligibility to alleged sex-related offenses). The Government told the defense that the victim's mother and father would give their victim unsworn statements through a question-and-answer (Q&A) format with trial counsel. (JA at 245-46.) The Government explained that a Q&A format would give trial counsel greater control to ensure the victim's parents did not provide information outside the bounds of R.C.M. 1001(c):

> This is a unique case. The accused was just convicted of killing these people's son so I think it would be

> …….appropriate for them to sit and answer questions. It also gives us, as the trial counsel, the ability to appease some of the defense concerns that this could go off the rails or outside the bounds if we do it in a question and answer format, we have the ability to control that versus just letting the mother, father, and brother[5] get up and talk, which does – there are concerns from trial counsel in any case but certainly in a case like this that it could go outside the bounds, and we want the ability to control that and we think the best way to do that would be through a question and answer format.

(JA at 248.)

The defense objected. (JA at 246.) The military judge overruled the defense objection. (JA at 246-47, 255.) In his reasoning, the military judge stated that R.C.M. 1001(c) did not prohibit a Q&A format. (Id.)

The military judge also noted that R.C.M. 801(a)(3) empowered him to exercise reasonable control over the proceedings. (JA at 247.) Consistent with that authority, the military judge allowed both the unsworn statements from the victim's parents and Appellant's unsworn statement in Q&A format to be delivered from the witness stand:

> I did inform the parties if they wish to do so in a Q&A format because they indicated a desire to do a Q&A format unsworn for both the victim impact witnesses as well as the accused, I told them that they would be permitted under the circumstances to have their respective witnesses sit in the actual witness chair, even though they are not

[5] MJ's brother ultimately elected to submit a written unsworn statement. (JA at 140.)

> providing sworn testimony. But I would make that exception in this case if they chose to go that route.

(JA at 243-44).

Defense did not object to delivery of the unsworn statements from the witness stand. (*See* JA at 244.)

Finally, the military judge agreed with the Government that the Q&A format "does give counsel greater control of the matters that are revealed during the unsworn statement if [trial counsel] is controlling the questioning and the answering." (JA at 248.) To that end, the military judge acknowledged his "*sua sponte* duty to step in and intervene if a victim impact statement strays beyond the confines of R.C.M. 1001" and made clear, "the court will exercise that authority." (JA at 248.) Just before the question-and-answer session, the military judge informed the members that the statements were not under oath:

> Members of the Court, at this time you will hear some unsworn statements from individuals that are identified as victims of the crime. I want to read you a brief instruction though as to how you can consider these particular statements. An unsworn statement is an authorized means for victim to bring information to the attention of the court and must be given appropriate consideration. The victim cannot be cross-examined by the prosecution or defense or interrogated by court members, or me, upon an unsworn statement but the parties may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that *the statement is not under oath*, its inherent probability or improbability, whether it is

> supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

(JA at 260) (emphasis added.)

The Government did not call the victim's parents as witnesses. Rather, trial counsel told the military judge: "we would ask for Mrs. MJ." (JA at 260.) Similarly, trial counsel noted the victim's father "would like to say something." (JA at 266.) The victim's parents gave their unsworn statements after the Government rested their sentencing case but before the defense's sentencing case. (R. at 1093, 1116.) The defense did not object to the content of either parents' Q&A. (*See* JA at 1101-1114.) Nor did the military judge *sua sponte* interrupt or stop either parent for straying outside the bounds of permissible victim impact. (Id.)

The first victim to provide an oral unsworn statement was MH, MJ's mother and Article 6b representative. (JA at 037.) The assistant trial counsel asked her questions, including: her name and relationship to MJ, where MJ was born, his hometown, his personality as a baby, what he was like as an older child and in high school, how MJ felt being stationed so close to home, why MJ joined the Air Force, and how it felt to watch him graduate from basic training. (JA at 037.) Additionally, trial counsel asked MH questions relating to MJ's injury and death,

including how she learned about it, how she felt at the hospital where MJ was being treated, how her life has been affected without MJ, and what had been done to memorialize MJ. (JA at 038.) The CCA found that "[m]any of MH's responses were narrative or provided more information than called for in the question." (JA at 038.)

The second victim to provide an oral unsworn statement was MJ's father. (JA at 038.) The circuit trial counsel asked him questions, including: background of MJ's birth and name, what MJ was like as a young child and older child, the father's relationship with MJ and MJ's brother, what he thought of MJ joining the Air Force and being stationed close to home, how it felt to watch MJ graduate from basic training, and whether MJ enjoyed being in the Air Force. (JA at 038.) Additionally, counsel asked him questions relating to MJ's injury and death, including how the father learned about it, going to the hospital where MJ was being treated, how he thought about MJ now that MJ was deceased, and changes in the family dynamic. (JA at 038.) The CCA found that, "[l]ike MH, many of MJ's father's responses were narrative or provided more information than called for in the question." (JA at 038.) Additionally, the CCA found that "[s]ome of the questions were more directive in nature, including whether he was proud of MJ when he joined the Air Force and whether they immediately drove to Lubbock after learning MJ was shot." (JA at 038.)

During sentencing instructions, the military judge again instructed the members that the unsworn statements were not under oath in an identical fashion as to how he instructed them before MJ's parents provided their unsworn statements. (R. at 1137; JA at 260.)

Standard of Review

This Court reviews a military judge's decision to admit an unsworn victim statement under R.C.M. 1001(c)[6] for an abuse of discretion. United States v. Edwards, ___ M.J. ____, No. 21-0245, 2022 CCA LEXIS 283, at *10 (C.A.A.F. 14 April 2022). A military judge abuses his discretion when his legal findings are erroneous or when he makes a clearly erroneous finding of fact. Id. (citing United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018) and United States v. Eugene, 78 M.J. 132, 134 (C.A.A.F. 2018)).

A military judge's interpretation of R.C.M. 1001(c) is a question of law this Court reviews *de novo*. Barker, 77 M.J. at 382.

This Court reviews a military judge's R.C.M. 801 exercise of "reasonable control over the proceedings" for an abuse of discretion. United States v. Brown, 72 M.J. 359, 362 (C.A.A.F. 2013).

[6] R.C.M. 1001A has been incorporated into the 2019 edition of the MCM (Appendix 15, Chapter X: *Sentencing*) as R.C.M. 1001(c). At the time of Appellant's sentencing, R.C.M. 1001(c) was the governing rule.

Law

Congress granted the victim of an offense under the UCMJ the right to be "reasonably heard" during any sentencing hearing related to that offense. Article 6b(a)(4)(B), UCMJ; United States v. Tyler, 81 M.J. 108, 111 (C.A.A.F. 2021). The President reiterated that "a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing procedure related to that offenses. R.C.M. 1001(c)(1).

Under R.C.M. 1001(c), victims in noncapital cases may exercise their right to be heard through sworn or unsworn statements. R.C.M. 1001(c). Unsworn statements may be oral, written, or both. R.C.M. 1001(c)(5)(A). "The military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." R.C.M. 1001(c)(5)(B). A victim's counsel may give a victim's unsworn statement upon "good cause shown." R.C.M. 1001(c)(5)(B).

The statute provides for the appointment of an individual to stand in for the victim if the victim, like MJ in this case, is deceased. Article 6b(c), UCMJ. The victim's representative may also "make a sworn or unsworn statement." R.C.M. 1001(c)(2)(A)-(D).

Trial counsel may not appropriate a victim's rights under Article 6b, UCMJ and R.C.M. 1001 in order to admit Government evidence in its aggravation case.

United States v. Hamilton, 78 M.J. 335, 342 (C.A.A.F. 2019). However, victims may confer with trial counsel in preparation for their unsworn statements. Edwards, 2022 CCA LEXIS, at *18; *see* Article 6b(a)(5), UCMJ.

Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's unsworn statement that includes matters outside the scope of R.C.M. 1001. Tyler, 81 M.J. at 112-13.

Analysis

A. Trial counsel properly facilitated the deceased victim's right to be reasonably heard through his legal representative and facilitated the victim's parents' independent right to be reasonably heard as victims themselves.

Appellant argues that R.C.M. 1001 does not permit a trial counsel to "participate" in the unsworn statement. (App. Br. at 54.) But there is a distinction between trial counsel *participating* and *facilitating* a victim unsworn statement. "Participate" is defined as "to take part" or "to have a part or share in something." Merriam-Webster Dictionary, https://www.merriam webster.com/dictionary/participate (last visited 7 May 2022). "Facilitate" is defined as "to make easier: help bring about." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/facilitate (last visited 7 May 2022). Here, the Government did not take part in the unsworn statements. They did not "drive" the answers given. (App. Br. at 53.) On the contrary, they merely

prompted mostly narrative-form responses from the victim's parents by asking open-ended questions.

When the assistant trial counsel facilitated MH's victim unsworn statement, she did not call her as a witness. Rather, she stated: "we would ask for Mrs. MJ." (JA at 260.) Similarly, the circuit trial counsel facilitated MJ father's oral unsworn statement by stating: "At this time, MJ's father would like to say something." (JA at 266.) Appellant complains that the Government "commandeered" the victims' right of allocution by the Q&A format of delivery. (App. Br. at 52.) But during MJ's mother's unsworn statement, the assistant trial counsel never once interrupted her. (*See* JA at 260-266.) When her responses provide more information than the call of the questions, trial counsel did not reorient her. (Id.) During MJ's father's unsworn statement, the circuit trial counsel minimally interrupted him. (*See* JA at 266-273.) Additionally, some of MJ's father's responses to questions were altogether non-responsive. (JA at 038.) When MJ's father was non-responsive, the circuit trial counsel did not prod him for an answer. (JA at 268, 273.)

Appellant argues that "[i]t is impossible to know whether the members recognized the distinction between these unsworn statements and sworn testimony." (App. Br. at 58.) But this Court presumes that members follow a military judge's instructions. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) (additional citations omitted). The military judge twice instructed the

members that neither parent was testifying under oath. (JA at 260, R. at 1137.) Trial counsel's questions did not alchemize unsworn statements into sworn testimony.

While the military judge did thank MJ's father for his "testimony," this perfunctory comment does not override the military judge's lengthy instructions on the "weight and significance to be attached to an unsworn statement" that immediately preceded the "testimony." (JA at 260.) The military judge's inartful word choice aside, trial counsel did not place MJ's father under oath nor did the defense cross-examine him on the contents of his statement. Nineteen witnesses testified under oath from both sides at various points in the proceeding. After seeing so many witnesses give sworn testimony, the members would surely appreciate the significant difference in the unsworn statements.

Appellant refers to the "non-standard presentation" of the victim impact statements. (App. Br. at 58.) But a victim presenting an unsworn statement through a Q&A with trial counsel is only "non-standard" to trial practitioners. Almost all the members were serving on a court-martial panel for the first time. (R. at 170.) Since there is no reason to believe the members perceived the non-standard nature of the presentation, this Court has no basis to find they disregarded the military judge's instructions on unsworn statements.

Since trial counsel did not appropriate the victims' rights to present their own unsworn statement and the military judge twice instructed that the unsworn statements were not made under oath, the military judge did not abuse his discretion in allowing trial counsel to facilitate the Q&A unsworn statements.

B. Trial counsel's facilitation of the victims' unsworn statements in this case is distinguishable from the trial counsel's production in Edwards.

In Edwards, trial counsel "produced" a seven-minute long victim unsworn video "on behalf of the victim's family" that included an interview with the victims and a slideshow of pictures of the victim set to music. 2022 CAAF LEXIS 283, at *1, 6. Trial counsel then played a portion of that video during her sentencing argument. Id. at *25. The video also went back with the members into the deliberation room. Id. This Court found that "the video was, at least in part, trial counsel's statement rather than theirs." Id. at *2.

Here, there was no prerecorded video. There were no pictures. There was no background music. Nothing was "produced." The members had nothing to bring back in the deliberation room. The impact statements were not played or recreated during trial counsel's sentencing argument. Trial counsel did not make "creative and organizational decisions that…incorporated her own personal artistic expression" into either victim impact statement. Id. at *17-18. Therefore, MH and MJ's father's statements solely belonged to them, not the trial counsel. Id. at *2.

The only "artistic expression" trial counsel could have even exercised was in the form of the questions asked, which were almost all open-ended and generic. There is no question "to whom [this Court] should attribute" the unsworn statement—it was the victim's parents. Id. at *17. The Government did not supplement its sentencing argument by putting trial counsel's own statements into the victims' mouths. Id. at *18.

In this regard, trial counsel did not "misappropriate the victim[]s' right to be heard." Id. Finally, the content of the oral unsworn statements stayed within the permissible bounds of R.C.M. 1001, as evidenced by the lack of defense objection or military judge intervention. For these reasons, this case is distinguishable from Edwards.

C. Unrepresented victims have a right to be reasonably heard through a question-and-answer exchange aided by trial counsel.

The victim's parents had a right to be reasonably heard in two ways. First, MH had a right to be reasonably heard as MJ's lawful representative under Article 6b, UCMJ. Second, both MH and MJ's father had an independent right to be reasonably heard as crime victims who had "suffered direct…emotional…harm" as a result of Appellant killing their son. R.C.M. 1001(c)(2)(A).

Appellant argues that R.C.M. 1001(c) "simply does not contemplate a role for trial counsel." (App. Br. at 108). But reading R.C.M. 1001(c) in the manner that Appellant advocates would frustrate the clear purpose behind the law. Article

6b, UCMJ, affords victims the "right to be reasonably heard." 10 U.S.C. § 806b(a)(4). Further, in the case of a deceased victim, the statute mandates appointment of a representative, such as a family member, to assume the deceased victim's rights. 10 U.S.C. § 806b(c). Yet, nothing in the language of R.C.M. 1001(c) addresses the ability of a victim's unrepresented Article 6b representative, or an unrepresented victim, to provide an unsworn statement with assistance of counsel. Appellant's reading arbitrarily restricts an unrepresented victim, and a victim's legal representative, in the mode of presenting their right to allocution.

R.C.M. 1001(c) should not be read so narrowly as to render it inconsistent with a victim's statutory right to be "reasonably heard." Article 6b, UCMJ. It is reasonable to allow the unrepresented parents of a deceased victim to deliver their unsworn statement via a Q&A format with trial counsel. To find otherwise would put victims without SVC representation, and a victim's Article 6b representative, on unequal footing with represented victims. Even victims of crimes as grave as murder are not statutorily entitled to SVC representation. *See* 10 USC § 1044e (limiting SVC eligibility to alleged sex-related offenses). The Air Force has expanded SVC eligibility from sex crimes to *qualifying* crimes of domestic violence. *See* Department of the Air Force (DAFI) 51-201, dated 15 April 2021, paragraph 24.2.2.2 (emphasis added). But to qualify, the domestic violence victim

of the crime must be a spouse, intimate partner, or immediately family member of the accused. Id. This was not the case for MJ or his parents.

Trial counsel facilitating a victim's statement is not unreasonable within the meaning of the "right to be reasonably heard." Article 6b(a)(4)(B), UCMJ; R.C.M. 1001(c)(2)(D)(ii). The victims wanted assistance in presenting their oral unsworn statements. But they did not have their own counsel. R.C.M. 1001(c) does not purport to address a situation where the victim unrepresented, but desires assistance in presenting their unsworn statement. If the victim is not eligible for SVC services, then the only "counsel" to facilitate their chosen manner of allocution is trial counsel. After all, a victim has the reasonable right to confer with trial counsel at sentencing. Article 6b(a)(5), UCMJ.

R.C.M. 1001(c) should not be interpreted to prevent a victim from being heard in this reasonable manner since nothing in the rule prohibits it *and* because trial counsel is not "delivering" the victim's statement on his or her behalf when trial counsel facilitates with questions. Statements by counsel are not normally considered to be evidence. *See* United States v. Castro-Davis, 612 F.3d 53, 68 (1st Cir. 2010) "[S]tatements of counsel are not evidence"); Long v. Hooks, 972 F.3d 442, 463 (4th Cir. 2000) ("Statements by an attorney are not considered evidence."). It follows that the questions of counsel to a victim facilitating an

unsworn statement are not matters before the court-martial – the matters before the court-martial for consideration are the victim's answers.

i. The military judge, as gatekeeper, exercised reasonable control over the proceedings in allowing trial counsel to facilitate the victims' oral unsworn statements.

R.C.M. 801(a)(3) empowers the military judge to "exercise reasonable control over the proceedings." This allows the military judge to "prescribe the manner and the order in which proceedings may take place." *See* R.C.M. 102; R.C.M. 801(a)(3) discussion. Consistent with that authority, the military judge found that the Q&A format would prevent the victim's parents from disclosing information outside the bounds of R.C.M. 1001(c). This was an appropriate preventive step in a case in which the parties expressed concern about the victims volunteering impermissible matters during their unsworn statements. (*See* JA at 248.)

A broad reading of R.C.M. 1001(c) is also appropriate because the military judge can still act as the gatekeeper to use his or her discretion to determine what is a reasonable, and unreasonable, means of being heard. Tyler, 81 M.J. at 113. "Although the unsworn victim statement is not object to the Military Rules of Evidence, this does not mean that the military judge is powerless to restrict its contents." Id. at 112. The military judge always has an obligation to ensure any victim unsworn statement "comports with the parameters of victim impact"

defined by R.C.M. 1001(c). Id. (citation omitted). Rather than categorically prohibiting all Q&A victim unsworn statements, this Court should allow the military judge to act as gatekeeper and restrict Q&A unsworn statements if they become "unreasonable."

ii. Cornelison is distinguishable.

The United States acknowledges that the Army Court of Criminal Appeals issued a non-binding contrary holding in United States v. Cornelison, 78 M.J. 739 (A. Ct. Crim. App. 2019). But this case is distinguishable from Cornelison in two ways. First, unlike Cornelison, the Government here did not present the victim's parents' unsworn statements in its sentencing case-in-chief. 78 M.J. at 741. Second, unlike the military judge in Cornelison, the military judge here explicitly instructed the members on the "weight and credibility" to give the victims' unsworn statements. Id. at 742. The combined effect was that the members understood the unsworn statements were not part of the Government's case and were not normal testimony. Under these circumstances, the military judge did not abuse his discretion.

iii. This Court's recent approach to interpreting Mil. R. Evid. 513 in Beauge provides helpful guidance for how this Court should interpret R.C.M. 1001(c).

In United States v. Beauge, ___M.J. ____, No. 21-0183, 2022 CAAF LEXIS 181 (C.A.A.F. 3 March 2022), this Court interpreted the psychotherapist-patient privilege under Mil. R. Evid. 513. In doing so, this Court employed

principles of statutory construction and stated "we must keep in mind the provisions of Mil. R. Evid. 513 were crafted to balance the interest of a victim in having private communications protected," and "[t]his Court should not take lightly the constraints these policy-laden choices place on our authority to second-guess the Executive on this point." Id. at *10-11. The Court specified, with regard to Mil. R. Evid. 513, the intent of the Executive, and "the very core of the rule" was to give the patient the choice of whether to disclose confidential communications. Id. at *13. In other words, "the intent of the rule is to vest control of disclosure with the patient, and in the absence of plain language to the contrary, we should not choose a reading of the rule that subverts this principle." Id. at *14.

This Court should apply the same reasoning in Beauge to this case in its analysis of R.C.M. 1001(c). The "very core" of R.C.M. 1001(c) is the victim's "right to be reasonably heard." The Executive's intent was to ensure a victim of a crime had the opportunity to be reasonably heard upon the determination of guilt of an accused. It is hard to believe that in promulgating R.C.M. 1001(c) the President specifically intended to prohibit Q&A victim unsworn statements – a seemingly anodyne means of presentation – or to otherwise strictly constrain the mode of delivery of a victim's unsworn statement. This Court should not read the Rule so strictly as to limit reasonable modes of presentation of a statement absent plain

language to the contrary. Beauge, 2022 CCAF LEXIS, at *13. To do so would be "to choose a reading of the rule that subverts" the President's intent that victims be reasonably heard at the sentencing proceeding. Id. at *13.

In sum, R.C.M. 1001(c) did not prohibit a question-and-answer session, R.C.M. 801(a)(3) allowed it, and the facts here justified it. Taken together, the military judge did not abuse his discretion.

D. This Court can harmonize Article 6b, UCMJ, with R.C.M. 1001(c) by finding that a military judge, in exercising his gatekeeping function, may permit an unrepresented victim or victim's representative to present an unsworn statement aided by trial counsel.

When two provisions "initially appear to be in tension," the provisions should be interpreted in a way that render them compatible, not contradictory. United States v. Kelly, 77 M.J. 404, 407 (C.A.A.F. 2008) ("[T]his Court typically seeks to harmonize independent provisions of a statute." (citing United v. Christian, 63 M.J. 205, 208 (C.A.A.F. 2006)).

Article 36, UCMJ, delegates to the President broad power to prescribe procedure and rules of evidence for trials by courts-martial. 10 U.S.C. § 836. In the exercise of his procedural power, the President promulgated R.C.M. 1001(c), which contains extensive procedural rules relating to victim unsworn statements. The President, by promulgating RCM 1001(c), gave effect to Article 6b, UCMJ. Hamilton, 78 M.J. at 339.

Article 6b representatives should not be treated as secondary participants in the sentencing process. A minor, incompetent, incapacitated, or deceased victim has just as much a right to be reasonably heard as an adult, competent, capable, alive victim. This reading is consistent with Congress' expansion of victims' rights and the role of a victim's right to be reasonably heard in the overall statutory scheme. Rules of statutory construction apply to interpreting the R.C.M. United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Kelly, 77 M.J. at 406-07 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal quotation marks omitted).

The National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 952 (2013), incorporated the Crime Victims' Rights Act (CVRA), 18 USC § 3771, into Article 6b, UCMJ. The CVRA gives crime victims "[t]he right to be reasonably heard at any public proceeding… involving…sentencing." 18 USC § 3771(a)(4).

"Article 6b generally mirrors the rights afforded to victims in civilian criminal trials under the CVRA and establishes that a victim has 'the right to be reasonably heard…at [a] sentencing hearing related to the offense.'" United States v. Lasalle, No. ACM 38831 (reh), 2019 CCA LEXIS 337, at *5-6 (A.F. Ct. Crim.

App. 21 August 2019) (unpub. op.). The CVRA clearly meant to make victims full participants." Kenna v. United States Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006).

The CCA's reconciliation of Article 6b and R.C.M. 1001(c)(5)(B) is perfectly consistent with the statutory language and general purpose of the legislation:

> Interpreting R.C.M. 1001(c)(5)(B) *expressio unius est exclusio alterius* would mean only a crime victim's counsel may deliver the victim's unsworn statement. Such an interpretation necessarily excludes the designee—unless they also are the victim's counsel—from exercising the victim's right to be reasonably heard; Therefore, we find R.C.M. 1001(c)(5)(B), which allows for all or part of the victim's statement to be delivered by the victim's counsel, does not *prohibit* a victim from responding to open questions from a party's counsel, as occurred in this case.

(JA at 041.)

This Court should not read Article 6b, UCMJ and R.C.M. 1001(c) to be at odds. This Court can reconcile any tension between the two by construing R.C.M. 1001(c) consistent with the intent of the Executive and "the very core of the rule" which is to vest the mode of being heard, within reason, with the crime victim. In doing so, this Court can give full meaning and effect to the phrase "right to be reasonably heard" for both an unrepresented victim and the legal representative of a deceased victim. Beauge, 2022 CAAF LEXIS at *13.

E. The witness stand was a proper situs for delivering both the victim and accused unsworn statements.

Next, Appellant complains the military judge allowed the parents to deliver their victim impact statements from the witness stand. (App. Br. at 57.) At the outset, this issue is forfeited. During an R.C.M. 802 conference the topic of both sides using the witness stand for unsworn statements was broached. (JA at 243.) The military judge summarized on the record that both sides "would be permitted under the circumstances to have their respective witnesses sit on the actual witness chair, even though they are not providing sworn testimony." (JA at 243-244.) The defense did not object. (JA at 244.) If an appellant forfeited an objection—in other words, failed to make a timely assertion of a right—this Court reviews for plain error. *See* United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (citing United States v. Sweeney, 70 M.J. 296, 303-04 (C.A.A.F. 2011)).

The burden of proof under plain error is on the appellant, who must establish: (1) there is error; (2) that error is plain or obvious; and (3) the error results in material prejudice to a substantial right of the appellant. United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005).

The military judge did not plainly err in allowing both the accused and victim's parents to deliver an unsworn statement from the witness stand. The rules vest the military judge with the power to "prescribe the manner and the order in which proceedings may take place." R.C.M. 801(a)(3) discussion. Where a victim

or accused delivers an unsworn statement from constitutes "the manner…in which proceedings may take place." R.C.M. 102. Here, the military judge discharged his responsibility in a "fair and orderly manner" when he likewise permitted the accused to deliver his unsworn from the witness stand as well. R.C.M. 801(a), Discussion.

Although there is no military case law dealing with a victim ascending the witness stand to deliver an unsworn statement, it is well-settled that a military judge may permit an accused to deliver his unsworn statement from the witness stand. *See* United States v. Akbar, No. 20050514, 2012 CCA LEXIS 247, at *90 (A. Ct. Crim. App. 13 July 2012) (unpub. op.); *see also* United States v. Peterson, 24 C.M.R. 51, 52 (C.M.A. 1957). The military judge permitted *both* the accused and victims to deliver their respective unsworn statements from the witness stand. (JA at 244.) Lest there be any confusion over the import of the witness stand, the military judge drew the distinction for the court members between the sworn testimony of a witness and an unsworn statement with a clear, concise instruction. (*See* JA at 260; R. at 1137.) For these reasons, the military judge did not commit plain error.

F. Appellant suffered no prejudice from the admission of the victim's parents' unsworn statements.

At the outset, Appellant urges this Court to adopt a "harmless beyond a reasonable doubt" standard in its prejudice analysis, arguing that the presentencing

error has "constitutional dimensions—specifically, [regarding] due process and the right to a fair trial." (App. Br. at 59-60.) But this Court already decided this precise issue in Edwards, the day after Appellant submitted his brief. 2022 CAAF LEXIS 283, at *19-20 (declining Appellant's request to adopt a harmless beyond a reasonable doubt standard generally or to apply it specifically to the case).

Even if the military judge abused his discretion, Appellant suffered no prejudice from the Q&A unsworn statements. When a military judge improperly allows sentencing matters, an appellant is only entitled to relief if the error substantially influenced the adjudged sentence. Barker, 77 M.J. at 384 (citation omitted). To determine whether an error substantially influenced the sentence, this Court considers (1) the strength of the prosecution'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. Id.

i. The strength of the government's case.

Here, the Government's evidence was exceptionally strong. Appellant's crimes were heinous, and the loss of life tragic. The Government highlighted both the exceptional aggravation in the case resulting from the violent nature of the offense, as well as the impact of Appellant's crimes on MJ's friends and families, on the Air Force, and highlighted the loss of life suffered by MJ. Appellant shot MJ in the head in a closed garage with a .45-caliber handgun on Independence Day

2018. (JA at 003.) MJ did not die until four days later from his wounds. (JA at 003.)

At the time Appellant shot MJ, he was already facing court-martial for other misconduct with a docketed trial date. (JA at 003.) Specifically, Appellant was also charged with, and convicted of, communicating a threat and significant drug use over the course of two years. (JA at 003, 279-80.) Taken with Appellant's disciplinary history demonstrating his poor rehabilitative potential (JA at 090, 094, 098, 101), the Government presented a strong sentencing case.

ii. The strength of the defense case.

By contrast, the defense case was weak. Appellant introduced only five, generic character letters from family and family friends, some basic certificates, and an unsworn statement. (JA 106-126.) The defense called two witnesses who provided brief testimony—a family friend (R. at 1116) and Appellant's mother. (R. at 1121.) There was no testimony from supervisors or fellow Airmen. There were no significant accolades worthy of consideration for sentence relief. The defense did not present evidence of rehabilitative potential. Nor did Appellant introduce any particular matters in extenuation or mitigation other than blaming alcohol for his poor decisions. (JA at 110.) Appellant's sentencing case was weak relative to the Government's case.

iii. The materiality of the evidence in question.

Trial counsel's questions prompting MH and MJ's father's unsworn statements were benign. The open-ended questions merely oriented the victims to different times in their son's life. While the parents' statements may very well have evoked strong "emotional" responses from the panel, it was not because of trial counsel's questions. (App. Br. at 11.) This emotional response likely would have been the same if the parents stood up and read their statement without orienting questions from trial counsel. The "powerful and compelling" nature of the unsworn statements came from the substantive content—not the prefatory questions. (App. Br. at 11.)

Unlike the Government's actions in Edwards, here trial counsel asking a few questions was not a "time-intensive process that resulted in an emotionally moving [unsworn statement]." 2022 CAAF LEXIS 283, at *24. While trial counsel harkened back to the oral unsworn statements in sentencing argument, she did not reference the questions that prompted those statements. Instead, she briefly argued: "Remember what they told you up on that stand and think about what they don't have, what they will never be able to get back." (JA at 286.) Trial counsel did not even mention, much less argue, the crying or the emotional impact Appellant complains of now on appeal. (App. Br. at 62 n.16.) A relevant factor in assessing the materiality is "the extent to which the government referred to the

evidence in argument." Washington, 80 M.J. 106, 111 (C.A.A.F. 2020). Here, in an argument that spanned eight pages of transcript, trial counsel specifically referenced the victim's parents' unsworn statements only once. (JA at 279-286.) This is a stark contrast from the Edwards trial counsel who replayed the unsworn statement during her sentencing argument then allowed the members "unfettered access" to the unsworn statement in the deliberation room. 2022 CAAF LEXIS 283, at *23-25.

iv. The quality of the evidence in question.

The fourth factor also weighs in favor of the Government. There is no evidence in the record that the members gave the impact statements more weight merely because trial counsel prompted the delivery with questions. The content of the unsworn statements stayed within the scope of R.C.M. 1001(c). There is no evidence that the Government used this mode of delivery in an attempt to "slip in evidence in aggravation that would otherwise by prohibited by the Military Rules of Evidence." Tyler, 81 M.J. at 112. On the contrary, the Government's stated goal, in part, was to alleviate the defense's stated concerns that the parents would "go off the rails." (JA at 248.) When trial counsel referred to her desire to "control" the parents' statements it was in reference to concerns that their statements "could go outside the bounds" of admissible evidence. (JA at 248.)

The Government's stated objective in facilitating the Q&A format was to *limit* inadmissible content—not to *procure* it.

Appellant speculates that "without the trial counsel's intervention and direction, [the unsworn statements] may not have happened." (App. Br. at 62.) Appellant posits a number of hypotheticals that could, or could not, have resulted: the unsworn statements may not have happened at all, they may have given "a brief, less effective version of the unsworn" or they may have given only "a written unsworn statement." (App. Br. at 62.) But there is no reason to believe MJ's parents "would have given either a less compelling or more compelling unsworn statement had [they] read a previously-prepared statement, been asked questions by a special victim's counsel, or narrowed [their] own unsworn statement." Cornelison, 78 M.J. at 744. Appellant cannot show prejudice with such speculative claims.

In its analysis finding no prejudice for a similar situation, the Army Court in Cornelison noted that trial counsel asked limited questions, several of which were prefatory. 78 M.J. at 741. The victim's answers to those questions "were lengthy and consistent with a narrative-form unsworn statement rather than a carefully-directed presentation by the trial counsel." Id. at 744. The reasoning regarding prejudice in Cornelison is persuasive here, where the parents' answers resembled a narrative-form unsworn that they otherwise would have narrated on their own.

Finally, the victim parents' unsworn statements were similar to themes expressed in the brother's written unsworn statement. (Court. Ex. 1.) "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial." Barker, 77 M.J. at 384 (citation omitted). Although the parents talked about the victim's background, the brother presented similar information. While the parents described their pain of losing their son, the brother expressed a similar pain. In that respect, the unsworn statements assisted by trial counsel did not provide "new ammunition against Appellant." Id.

Thus, in sum, the purported error did not substantially influence the adjudged sentence.

Conclusion

The military judge did not abuse his discretion by allowing the victim's parents to present their unsworn statement in a Q&A session with trial counsel. But even if the military judge abused his discretion, Appellant suffered no prejudice and deserves no relief.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of the Air Force Court.

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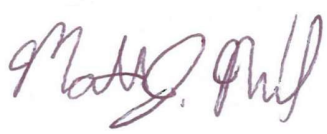

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 May 2022.

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APPENDIX

Cited Unpublished Opinions

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1. *United States v. Akbar, 2012 CCA LEXIS 247*

Client/Matter: -None-
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Cases	Court: Federal > Military Justice

United States v. Akbar

United States Army Court of Criminal Appeals

July 13, 2012, Decided

ARMY 20050514

Reporter
2012 CCA LEXIS 247 *

UNITED STATES, Appellee v. Sergeant HASAN K. AKBAR, United States Army, Appellant

Subsequent History: Later proceeding at *United States v. Akbar, 72 M.J. 408, 2013 CAAF LEXIS 656 (C.A.A.F., 2013)*

Affirmed by *United States v. Akbar, 2015 CAAF LEXIS 721 (C.A.A.F., Aug. 19, 2015)*

Prior History: **[*1]** Headquarters, XVIII Airborne Corps and Fort Bragg. Dan Trimble, Military Judge (arraignment), Patrick J. Parrish, Military Judge (motions hearing), Stephen R. Henley, Military Judge (motions hearing & trial), Colonel Malinda E. Dunn, Staff Judge Advocate (pretrial), Lieutenant Colonel Tyler J. Harder, Acting Staff Judge Advocate (recommendation), Colonel W. Renn Gade, Staff Judge Advocate (addendum).

United States v. Akbar, 68 M.J. 207, 2009 CAAF LEXIS 1058 (C.A.A.F., 2009)

Core Terms

mitigation, defense counsel, aggravating factor, military, sentence, soldiers, diary, witnesses, grenades, disorder, cases, Tent, capital case, court-martial, allegations, ineffective, panel member, interview, Staff, sleep, kill, death penalty, brigade, phase, talk, conflicting interest, mental illness, recommended, deployment, post-trial

Case Summary

Overview
The court rejected appellant's argument that R.C.M. 1004, Manual Courts-Martial, aggravating factors were elements requiring legislative prescription. Appellant also alleged constitutionally deficient notice because the Rule 1004 aggravating factor was not included in the charge and specifications, not investigated, and not properly referred; however, this argument failed for the same reason: Rule 1004 aggravating factors were not elements or the functional equivalent of elements, so they were not required to be included within the charges and specifications.

Outcome
The petition for a new trial was denied. The findings of guilty and the sentence were affirmed.

LexisNexis® Headnotes

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

HN1 **Judicial Review, Standards of Review**

Where preserved for appeal, the United States Army Court of Criminal Appeals reviews de novo matters of constitutionality, to include those of congressional delegation, presidential rule-making, due process, and constitutionally required notice.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > Military Offenses > Murder

HN2 **Sentences, Capital Punishment**

Unif. Code Mil. Justice art. 118, *10 U.S.C.S. § 918*, authorizes the death penalty for premeditated murder. Although the statute permits imposition of the death penalty without regard to aggravating factors, the United States Supreme Court held in Loving v. United States

that aggravating factors are necessary to the constitutional validity of the military capital punishment scheme. By applying its *Eighth Amendment* death-penalty jurisprudence to the military justice system, the Court remarked that Unif. Code Mil. Justice art. 118, *10 U.S.C.S. § 918*, by its own terms, too broadly defined the eligible class of individuals against whom the death penalty may be imposed. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. In the military justice system, this narrowing of the class is achieved through application of R.C.M. 1004, Manual Courts-Martial. The presidentially prescribed R.C.M. 1004(c), Manual Courts-Martial, lists the aggravating factors that must be proven to exist for the death penalty to be lawfully imposed.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

HN3 **Sentences, Capital Punishment**

At courts-martial, the existence of an aggravating factor is for the panel to determine, and it must be found unanimously and beyond a reasonable doubt. R.C.M. 1004(b)(4), 1004(c), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

HN4 **Sentences, Capital Punishment**

Congress's delegation to the President, through Unif. Code Mil. Justice arts. 18, 36, and 56, *10 U.S.C.S. §§ 818*, *836*, and *856*, and the President's subsequent prescription of R.C.M. 1004, Manual Courts-Martial, was constitutional. *U.S. Const. art. II, § 2, cl. 1*.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN5 **Imposition of Sentence, Statutory Maximums**

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. This right arises under the *Due Process Clause of the Fourteenth Amendment* and under the *Fifth* and *Sixth Amendments*.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

HN6 **Sentences, Capital Punishment**

Imposition of the death penalty for a violation of Unif. Code Mil. Justice art. 118(1), *10 U.S.C.S. § 918*, does not require any additional finding of fact because Congress, without reservation, authorized the maximum punishment of death for Article 118(1), *§ 918*. The aggravating factors promulgated by the President in R.C.M. 1004, Manual Courts-Martial, serve to restrict the opportunities at courts-martial for imposition of the death penalty, not to increase the authorized maximum punishment.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN7 **Imposition of Sentence, Statutory Maximums**

The term "sentencing factor" appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

HN8 **Imposition of Sentence, Statutory**

Maximums

The aggravating factors present in R.C.M. 1004, Manual Courts-Martial, are not elements, nor even the functional equivalent of elements as they do not provide for an increase beyond the maximum authorized statutory sentence.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN9 **Imposition of Sentence, Statutory Maximums**

Under the *Due Process Clause of the Fifth Amendment* and the notice and jury trial guarantees of the *Sixth Amendment*, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Grand Jury Requirement

Military & Veterans Law > Military Justice > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN10 **Procedural Due Process, Grand Jury Requirement**

In courts-martial, there is no right to indictment by grand jury. *U.S. Const. amend. V* states that 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, or in the Militia, when in actual service in time of War or public danger. In addition, there is no *Sixth Amendment* right to trial by jury in courts-martial.

Military & Veterans Law > Armed Forces > Organization > US President

HN11 **Organization, US President**

See Unif. Code Mil. Justice art. 36, *10 U.S.C.S. § 836*.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

HN12 **Sentences, Capital Punishment**

Recognizing a distinction between sentencing factors and sentence enhancements, R.C.M. 307, Manual Courts-Martial, requires sentence enhancements to be pled while specifically excepting aggravating factors per R.C.M. 1004, Manual Courts-Martial, from the need to be expressed in the charging document itself. R.C.M. 1004(b)(1)(B), 307(c)(3). R.C.M. 1004 procedures afford constitutional protections. The prosecution is required to give the defense written notice of the aggravating factors set out in R.C.M. 1004(c) that it intends to prove. R.C.M. 1004(b)(1)). This notice must be provided to the accused prior to arraignment. R.C.M. 1004(b)(1)(B). The analysis to R.C.M. 1004 explains that the timing of notice under the rule is intended to afford some latitude to the prosecution to provide later notice, recognizing that the exigencies of proof may prevent early notice in some cases.

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

HN13 **Criminal Process, Assistance of Counsel**

The *Sixth Amendment* guarantees an accused the right to the effective assistance of counsel. *U.S. Const. amend. VI*.

Military & Veterans Law > Military Justice > Counsel

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

HN14 **Military Justice, Counsel**

The United States Army Court of Criminal Appeals reviews de novo claims that an appellant did not receive the effective assistance of counsel.

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

Military & Veterans Law > Military Justice > Counsel

HN15[] Particular Presumptions, Regularity

In assessing the effectiveness of counsel the United States Army Court of Criminal Appeals applies the standard set forth in Strickland v. Washington and begins with the presumption of competence. To overcome the presumption of competence, the Strickland standard requires appellant to demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice.

Military & Veterans Law > Military Justice > Counsel

HN16[] Military Justice, Counsel

The United States Army Court of Criminal Appeals applies a three-part test to determine whether the presumption of competence of counsel has been overcome: 1. Are the allegations true, and, if so, is there any reasonable explanation for counsel's actions? 2. If the allegations are true, did counsel's performance fall measurably below expected standards? 3. Is there a reasonable probability that, absent the errors, there would have been a different outcome? Hindsight in these matters is not usually countenanced by the court or by the United States Supreme Court.

Military & Veterans Law > Military Justice > Counsel

HN17[] Military Justice, Counsel

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > General Overview

HN18[] Courts Martial, Posttrial Procedure

As a rule, appellate courts cannot decide a disputed question of fact in a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties. However, in cases where the record of trial compellingly demonstrates the improbability of the facts supporting the appellant's post-trial claim of ineffectiveness, the court may discount those factual assertions and decide the legal issue. Additionally, if the factual assertions allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, then the conflict may be ignored and the legal issue decided.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > Military Justice > Counsel

HN19[] Sentences, Capital Punishment

There has been no bright light rule to determine what qualifications of counsel are necessary for capital cases.

Military & Veterans Law > Military Justice > Counsel

HN20[] Military Justice, Counsel

What an appellate court must consider is whether counsels' performance was deficient and whether counsels' errors were so serious as to deprive the defendant of a fair trial, one where the result of the trial is reliable.

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

Legal Ethics > Client Relations > Conflicts of Interest

HN21[] **Criminal Process, Assistance of Counsel**

The right to effective assistance of counsel includes a correlative right to representation that is free from conflicts of interest. To establish an actual conflict of interest, appellant must show that (1) counsel actively represented conflicting interests and (2) that the actual conflict of interest adversely affected his lawyer's performance. To show an adverse effect, a petitioner must show that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. Prejudice is presumed when counsel is burdened by an actual conflict of interest.

Legal Ethics > Client Relations > Conflicts of Interest

Military & Veterans Law > Military Justice > Counsel

HN22[] **Client Relations, Conflicts of Interest**

The Army Rules of Professional Conduct state that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. Army Reg. 27-26, Army R. Prof'l Conduct for Lawyers 1.7(b). A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Legal Ethics > Client Relations > Conflicts of Interest

Military & Veterans Law > Military Justice > Counsel

HN23[] **Client Relations, Conflicts of Interest**

An accused may waive his right to conflict-free counsel when the waiver is a knowing intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an Unif. Code Mil. Justice art. 39(a), *10 U.S.C.S. § 839(a)*, session so that an appropriate record can be made.

Legal Ethics > Client Relations > Conflicts of Interest

Military & Veterans Law > Military Justice > Counsel

HN24[] **Client Relations, Conflicts of Interest**

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where the testimony relates to an uncontested issue. Army Reg. 27-26, Army R. Prof'l Conduct for Lawyers 3.7(a).

Legal Ethics > Client Relations > Conflicts of Interest

HN25[] **Client Relations, Conflicts of Interest**

The government must show that there is no other reasonably available source for the evidence to compel a lawyer to testify against his client.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

HN26[] **Capital Punishment, Mitigating Circumstances**

Strickland does not require counsel to investigate every

conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. While use of an analysis prepared by an independent mitigation expert is often useful, such an expert is not required. What is required is a reasonable investigation and competent presentation of mitigation evidence. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN27[] **Judges, Challenges to Judges**

R.C.M. 912(f)(1)(N), Manual Courts-Martial, prescribes the rule for challenges based on both actual bias and implied bias: A member shall be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. Actual bias exists where any bias is such that it will not yield to the evidence presented and the judge's instructions.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN28[] **Judges, Challenges to Judges**

Unlike actual bias, implied bias exists when regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced. When there is no actual bias, implied bias should be invoked rarely.

Military & Veterans Law > Military Offenses > Murder

HN29[] **Military Offenses, Murder**

The elements of premeditated murder are (a) That a certain named or described person is dead; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That, at the time of the killing, the accused had a premeditated design to kill. Manual Courts-Martial pt. IV, para. 43.b.(1) (2002).

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN30[] **Sentencing, Capital Punishment**

Conceding certain elements, particularly an accused's identity as the perpetrator, and focusing on avoiding the death penalty is a strategy accepted as reasonable by the United States Supreme Court. In such cases, avoiding execution may be the best and only realistic result possible. In this light counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade.

Military & Veterans Law > ... > Courts Martial > Evidence > General Overview

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

HN31[] **Courts Martial, Evidence**

All evidence properly admitted during the findings phase is to be considered on sentencing. R.C.M. 1001(f)(2), Manual Courts-Martial.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

HN32[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

When courts look for effective assistance, they do not scrutinize each and every movement or statement of counsel. Rather they satisfy themselves that an accused has had counsel who, by his or her representation, made the adversarial proceedings work.

Counsel: For Appellant: Captain E. Patrick Gilman, JA;

Captain Kristin B. McGrory, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Bradley M. Voorhees, JA; Major Timothy W. Thomas, JA; Captain Shay Stanford, JA (on brief & petition for new trial); Colonel Mark Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Laura R. Kesler, JA; Captain E. Patrick Gilman, JA; Captain Kristin B. McGrory, JA (on reply brief & supplemental brief); Mr. Louis P. Font, Esquire.

For Appellee: Major Adam S. Kazin, JA; Captain Chad M. Fisher, JA (argued); Major Christopher B. Burgess, JA; Major Adam S. Kazin, JA; Captain Nicole L. Fish, JA; Captain Joshua W. Johnson, JA (on brief); Colonel Denise R. Lind, JA; Lieutenant Colonel Mark H. Sydenham, JA; Major Adam S. **[*2]** Kazin, JA; Captain Nicole L. Fish, JA (petition for new trial); Major Amber J. Williams, JA; Captain Chad M. Fisher, JA (on supplemental brief); Colonel Norman F.J. Allen, III, JA; Colonel Denise R. Lind, JA; Lieutenant Colonel Steven P. Haight, JA (additional pleadings).

Amicus Curiae on behalf of Appellant: Colonel Mark Cremin, JA; Captain Elizabeth Turner, JA (on brief)—for the United States Army Trial Defense Service.

Judges: Before SIMS, GALLAGHER, and BURTON, Appellate Military Judges. Senior Judge SIMS and Judge GALLAGHER concur.

Opinion by: BURTON

Opinion

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MEMORANDUM OPINION AND ACTION ON PETITION FOR NEW TRIAL

BURTON, Judge:

A fifteen-member panel composed of officer and enlisted members, sitting **[*3]** as a general court-martial, unanimously convicted appellant, contrary to his pleas, of three specifications of attempted premeditated murder, and two specifications of premeditated murder, in violation of Articles 80 and 118, Uniform Code of Military Justice, *10 U.S.C. §§ 880*, *918 (2000)* [hereinafter UCMJ]. The court-martial sentenced appellant to be put to death. The convening authority approved the adjudged sentence.

Appellant's case is before this court for review pursuant to *Articles 66* and *73, UCMJ*. On 19 June 2008, appellant's request for appellate expert assistance in the form of a mitigation specialist was granted. On 5 May 2009, appellant requested additional funding for his mitigation specialist, which was denied. Appellant also requested appointment of additional experts in forensic psychiatry and psychology, which was also denied. Subsequently, appellant filed two petitions for extraordinary relief with our superior court on 19 and 26 May 2009, renewing the foregoing requests for expert assistance. On 23 June 2009, the Court of Appeals for the Armed Forces (CAAF) stayed the proceedings before this court in order to consider appellant's petitions and the government's consolidated **[*4]** response thereto. On 3 September 2009, CAAF denied appellant's petitions and, on 16 September 2009, lifted the stay of proceedings.

Appellant has alleged fifty-eight assignments of error and three supplemental assignments of error. Appellant also filed a petition for a new trial. We have reviewed all of the assignments of error and the petition for a new trial. We find five of the assignments of error merit discussion, but no relief.

FACTUAL BACKGROUND

Appellant was assigned to the 326th Engineers which was attached to the 1st Brigade, 101st Airborne Division (Air Assault) during a deployment to Iraq. On 22 March 2003, the 1st Brigade was located at Camp Pennsylvania preparing to cross the line of departure (LOD) from Kuwait into Iraq. Earlier in the day, the platoon received training on the proper use of grenades. That evening, appellant and a junior soldier were assigned to guard his squad's grenades for two hours. The first hour, Private First Class (PFC) CP stood guard with him. Private First Class TW stood guard with appellant during the second hour. The grenades were stored under the passenger seat in High Mobility Multipurpose Wheeled Vehicle-Alpha 21 (HMMWV-A21), which belonged **[*5]** to appellant's squad located on Pad 4. When PFC CP arrived for guard duty he inventoried the grenades and all of the grenades were there. There was no requirement that the grenades be inventoried. During the two-hour guard shift, appellant was left alone with the grenades twice, both times while the junior soldier went to wake up the next shift. At an underdetermined time, appellant removed four M-67 fragmentation grenades and three M-14 incendiary grenades from HMMWV-A21 and placed them into his

pro-mask carrier and his Joint Service Lightweight Integrated Suit Technology (JSLIST) bag.

When appellant's guard duty ended he returned to his sleep tent located on Camp Pennsylvania's Pad 4. Staff Sergeant (SSG) EW assumed guard duty from appellant, but did not inventory the grenades at the beginning of his guard shift.

Appellant left Pad 4 on foot and travelled to Pad 7 where the brigade headquarters was located. Upon arrival at Pad 7, appellant turned off the standalone generator, killing all the exterior lights on Pad 7. Appellant then tossed an incendiary grenade into Tent 1 which was occupied by the brigade commander, brigade Command Sergeant Major, and the brigade executive officer. **[*6]** After the explosion in Tent 1, the brigade executive officer, Major (MAJ) KR, exited the tent and was shot by appellant. Appellant next moved to Tent 2, which was occupied by several staff officers, and pulled the pin from a fragmentation grenade and yelled into the tent, "We're under attack." He then tossed the grenade into the tent. Appellant then went to Tent 3, which was occupied by several Captains on the brigade staff, and threw a fragmentation grenade inside. As Captain (CPT) CS exited Tent 3, appellant shot him in the back. As a result of appellant's actions, MAJ GS and CPT CS were killed and fourteen other soldiers were injured. Some of the soldiers suffered permanent damage. Appellant also injured himself.

As the unit leadership was reacting to the attack, setting up security and conducting an accountability check, appellant was identified as being absent from his unit and grenades were reported as missing from HMMWV-A21. After helping set up a secure perimeter around the Tactical Operations Center (TOC) and placing two Kuwaiti interpreters under guard, MAJ KW, the brigade staff intelligence officer, proceeded to the sleeping area to set up a secure perimeter around the tents. **[*7]** Upon noticing soldiers at a bunker outside of the perimeter, MAJ KW approached them in an effort to identify them and prevent accidental fratricide. As MAJ KW approached the first soldier, he asked "Who do we got out here?" and received the response of "Sergeant Akbar." Recognizing the name as belonging to the unaccounted-for soldier, MAJ KW maintained his composure, asked "who else we got out here?" and then moved to restrain appellant by shoving him to the ground and drawing his sidearm. Major KW then identified himself and ordered a nearby soldier to help guard appellant. Major KW then asked appellant if he bombed the tent and appellant confirmed that he was responsible by saying, "Yes." Major KW then directed two non-commissioned officers (NCOs) to guard appellant and went to seek legal advice on how to proceed.

When appellant was apprehended he had one M-67 and two M-14 grenades in his protective mask. An additional three M-14 canisters were discovered in appellant's JSLIST bag. These were confiscated along with appellant's assigned M-4 rifle. One expended shell casing from an M-4 was found in front of Tent 1 and two expended shell casings from an M-4 rifle were found in front **[*8]** of Tent 3. Ballistic analyses of bullets recovered from MAJ KR, who appellant shot in the hand when MAJ KR was exiting Tent 1, and CPT CS, who appellant shot and killed as CPT CS was exiting Tent 3, confirmed that the bullets were fired from appellant's assigned M-4 rifle. The shell casings recovered near Tents 1 and 3 also confirmed appellant's rifle was used in the attack. Appellant's uniform and hands both contained residue from M-14 and M-67 grenades. Additionally, appellant's fingerprints were discovered on the Pad 7 light generator that had been shut off.

For his actions on 22 March 2003, appellant was charged with three specifications of attempted premeditated murder by throwing grenades into Tents 1, 2, and 3, and by shooting MAJ KR. Appellant was also charged with two specifications of premeditated murder for causing the death of MAJ GS and CPT CS. These charges were referred by the convening authority with special instructions to be tried as capital offenses. As previously noted, appellant was convicted of these charges and sentenced to death.

LAW AND DISCUSSION

I. PRESCRIPTION AND PLEADING OF RCM 1004(c) AGGRAVATING FACTORS[1]

In *Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*, the United States Supreme Court held that the aggravating factors in Arizona's capital punishment scheme were the "functional equivalent" of elements which the *Fifth* and *Sixth Amendments* required to be determined by a jury.

[1] Appellant's allegations of improper delegation, prescription, **[*9]** pleading, investigation, and referral of the aggravating factors were presented in Assignment of Error III and Supplemental Assignment of Error III.

Appellant seeks to extrapolate from this precedent a precept applicable to the military capital punishment scheme: that aggravating factors must, for all purposes, be treated as elements.

In the first instance, appellant avers that Congress impermissibly delegated the authority to prescribe, or the President exceeded his authority by prescribing, the capital aggravating factors found in Rule for Courts-Martial [hereinafter R.C.M.] 1004(c), because just like elements of a crime, aggravating factors must be prescribed by Congress. In addition, appellant avers that, just like elements of a crime, aggravating factors must be included in the charge sheet. Included in this latter complaint are attendant failures to properly investigate and refer the capital charges of which appellant **[*10]** was convicted.

A. Background

The government preferred, *inter alia*, two specifications of murder against appellant, each alleging violations of *Article 118(1), UCMJ*.[2] The charges against appellant were investigated pursuant to *Article 32, UCMJ* and the investigating officer recommended that the charges against appellant be referred to a general court-martial. (App. Ex. 75, p. 2; App. Ex. 75, Article 32 Tr. at 945).

The staff judge advocate (SJA) thereafter provided her pretrial advice and recommendation to the convening authority, *see UCMJ art. 34*, in which she recommended that appellant's case be referred as a capital case. In her recommendation, the SJA specifically **[*11]** referenced two R.C.M. 1004 aggravating factors:

> The aggravating factors are: that the premeditated murder of Major [GS], a violation of *UCMJ Article 118(1)*, was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered (R.C.M. 1004(c)(4)); and if the accused is found guilty of Specifications 1 & 2 of Charge II, the accused will have been found guilty of a violation of *UCMJ Article 118(1)*, and will also have been found guilty in the same case of another violation of *UCMJ Article 118* (R.C.M. 1004(c)(7)(J)).

The convening authority approved the SJA's pretrial recommendation and referred the charges against appellant to a general court-martial with special instructions that it was "to be tried as a capital case." Shortly thereafter and prior to arraignment, the prosecution notified appellant in writing that it intended to prove two aggravating factors—the same two factors referenced in the SJA's pretrial recommendation. (App. Ex. I).[3]

The panel at appellant's court-martial unanimously found him guilty of both premeditated murder specifications. The prosecution then moved, without objection from the defense, to limit the aggravating factor in appellant's case to R.C.M. 1004(c)(7)(J): multiple convictions of premeditated murder in the same case. The military judge granted the prosecution's motion and instructed the panel as follows:

> [A] death sentence may not be adjudged unless all of the court members find, beyond a reasonable doubt, that the aggravating factor existed. The alleged aggravating factor in this case is: having been found guilty of the premeditated murder of Major **[*13]** [GS], a violation of *U.C.M.J. Article 118(1)*, the accused has been found guilty in the same case of another violation of *U.C.M.J. Article*

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[2] The specifications of Charge II read:

> SPECIFICATION 1: In that Sergeant Hasan K. Akbar, U.S. Army, did, at or near Camp Pennsylvania, Kuwait, on or about 22 March 2003, with premeditation, murder CPT [CS] by means of throwing an armed grenade into his sleep tent and by shooting him in the back with a rifle.
>
> SPECIFICATION 2: In that Sergeant Hasan K. Akbar, U.S. Army, did, at or near Camp Pennsylvania, Kuwait, on or about 22 March 2003, with premeditation, murder Major [GS] by means of throwing an armed grenade into his sleep tent.

[3] In a document titled "Notice of Aggravating Factors," the government notified appellant:

> 2. The prosecution intends to prove the aggravating factor cited under R.C.M. 1004(c)(4), **[*12]** to wit: that the premeditated murder of Major [GS], a violation of *U.C.M.J. 118(1)*, was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered.
>
> 3. The prosecution further intends to prove the aggravating factor cited under R.C.M. 1004(c)(7)(J), to wit: that having been found guilty of premeditated murder, a violation of *U.C.M.J. Article 118(1)*, the accused has been found guilty in the same case of another violation of *U.C.M.J. Article 118*.

(App. Ex. I).

118(1), the premeditated murder of Captain [CS]. (App. Ex. 306, p. 5). The panel found this aggravating factor beyond a reasonable doubt and sentenced appellant to death. (App. Ex. 307).

B. The Military System's Capital Aggravating Factors

HN1[] Where preserved for appeal, we review de novo matters of constitutionality, to include those of congressional delegation, presidential rule-making, due process, and constitutionally required notice.[4]

HN2[] Article 118, UCMJ, authorizes the death penalty for premeditated murder. Although the statute permits imposition of the death penalty without regard to aggravating factors, the Supreme Court held in Loving v. United States (Loving II), 517 U.S. 748, 755, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996), "that aggravating factors are necessary to the constitutional validity of the military capital punishment scheme as now enacted."[5] By applying its Eighth Amendment death-penalty jurisprudence to the military justice system, *see, e.g.,* Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (per curiam); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) (plurality opinion), the Court remarked that Article 118, UCMJ, by its own terms, too broadly defined the eligible class of individuals against whom the death penalty may be imposed. "[A] capital sentencing scheme **[*15]** must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Loving II, 517 U.S. at 755 (quoting Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), and Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)) (internal quotation marks omitted).

In the military justice system, this narrowing of the class is achieved through application of R.C.M. 1004. The presidentially prescribed R.C.M. 1004(c)[6] lists the aggravating factors that must be proven to exist for the **[*16]** death penalty to be lawfully imposed.[7]

In *Loving*, the Supreme Court considered, and rejected, appellant's claim that the President's prescription of aggravating factors was "inconsistent with the Framers' decision to vest in Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces.'" Loving II, 517 U.S. at 759 (quoting the U.S. Const. art. I, § 8, cl. 14). After considering the history of military capital punishment in both England and in the United States, the Court held that HN4[] Congress's delegation to the President, through Articles 18, 36, and *56, UCMJ*, and the President's subsequent prescription of R.C.M. 1004 was constitutional. Id. at 759-70. *See also* U.S. Const. art. II, § 2, cl. 1. "We hold that Articles 18, 36, and *56* together give clear authority to the President for the promulgation of RCM 1004." **[*17]** Loving II, 517 U.S. at 770.

Subsequent to its decision in *Loving*, the Supreme Court decided Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). *Ring* involved the

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[4] *See, e.g.,* Loving v. United States (Loving II), 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) (reviewing the constitutionality of a congressional delegation of authority and the presidential authority to prescribe aggravating factors); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) (reviewing the constitutionality of the notice provided in a charge sheet); United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010) (reviewing the constitutionality of a statute); United States v. Ronghi, 60 M.J. 83 (C.A.A.F. 2004) (reviewing the President's Article 56, UCMJ, prescription of a maximum punishment); United States v. Czeschin, 56 M.J. 346 (C.A.A.F. 2002) **[*14]** (reviewing the President's Article 36, UCMJ, rule-making authority); United States v. Davis, 47 M.J. 484 (C.A.A.F. 1998) (reviewing the President's Article 36, UCMJ, rule-making authority); United States v. Zachary, 61 M.J. 813 (Army Ct. Crim. App. 2005) (reviewing the President's Article 56, UCMJ, prescription of aggravating factors).

[5] In *Loving*, the Supreme Court assumed applicability of *Furman* and the resulting case law for convictions under Article 118, UCMJ, for murder committed in the United States during peacetime as the government did not contest such application. Similarly, the government in this case has not contested the applicability of Supreme Court death-penalty jurisprudence to the military justice system, and we will assume its applicability to the circumstances of this case, although the crime occurred in a foreign country on the eve of battle. *See* Loving II, 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36; Kennedy v. Louisiana, 554 U.S. 945, 129 S.Ct. 1, 2, 171 L. Ed. 2d 932 (2008).

[6] Exec. Order No. 12,460, 49 Fed. Reg. 3169 (Jan. 24, 1984) *reprinted as amended in Manual for Courts-Martial*, (2002 ed.) [hereinafter MCM, 2002], pt. II, R.C.M. 1004.

[7] HN3[] At courts-martial, the existence of an aggravating factor is for the panel to determine, and it must be found unanimously and beyond a reasonable doubt. R.C.M. 1004(b)(4), 1004(c).

constitutionality of the State of Arizona's capital punishment scheme. In Arizona, the maximum punishment for first-degree felony murder was death or life imprisonment; however, a death sentence could be imposed only if, *inter alia*, at least one aggravating factor was found to exist. The existence of any aggravating factor was to be determined by the trial judge and not the jury. After petitioner Ring was convicted of felony murder, the Arizona trial judge determined two aggravating factors existed and sentenced him to death. Ring petitioned the Supreme Court, asserting that the Arizona capital punishment scheme was unconstitutional because "the *Sixth Amendment* required jury findings on the aggravating circumstances asserted against him." *Ring, 536 U.S. at 597 n.4*. This "tightly delineated" claim was rooted in the decisions of *Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)*, and *Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, in which the Court held that ***HN5***[⬆] "any fact that increases the penalty for a crime beyond the prescribed statutory maximum **[*18]** must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi, 530 U.S. at 490* (recognizing this right under the *Due Process Clause of the Fourteenth Amendment*). *Jones, 526 U.S. at 243 n.6* (recognizing this right under the *Fifth* and *Sixth Amendments*).

Although it had previously rejected a similar challenge in *Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990)*, the *Ring* Court narrowly agreed with the petitioner. The Supreme Court's ultimate conclusion depended upon the Arizona Supreme Court's predicate construction of the state's capital punishment scheme. In its opinion below, the Arizona high court concluded that under Arizona law "a defendant cannot be put to death solely on the basis of a jury's verdict . . . It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death." *State v. Ring, 200 Ariz. 267, 279, 25 P.3d 1139 (2001)*, *rev'd sub nom. Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*. The *Ring* Court rejected the prosecution's claim that the Arizona system allowed for the imposition of either death or life imprisonment based upon the jury's verdict. "In effect, the required **[*19]** finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Id. at 604* (quoting *Apprendi, 530 U.S. at 494*) (internal quotations and alterations omitted). Accordingly the Court held, "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of a greater offense,' *Apprendi, 530 U.S. at 494 n.19*[ ], the *Sixth Amendment* requires that they be found by a jury." *Ring, 536 U.S. at 609*.

Appellant argues that *Ring*, which was decided six years after *Loving*, changed the legal character of aggravating factors in the capital system, so much so that *Loving* is no longer good law.

The concerns present in *Ring* simply do not apply to this case.[8] Unlike the civilian laws at issue in *Ring*, *Jones*, and *Apprendi*, ***HN6***[⬆] imposition of the death penalty for a violation of *Article 118(1), UCMJ*, does not require any additional finding of fact because Congress, without reservation, authorized the maximum punishment of death for *Article 118(1), UCMJ*. *Loving II, 517 U.S. at 769*. The aggravating factors promulgated by the President in R.C.M. 1004 serve to restrict the opportunities at courts-martial for imposition of the death **[*20]** penalty, not to increase the authorized maximum punishment. *Id.* ("This past practice suggests that *Articles 18* and *56* support as well an authority in the President to restrict the death sentence to murders in which certain aggravating circumstances have been established.").

In *Apprendi*, the Supreme Court specifically noted that its holding did not divest the term "sentencing factor" of meaning:

> ***HN7***[⬆] The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Apprendi, 530 U.S. at 494 n.19. ***HN8***[⬆] The aggravating factors present in R.C.M. 1004 are not elements, **[*21]** nor even the functional equivalent of elements as they do not provide for an "increase beyond

[8] In this case, the panel found the aggravating factor beyond a reasonable doubt and sentenced appellant to death. (App. Ex. 307).

the maximum authorized statutory sentence." *Id*. The validity of the Supreme Court decision in *Loving* remains unaltered by Ring. Accordingly, we reject appellant's argument that R.C.M. 1004 aggravating factors are elements requiring legislative prescription.

C. Notice of the Aggravating Factors

Appellant also alleges constitutionally deficient notice because the R.C.M. 1004 aggravating factor was not included in the charge and specifications, not investigated, and not properly referred.[9] *Cf.* Jones v. United States, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (stating that ***HN9***[⬆] "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").[10]

This argument fails for the same reasons cited above. R.C.M. 1004 aggravating factors are not elements or the functional equivalent of elements, so they are not required to be included within the charges and specifications. This argument also fails to account for constitutional distinctions. ***HN10***[⬆] "In courts-martial, there is no right to indictment by grand jury." United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing 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, or in the Militia, when in actual service in time of War or public danger; . . . ."). "In addition, there is no Sixth Amendment right to trial by jury in courts-martial." *Id*. (citing Ex parte Quirin, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F.2002) (per curiam)). Thus, the Supreme Court's pronouncement in Jones regarding the pleading of sentence enhancements is **[*23]** not clearly applicable to the military capital punishment scheme in the first instance.[11]

In *Loving*, the Supreme Court specifically rejected the argument that Article 36, UCMJ,[12] limited the President's discretion to define aggravating factors for capital crimes. Loving II, 517 U.S. at 770. Congress delegated the power to prescribe aggravating factors in capital cases to the President, who "acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance." Id. at 773.

HN12[⬆] Recognizing a distinction between sentencing factors and sentence enhancements, R.C.M. 307 requires sentence enhancements to be pled while specifically excepting aggravating factors per R.C.M. 1004 from the need to be expressed in the charging document itself. R.C.M. 1004(b)(1)(B), 307(c)(3); R.C.M. 307(c) analysis at A21-22 (citing *Jones* and *Apprendi*). R.C.M. 1004 procedures afford constitutional protections. The prosecution is required "to give the defense written notice of the 'aggravating factors' set out in (c) that it intends to prove." United States v. Loving (Loving I), 41 M.J. 213, 266-267 (C.A.A.F. 1994) (citing RCM 1004(b)(1)). This notice must be provided to the accused prior to arraignment. **[*25]** R.C.M. 1004(b)(1)(B). The analysis to R.C.M. 1004 explains that the timing of notice under the rule is intended to "afford some latitude to the prosecution to provide later

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[9] The aggravating factor in this case was the premeditated killing of a second individual. This, of course, was pled on the charge sheet, in so far as appellant was charged with the premeditated murder of two individuals. Appellant fails to clearly **[*22]** identify what fact should have been included within the specifications that was not.

[10] *Ring* specifically did not concern or apply to indictments. Ring, 536 U.S. at 600 n.4.

[11] *See, e.g.,* People v. McClain, 343 Ill.App.3d 1122, 799 N.E.2d 322, 278 Ill. Dec. 604 (2003); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593 (N.C. 2003); McKaney v. Foreman, 209 Ariz. 268, 100 P.3d 18 (2004); Goff v. State, 14 So.3d 625, 665 (Miss. 2009) ("We have held that *Apprendi* and *Ring* address issues wholly distinct from the present one, and in fact do not address indictments at all. *Spicer[v. Mississippi*,] 921 So.2d [292,]319 (citing *Brown[v. Mississippi*,] 890 So.2d [901,]918)"); Kormondy v. State, 845 So.2d 41 (Fla. 2003) ("*Ring* does not require . . . notice of the aggravating factors that the State will present at sentencing.").

[12] Article 36, UCMJ, states in part:

> ***HN11***[⬆] Pretrial, trial, and post-trial procedures, **[*24]** including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

notice, recognizing that the exigencies of proof may prevent early notice in some cases." R.C.M. 1004 analysis at A21-76. *See also* R.C.M. 307(c) analysis at A21-22.

This system clearly comports with the Supreme Court holding in *Ring* and its underlying rationale. There is no constitutional infirmity.

II. SUPPRESSION OF STATEMENT[13]

Appellant avers that two different military judges erred in not granting his motion to suppress his response of "yes" which was made to MAJ KW in the aftermath of the attack and without the benefit of rights warnings under either *Article 31, UCMJ*, or *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. We disagree.

At the time of the unwarned questioning, MAJ KW was a brigade staff officer who was reacting to an attack on his unit and who was "focused solely on the accomplishment of an operational mission," that being to protect the soldiers in his unit from further attack and to prevent friendly **[*26]** fire casualties in the confusion that ensued following the attack. *United States v. Cohen, 63 M.J. 45, 50* (citing *United States v. Bradley, 51 M.J. 437, 441 (C.A.A.F. 1999)*). Major KW's actions in ascertaining appellant's identity, subduing him, and asking him if he was responsible for the attack were taken pursuant to "unquestionable urgency of the threat" and "limited" in scope to those "required to fulfill his operational responsibilities." *United States v. Loukas, 29 M.J. 385, 389 (C.M.A. 1990)* (citations omitted). Furthermore, his actions taken immediately after ascertaining that appellant was responsible for the attack indicate that MAJ KW was not attempting "to evade [appellant's] constitutional or codal rights." *Id*. Instead of trying to elicit more incriminating evidence from appellant, MAJ KW placed him under guard, sought legal advice, and thereafter ensured that appellant was informed of his Article 31(b) rights by a trained interrogator prior to detailed questioning. Accordingly, we find that MAJ KW was neither "acting," nor "could [he] reasonably be considered to [have been] acting in an official law enforcement or disciplinary capacity," and therefore, there was no requirement **[*27]** for him to have provided an *Article 31(b), UCMJ*, rights warning to appellant prior to asking the questions he asked.

When MAJ KW asked appellant if he was responsible for the attack, MAJ KW had no way of knowing if there was more than one attacker or if the attack was even over. This scenario clearly fits within the "public safety exception" in regard to the requirements for *Miranda* warnings. *See New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)*. We find, therefore, that neither of the military judges abused their discretion in denying appellant's motion to suppress his statement to MAJ KW.

III. WHETHER SERGEANT HASAN K. AKBAR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE *SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION*, AT EVERY STAGE OF HIS COURT-MARTIAL.[14]

Appellant alleges he received ineffective assistance of counsel at every critical stage of his court-martial, ranging from the appointment of counsel through the presentencing case. We reviewed every aspect **[*28]** of appellant's claim, including consideration of the training, experience, and abilities of the trial defense counsel; the pretrial proceedings and motions practice; the investigative efforts of the defense team, to include the assistance from mitigation experts; the selection of the court members; the trial strategy; and the performance of counsel throughout the trial and during the presentencing phase. We reject appellant's claim of ineffective representation.

A. Standard of Review and Applicable Law

HN13[↑] The *Sixth Amendment* guarantees an accused the right to the effective assistance of counsel. *U.S. Const. amend. VI*; *United States v. Gooch, 69 M.J. 353, 361 (C.A.A.F. 2011)* (*citing United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*). ***HN14***[↑] We review de novo claims that an appellant did not receive the effective assistance of counsel. *United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)*. ***HN15***[↑] "In assessing the effectiveness of counsel we apply the standard set forth in *Strickland v. Washington, 466 U.S.*

[13] Appellant's allegations concerning the admission of his statement were presented in Assignment of Error VII.

[14] Appellant's numerous allegations of ineffective assistance of counsel were presented in Assignments of Error I, II, and XVII. Only those found in Assignments of Error I and II merit discussion.

668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)." Gooch, 69 M.J. at 361. To overcome the presumption of competence, **[*29]** the *Strickland* standard requires appellant to demonstrate "both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 687).

HN16[] This Court applies a three-part test to determine whether the presumption of competence has been overcome:

> 1. Are the allegations true, and, if so, is there any reasonable explanation for counsel's actions?
> 2. If the allegations are true, did counsel's performance fall measurably below expected standards?
>
> 3. Is there a reasonable probability that, absent the errors, there would have been a different outcome?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991). Hindsight in these matters is not usually countenanced by this court or by the Supreme Court, which said in *Strickland*:

> HN17[] Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. **[*30]** *Cf.* Engle v. Isaac, 456 U.S. 107, 133-34, 102 S. Ct. 1558, 71 L. Ed. 2d 783 [ ] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See* Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See* [Gary] Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 343 (1983).

Strickland, 466 U.S. at 689-90.

B. Procedural Posture

Assessing the truth of appellant's factual allegations under the first part of the *Polk* test raises an important procedural issue. Where **[*31]** evidence is provided on appeal, as to the competence or ineffectiveness of counsel during the court-martial process, we must first determine whether resort to a post-trial fact-finding hearing is necessary. *See* United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). HN18[] As a rule, we cannot decide a disputed question of fact "in a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." United States v. Ginn, 47 M.J. 236, 243 (C.A.A.F. 1997). However, in cases where the record of trial compellingly demonstrates the improbability of the facts supporting the appellant's post-trial claim of ineffectiveness, this Court "may discount those factual assertions and decide the legal issue." Ginn, 47 M.J. at 248. Additionally, if the factual assertions "allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor," then the conflict may be ignored and the legal issue decided. *Id*.

In this case, appellant did not submit a post-trial affidavit. However, in some respects there are conflicts between inferential facts supporting appellant's ineffectiveness claims, affidavits submitted by others in support **[*32]** of those claims, and the post-trial documents, to include affidavits, submitted by appellant's defense counsel to rebut these claims. Ultimately, we conclude that there is no conflict that requires a post-trial fact-finding hearing in this case.

C. Appellant's Defense Counsel's Qualifications

Appellant was defended at court-martial by MAJ DB and CPT DC.[15] Appellant first alleges that he was denied

[15] Appellant was originally detailed three counsel: MAJ DB, CPT DC and CPT JT. An individual military counsel (IMC) request was approved for a fourth military defense counsel, Lieutenant Colonel (LTC) VH. In addition, appellant hired two

due process of law by the absence of formalized standards for assigning counsel to capital cases and that his detailed counsel were unqualified to represent him in a capital case. We disagree.

HN19[⬆] There has been no bright light rule to determine what qualifications are necessary for capital cases, and we will not impose such a standard here. In *United States v. Murphy, 50 M.J. 4, 9-10 (C.A.A.F. 1998)*, and *United States v. Loving (Loving I), 41 M.J. 213, 300 (C.A.A.F. 1994)*, the Court of Appeals for the Armed Forces (CAAF) followed the route illuminated by the Supreme Court in *Cronic*; the same route will be followed in this case.

> That route **[*34]** compels us to look to the adequacy of the counsel's performance, rather than viewing the limited experience of counsel as an inherent deficiency. Of course, as the ABA Guidelines and *18 USC § 3005* implicitly suggest . . . inexperience—even if not a flaw *per se*—might well lead to inadequate representation. In the final analysis, ***HN20***[⬆] what we must consider is whether counsels' performance was "deficient" and whether "counsels' errors were so serious as to deprive the defendant of a fair trial," one where the "result [of the trial] is reliable."

Murphy, 50 M.J. at 10 (quoting *Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)*) (internal citations omitted). Thus, while the American Bar Association guidelines, Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), and civilian federal law, *18 U.S.C. §§ 3559*,[16] *3005 (2006)*, are "instructive," the adequacy of counsels' representation is judged by their actual performance, and not any per se rules established by outside organizations. *Id. at 9-10*.

Unlike the counsel in *Murphy*, MAJ DB and CPT DC provided a detailed listing of their trial experience and their knowledge of capital cases. On the record both counsel detailed the number of cases each counsel had tried and how long counsel had been admitted to their respective state bar. Both counsel further detailed the number of contested felony cases involving voir dire examination of witnesses, cross-examination, and opening and closing statements. Counsels' experience with expert witnesses in the fields of mental and medical health, forensic psychiatry, and ballistics was also detailed.

MAJ DB possessed an L.L.M. in military law from The Judge Advocate General's Legal Center and School, with a specialty in criminal law. He also possessed significant military justice experience, to include experience with capital cases. For one year, MAJ DB worked as a government appellate counsel for the Army, where he briefed approximately fifty appellate cases dealing with a variety of issues to include a variety of expert witnesses. In anticipation of handling the case of *United* ***[*36]*** *States v. Kreutzer*, a capital case pending appeal at the time, MAJ DB attended a capital litigation course. Additionally MAJ DB, served in the Trial Counsel Assistance Program (TCAP) providing training to trial counsel at various military installations and rendering advice in the case of *United States v. Ronghi*, where a capital referral was contemplated. After leaving TCAP, MAJ DB was assigned as a branch chief at the Government Appellate Division where he participated in strategy sessions and reviewed and edited the government brief for *United States v. Murphy*, a capital case, on appeal. He also reviewed and edited the government briefs in *United States v. Kreutzer* in addition to hundreds of other appellate briefs. MAJ DB has argued approximately seven cases before CAAF and approximately seven cases before this court.

CPT DC gained experience using collateral resources in the Army, Department of Defense, and civilian sector to assist in the investigation and defense of cases. In

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civilian attorneys, Mr. MD-F and Mr. WA-H, to represent him during the motions phase of the trial. However, prior to trial, appellant released LTC VH, CPT JT, Mr. MD-F, and Mr. WA-H from further representation, leaving MAJ DB and CPT DC to represent appellant during the court-martial. Of the remaining counsel, MAJ DB began his representation of appellant on 23 March 2003, **[*33]** the day following the charged offenses, and he continued this representation throughout the court-martial process, to include the ***Article 32, UCMJ***, investigation, a pre-referral briefing concerning the capital referral of the case, the discovery phase, the pretrial motion practice, and the trial itself. At one point in time, MAJ DB was reassigned to a new duty station (PCS'd), but appellant completed a successful IMC request for MAJ DB's continued representation. In this request, appellant stated, "MAJ DB is the only member of the defense team with any level of prior capital experience." It is also worth noting that CPT DC was promoted to Major just prior to trial, but will be referred to as CPT DC throughout this opinion for ease of reference.

[16] *18 USC § 3559 (2006)* **[*35]** was not promulgated until 9 March 2006; therefore it was not in effect at the time of appellant's court-martial in 2005.

September 2003, CPT DC attended a week-long death penalty course designed to prepare an attorney to try and defend a capital case.

Post-trial affidavits revealed the myriad outside resources and capital litigation **[*37]** consultants[17] to which the defense counsel had access and used prior to trial. Counsel obtained materials from two other death penalty cases to include death penalty motions and case analysis. Additionally they read numerous law review articles in preparation for appellant's case.

Appellant was not denied due process of law due to an absence of formal standards for the representation of soldiers in capital cases, nor by the assignment of MAJ DB and CPT DC to represent him in his capital case. We find MAJ DB and CPT DC were well-qualified to handle a capital case. They **[*38]** had significant trial experience and conducted adequate preparation prior to handling appellant's court-martial. Though neither MAJ DB nor CPT DC had tried a capital case, they were nonetheless qualified to represent appellant with "a degree of competence well above the constitutional minimums at his court-martial." *Loving I, 41 M.J. at 300*.

D. Appellant's Defense Counsel's Conflicts of Interest

Appellant next alleges that MAJ DB's and CPT DC's performance at trial was hindered due to several conflicts of interest. We find no merit in these allegations. Appellant's counsel were free from any conflict, perceived or otherwise. Assuming *arguendo* a conflict did exist, appellant knowingly and intelligently waived any such conflict without raising any objections at trial.

HN21[↑] The right to effective assistance of counsel includes a "correlative right to representation that is free from conflicts of interest." *Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)*. To establish an actual conflict of interest, appellant must show that (1) "counsel actively represented conflicting interests" and (2) that the "actual conflict of interest adversely affected his lawyer's performance."[18] *Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)*. **[*39]** To show an adverse effect, a petitioner must show "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Wells, 394 F.3d 725, 733 (9th Cir. 2005)* (quoting *United States v. Stantini, 85 F.3d 9, 16 (2d Cir. 1996)*). "[P]rejudice is presumed when counsel is burdened by an actual conflict of interest." *Strickland, 466 U.S. at 692* (citing *Cuyler, 446 U.S. at 345-50*).

HN23[↑] "An accused may waive his right to conflict-free counsel," *United States v. Lee, 66 M.J. 387, 388 (C.A.A.F. 2008)* (citing *United States v. Davis, 3 M.J. 430, 433 & n.16 (C.M.A. 1977)*), when the waiver is a "knowing intelligent [act] done with sufficient awareness of the relevant circumstances and likely consequences." *Id*. (quoting *Davis, 3 M.J. at 433*). The discussion to R.C.M. 901(d)(4) provides:

> Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an Article 39(a) session so that an

[17] Counsel consulted with the following legal experts: Colonel Robert D. Teetsel, Chief, Defense Appellate Division; Lieutenant Colonel E. Allen Chandler Jr., Deputy Chief, Defense Appellate Division (developing the mitigation case, appointment of experts and possibility of a plea); Lt. Col. Dwight Sullivan (USMC) and Lieutenant Michael Navarre (USN) (voir dire and motions); Mr. Isaiah "Skip" Grant, head of the National Capital Resource Counsel Project with the Federal Defenders of Nashville, Tennesee (trial strategy and tactics); and Tom Dunn, Georgia Resource Center (trial strategy and frontloading mitigation evidence).

[18] The Army's ethical rules regulate a lawyer's responsibility in this regard as well. ***HN22***[↑] The Army Rules of Professional Conduct state, "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless; (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." Army Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers [hereinafter AR 27-26], Rule 1.7(b) (1 May 1992). "A possible conflict does not itself preclude the representation. The critical questions are the likelihood **[*40]** that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." AR 27-26, comment to Rule 1.7.

appropriate **[*41]** record can be made.

CAAF affirmed this process in *United States v. Lindsey, 48 MJ 93, 98 (C.A.A.F. 1998)*.

The first conflict alleged is that the military judge erred in accepting appellant's waiver of conflict-free counsel after defense counsel disclosed a relationship between themselves and MAJ AM,[19] a victim in the case. We disagree.

MAJ AM, who was assigned as the trial counsel for 1st Brigade, 101st Airborne Division (Air Assault), was injured when appellant tossed a grenade into his tent. Before the deployment, MAJ AM was a military prosecutor at Fort Campbell which is also the home station of 1st Brigade. As a result, MAJ AM and MAJ DB possessed an adversarial, professional relationship, working with one another for about a year on various military justice issues. MAJ DB disclosed this relationship to the appellant in writing. MAJ DB further disclosed that he maintained a strictly professional relationship with MAJ AM and that he did not know MAJ AM in any capacity outside of their professional adversarial **[*42]** role. MAJ AM had also worked with CPT DC in an adversarial capacity. CPT DC also advised the appellant in writing of this relationship; specifically, that he, as a defense counsel, had tried a case against MAJ AM in 2002.

Both counsel advised appellant that their previous working relationship with MAJ AM would not affect their ability to represent him. Neither counsel had any reservations about representing the appellant and did not believe that appellant's interest would be adversely affected. The appellant signed both of the documents confirming that he understood the prior professional relationship between his counsel and MAJ AM and that it was his desire to have MAJ DB and CPT DC remain on his case.

At the first Article 39(a), UCMJ, session, defense counsel informed the military judge of the foregoing and provided the court with appellant's acknowledgment and desire to continue with his detailed counsel. The military judge discussed with appellant his constitutional right to be represented by counsel who have undivided loyalty to him and his case. Appellant informed the military judge that after discussion with his defense counsel, he decided for himself that he wanted MAJ DB and **[*43]** CPT DC to still represent him: "Because of my - - my familiarity with MAJ DB and CPT DC over the past year that I've had in dealing with them and their familiarity with my case. I think to bring another lawyer on that I'm not familiar with, I would have to basically build up a level of trust with him. I already have that with these two officers, sir." (R. at 8). The military judge concluded that appellant knowingly and voluntarily waived his right to conflict-free counsel and could be represented by MAJ DB and CPT DC.

We do not find that MAJ DB's and CPT DC's adversarial relationship with MAJ AM amounts to representation of conflicting interests. Moreover, even assuming a potential for such representation, we conclude appellant waived the issue after both inquiry by the court and consultation with counsel. Counsel properly disclosed to the appellant and to the court any possible conflict stemming from their professional relationship with MAJ AM. The military judge's inquiry with the appellant was brief; however, coupled with the appellant's signed acknowledgement of the prior relationship and his desire for both of his counsel to remain on the case, the inquiry was sufficient. No evidence **[*44]** has been submitted to establish what a more detailed inquiry would have shown.

In any event, appellant failed to establish any adverse effect from the conflict alleged. MAJ AM testified at trial in reference to the facts surrounding the explosion on 22 March 2003 and the injuries he received as a result of the explosion. He offered no evidence implicating appellant as he never knew or saw appellant until the day he testified. There was nothing to challenge MAJ AM about through cross-examination. Additionally, there is nothing to suggest that the defense counsel's dealings with MAJ AM were ineffective or unreasonable. Their relationship with MAJ AM was not an attorney-client relationship, and therefore, appellant's counsel faced no fear of revealing privileged information. Appellant has provided no evidence or argument as to any alternative strategy or tactic that was not employed due to his defense counsel's acquaintance with MAJ AM. *See* *Carter v. Scribner, 412 Fed. Appx. 35, 37 (9th Cir. Jan. 24, 2011)* (unpub.) (finding no actual conflict of interest where the defendant failed to demonstrate how his defense counsel's friendship with the victim limited any plausible alternative legal **[*45]** strategy or tactic).

Appellant further avers that MAJ DB was conflicted because he was stationed in Iraq at the time of the attack and witnessed the impact of the attack on his

[19] At the time MAJ DB and CPT DC interacted with AM he held the rank of Captain. However, he was subsequently promoted to Major prior to testifying at appellant's court-martial.

fellow soldiers thus making MAJ DB a victim. MAJ DB's mere presence in Iraq does not create a conflict. The record is void of anything that MAJ DB may have observed or experienced in Iraq that would create a conflict.

Appellant also claims that MAJ DB is conflicted because of his role in alleged additional misconduct committed by appellant. Shortly before trial began, appellant allegedly assaulted a military police officer (MP) by stabbing him in the neck with scissors in the latrine of the Trial Defense Service office. Statements were requested from both MAJ DB and CPT DC. They did not provide statements, and appellant was never charged with any crime related to this event.

It is clear that ***HN24***[⬆] "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue. . . ." AR 27-26, Rule 3.7(a). One day after the alleged stabbing, counsel filed a motion in limine to preclude use of uncharged misconduct to prove future **[*46]** dangerousness of appellant. The motion was granted without prejudice.[20]

These actions dissolved any concerns counsel may have had about the alleged stabbing. The record is devoid of any evidence that MAJ DB or CPT DC were ever involved in or witnessed the alleged attack on the MP. There is also no evidence that MAJ DB or CPT DC were ever considered suspects in this matter or that either had any prior knowledge of the impending attack. No charges were filed stemming from the alleged stabbing. Appellant's defense counsel could hardly be described as "necessary" to appellant's uncharged, **[*47]** potential trial on unrelated charges. *See* United States v. Smith, 35 M.J. 138, 141 (C.M.A.1992) (citing In re Grand Jury Subpoena (Legal Services Center), 615 F.Supp. 958, 964 (D.Mass. 1985)) (stating ***HN25***[⬆] the "[g]overnment must show 'that there is no other reasonably available source for' the evidence" to compel a lawyer to testify against his client).

[20] The same day of the alleged stabbing, appellant's defense counsel requested that the sanity board be reconvened. The sanity board reconvened and concluded that appellant had the sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and appellant had a rational as well as a factual understanding of the proceedings against him. Appellant also had sufficient mental capacity to understand the nature of the proceeding against him and to conduct or cooperate intelligently in his defense. The board further concluded that appellant was a physical threat to himself and others.

Accordingly, we find no merit in any of appellant's allegations about his defense counsel's allegiances. They did not represent conflicting interests nor was their performance adversely affected by the circumstances alleged by appellant.

E. Development of the Mitigation Case

Appellant also contends that he was denied his right to effective assistance of counsel because his trial defense counsel failed to adequately investigate appellant's social history, ignored voluminous information collected by mitigation experts, and ceased using mitigation experts, resulting in an inadequate mental health diagnosis because the defense failed to provide necessary information to the defense psychiatrist witness. We find no merit in these allegations.

Mitigation specialists are uniquely important to the defense of a capital case. As CAAF explained in *United* ***[*48]*** *States v. Kreutzer*:

> Mitigation specialists typically have graduate degrees, such as a Ph.D or masters degree in social work, and have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review.

United States v. Kreutzer, 61 M.J. 293, 302 (C.A.A.F. 2005) (quoting Judicial Conference of the U.S., Subcomm. on Federal Death Penalty Cases, Comm. on Defender Services, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 24 (1998)).

At the outset, trial defense counsel understood the importance of obtaining the services of a mitigation specialist. In their post-trial affidavits they state:

> [We] perceived the role of mitigation specialist as assisting us by conducting a thorough social history investigation and psychosocial assessment; identifying factors in the client's background or circumstances that require expert evaluations; assisting in locating appropriate **[*49]** experts; providing background materials and information to experts to enable them to perform competent and reliable evaluations; consulting with us regarding the development of the theory of the case and case

> strategy, assuring coordination of the strategy for the guilt-innocence phase with the strategy for the penalty phase; identifying potential penalty phase witnesses; and working with the client and his family while the case was pending.

A request was submitted for the services of a mitigation specialist on 15 April 2003, less than one month after the incident. Though their request was denied the defense maintained their request insisting that the mitigation specialist would gather information that would be critical to the referral process.

Ms. JY, a mitigation specialist and attorney, was the defense choice for assistance in this case. However, she was not approved. Instead the defense chose Ms. DG from a list of substitute experts provided by the government. Ms. DG's services were approved on 18 September 2003. Ms. DG was a competent mitigation specialist; nonetheless appellant's mother refused to cooperate with her and directed other family members to do the same. In May 2004, **[*50]** Ms. DG was informed that her services were no longer needed. Prior to her departure she provided a continuity memo detailing the work she had completed and what she believed to be remaining work. She also provided the defense with four boxes of documents pertaining to this case.

Defense requested and received a new mitigation specialist, one with which appellant's mother was willing to work. Ms. SH of the Center for Capital Assistance (CCA) was appointed and approved for seventy-five hours of work at a cost of $10,000. Due to an undisclosed medical condition Ms. SH was replaced on 30 September 2004 by Ms. TN of the CCA, who had previously been working with Ms. SH. An additional authorization was approved on 12 December 2004 to have Mr. JL and Ms. RR assist Ms. TN. Counsel confirm in their post-trial affidavit that they had limited contact with Mr. JL and Ms. RR yet they continued their contact with Ms. TN. Counsel also state in their post-trial affidavit that Ms. TN "regularly gave reports of her activities to the defense. The information she was uncovering, while interesting in the abstract, did not add much evidentiary value to the detailed review already conducted by Ms. [DG]." Nevertheless, **[*51]** Ms. TN did discover that appellant had been treated by Dr. FT as a child, and the defense determined that this information was significant.

As appellant's mental state of mind was in question, mental health experts were consulted. Defense counsel briefly consulted with Dr. WM, a clinical psychologist. Dr. PW was consulted to focus on appellant's sleep disorder and his results were admitted into evidence. Dr. DW, an Air Force major and forensic psychiatrist, was retained to assist the defense by observing appellant's R.C.M. 706 board. Dr. PC, the chief of neuropsychology at Brooke Army Medical Center, conducted the R.C.M. 706 board and employed an extensive battery of neuropsychological tests on appellant. Appellant's defense counsel made a tactical decision not to call Dr. PC and instead provided her results, but not some of appellant's underlying and particularly damaging statements, to their own expert witness, Dr. GW, who they later called during trial. In addition, Dr. FT, another clinical psychologist, was called by the defense at trial.

Other witnesses identified by the mitigation experts testified and documents prepared by the mitigation experts were admitted into evidence.

Appellant **[*52]** now contends that the mitigation specialists' work was not complete. Not every aspect of appellant's life has to be investigated to determine that the investigation was thorough or complete. Though the mitigation specialist employed on appeal now offers in her affidavit information that, in her opinion, should have been offered at trial, we defer to qualified counsel to make reasonable decisions as to when to terminate the investigation and in how their case is presented. In *Loving v. United States (Loving III), 68 M.J. 1, 15-16 (C.A.A.F. 2009)*, CAAF emphasized that there is a distinction between cases where no life history or mitigating evidence was presented and an allegation that additional life history or mitigating evidence was available. The Supreme Court stated in *Wiggins v. Smith, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*:

> [W]e emphasize that ***HN26***[ ] *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence **[*53]** of counsel" at the heart of *Strickland, 466 U.S. at 689*[ ].

Defense counsel were also not required to call a mitigation specialist in sentencing. "While use of an analysis prepared by an independent mitigation expert is often useful, we decline to hold that such an expert is required. What is required is a reasonable investigation

and competent presentation of mitigation evidence. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses." *Loving I, 41 M.J. at 250*. Moreover, appellant has brought forth no new evidence on appeal that would alter the outcome of this case. The documents relied on by the appellate mitigation specialist are the same documents the defense counsel had at the time of trial. In our view, a reasonable investigation was conducted and a competent presentation was placed before the panel.

F. Panel Selection

Appellant's defense counsel challenged only one panel member for cause. Appellant now claims that this tactic was ineffective because many of the fifteen remaining members were either actually or impliedly biased against him. However, we conclude that appellant's defense counsel employed a sound strategy against pursuing **[*54]** potential challenges and, therefore, were not ineffective.

In this case, the panel members did not actually possess an unrehabilitated bias. ***HN27***[↑] R.C.M. 912(f)(1)(N) prescribes the rule for challenges based on both actual bias and implied bias: "A member shall be excused for cause whenever it appears that the member . . . [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." Actual bias exists where any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997)* (quoting *United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987))*, *United States v. Leonard, 63 M.J. 398, 401-02 (C.A.A.F. 2006)*.

Appellant alleges Sergeant First Class (SFC) KD, MAJ DS, and CSM MH possessed an inelastic opinion on sentencing or a misunderstanding about sentencing procedures. Appellant's further, specific allegations of actual bias against SFC JC, LTC TA, LTC DL, LTC JE, LTC WT, and LTC TG consist mainly of claims of personal knowledge of case facts, medical knowledge in general, or a general bias against certain evidence. Finally, **[*55]** appellant claims that several panel members should have been challenged based on their vague, second-hand knowledge of appellant's uncharged misconduct. However, all of the foregoing panel members expressed their willingness to consider, without reservation, the evidence, the military judge's instructions, and whether the punishment of life in prison, as opposed to death, should be imposed. Thus, even where appellant's allegations may have provided a basis for an actual bias objection, we find the members' rehabilitative pronouncements sufficient to expunge any taint of actual bias.

In addition, the grounds alleged in this case do not fall within that rare category meriting a challenge for implied bias. ***HN28***[↑] Unlike actual bias, implied bias exists when "regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced." *United States v. Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010)* (quoting *United States v. Napolitano, 53 M.J. 162, 167 (C.A.A.F. 2000))*. "[W]hen there is no actual bias, 'implied bias should be invoked rarely.'" *Leonard, 63 M.J. at 402* (quoting *United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998))*. Here, the grounds for implied bias **[*56]** are lacking, especially considering the defense counsel's panel selection strategy.

It is important to note that appellant's defense counsel made tactical decisions not to raise any of the foregoing grounds during panel selection. As detailed in their affidavit to this court, defense counsel chose this strategy to maximize the number of panel members. (Gov. App. Ex. 1, pp. 44-46). This tactic was used to increase the chance that at least one member of the panel—the "ace of hearts"—would not vote for a death sentence. *United States v. Simoy, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996)* (Morgan, J., concurring), *rev'd on other grounds*, *50 M.J. 1 (C.A.A.F. 1998)*. "To use a simple metaphor, if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of 52 playing cards, would he prefer to be dealt 13 cards or 8?" *Id*. We will not fault appellant's counsel for employing this strategy and certainly do not find it amounts to ineffective assistance of counsel. This tactic was reasonable and, as discussed below, it complemented the defense's goal of avoiding imposition of the death penalty during the findings and presentencing phases of appellant's **[*57]** court-martial.

G. Findings Phase

Appellant alleges that counsel was ineffective during the findings phase of his court-martial because they conceded guilt to all of the elements of a capital offense and devised a trial strategy that was unreasonable and prejudicial. We disagree.

Prior to trial, appellant's defense counsel filed and

litigated in excess of fifty motions. These motions covered every aspect of the trial. Defense counsel stated during their opening statement:

> What the government has just given you, their version of the facts, is only half the story. They told you what happened. But what happened really isn't in dispute. The defense isn't here to contest what happened. Yes. The facts will show that Sergeant Akbar threw those grenades. Yes. The facts will show the he shot and killed Captain [CS]. Those are the facts. That is what happened. But what happened is only half the story. Equally important in your quest for the truth is the understanding why, because the elements of the offense, are pieces of the puzzle that you cannot leave out. Premeditation requires you to look inside Sergeant Akbar's mind and understand why. Until you answer that question, until you know why, you **[*58]** cannot fairly pass judgment. The evidence in this case will show that the answer to that question lies in mental illness. The evidence will show that Sergeant Akbar comes from a family with a history of mental illness. The evidence will show that Sergeant Akbar himself was first diagnosed with mental illness at the age of 14. The evidence will show that the symptoms of that mental illness are verifiable through independent witnesses who have known him throughout the course of his life. The evidence will show that those symptoms grew progressively worse. The evidence will show that on [22] March 2003, Sergeant Akbar did not and could not premeditate due to mental illness.

This strategy was reasonable in light of the overwhelming evidence identifying appellant as the attacker.

HN29[↑] The elements of premeditated murder are:

> (a) That a certain named or described person is dead;
> (b) That the death resulted from the act or omission of the accused;
> (c) That the killing was unlawful; and
> (d) That, at the time of the killing, the accused had a premeditated design to kill.

MCM, 2002, pt. IV, ¶ 43.b.(1).

Though the defense conceded appellant's identity they challenged the "premeditated design to kill" based **[*59]** on appellant's alleged mental illness, thus not conceding guilt. HN30[↑] Conceding certain elements, particularly an accused's identity as the perpetrator, and focusing on avoiding the death penalty is a strategy accepted as reasonable by the Supreme Court. *Florida v. Nixon, 543 U.S. 175, 191-92, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)*. "In such cases, 'avoiding execution [may be] the best and only realistic result possible." *Nixon, 543 U.S. at 191* (quoting Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Sec. 10.9.1 commentary (rev. ed. 2003), *reprinted in 31 Hofstra L. Rev 913, 1040*). "In this light counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Id. at 191-92* (quoting *Cronic, 466 U.S. at 656-657* & n.19, and Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, *83 Cornell L. Rev 1557, 1589-1591 (1998)*).

Employing this tactic was not only reasonable but it gave the defense an opportunity to avoid a death-eligible offense and leave open the option for mitigating evidence focused on mental health. The defense counsel wove **[*60]** their theme of mitigation and mental instability throughout both the government case and their own case-in-chief.

1. The Government's Case

As the government presented their case in chief, the majority of the witnesses testified to the events of the evening of 22 March 2003 and their reactions after they heard the explosion. They also testified to the horrific injuries that many of the soldiers suffered. These matters were not in dispute and these witnesses were not challenged or cross-examined.

Government witnesses who may have had information pertaining to the appellant were effectively cross-examined. These witnesses highlighted the defense theory of appellant's inability to premeditate the murders because of his mental capacity. Captain GS, the assistant brigade engineer, testified on cross-examination that he first saw appellant on the security detail after the explosion. He had worked with appellant during training exercises and was aware that appellant had been fired from his squad leader position because he forgot some of his equipment. Appellant couldn't perform simple tasks and did not perform at an E-5 level. While pulling security that night, appellant was unmotivated and unfocused **[*61]** and not paying attention. Captain GS had seen this type of behavior before from appellant at Fort Campbell and was aware

that appellant was a substandard NCO.

Mr. BH, a former soldier, had served as the unit armorer and issued appellant's M-4. He testified about the weapon he issued appellant prior to the deployment. When questioned by the defense, he testified that he thought appellant was always unfocused and daydreaming and that appellant always had a smile on his face for no apparent reason.

Private First Class CP[21] was a member of appellant's team. He slept next to appellant during the deployment and pulled the first hour of guard duty with appellant on the night of the murders. During guard duty, PFC CP and appellant did not talk. According to PFC CP, appellant did not like to talk to other people but he did like to talk to himself. Private CP often saw appellant pacing and talking to himself. This behavior increased when they deployed as appellant seemed to be in his own world. Private CP heard Soldiers using derogatory terms towards Iraqis, making derogatory statements about appellant as well as making jokes about raping or sexually assaulting Iraqi women. Private CP was also **[*62]** aware that appellant had a sleep disorder, because appellant fell asleep while counseling him. Prior to the deployment, PFC CP heard NCOs expressing concern about deploying with appellant.

Private First Class TW[22] was also a previous member of appellant's team. During the deployment he was the assigned driver for HMMWV-A21 and pulled the second hour of guard duty with appellant on 22 March 2003. Private TW testified that appellant fell asleep during guard duty. He thought appellant was a fair NCO with bad duty performance and no common sense. Previously he referred to appellant as "retarded" because of some of his odd behavior. Private TW heard derogatory terms used about the Iraqis and saw some derogatory words on the wall in the latrine.

Staff Sergeant EW,[23] a former member of appellant's squad, was called to testify. He pulled guard duty on 22 March 2003 immediately following appellant. On cross-examination he testified that ever since he has known appellant, he thought **[*63]** he was odd because appellant would pace a lot. Appellant had difficulty sleeping at night which resulted in him falling asleep in class and limited his effectiveness.

The government also offered two entries from appellant's diary. Appellant maintained a diary from 1992, before joining the military, until 2002. The entries admitted by the government provided some aggravating matters purportedly written close to the time of the attack. The defense counsel successfully argued to keep the remainder of appellant's journal out of evidence, as they argued that the diary was "unfairly prejudicial" and could potentially lead to an emotional reaction to the evidence.

2. The Defense Case-in-Chief

As the defense presented their case, their theme continued. Witnesses were called who testified that appellant comes from a family with a history of mental illness, that appellant was first diagnosed with mental illness at the age of fourteen, that the symptoms of appellant's mental illness are verifiable through independent witnesses who have known him throughout the course of his life, and that the symptoms **[*64]** grew progressively worse. Again, the focus was on appellant's lack of mental capacity to premeditate murder.

Dr. FT

Dr. FT, an expert in clinical psychology, testified about the start of appellant's mental problems. Dr. FT testified that he treated appellant in 1986 when appellant was fourteen years old, because appellant's sister had been a victim of sexual abuse, and appellant had been in an abusive home situation. Treatment included a battery of tests which indicated that appellant was within the average range for verbal skills and abilities and average in his planning ability; however, appellant was in the superior range for nonverbal skills. Dr. FT opined that these test results indicated that appellant was having problems which were exhibited in the repression of his verbal responses and that appellant could visually see things well and copy them down, but he lacked visual motor development. This was unexpected because appellant had scored so high on all of the performance and intelligence tests. Appellant's wide range of cognitive functions and discrepancies showed significant lags and suggested a learning disability.

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[21] At the time of trial, PFC CP had been promoted to Specialist. For ease of reference, he will be referred to as PFC CP.

[22] At the time of trial, PFC TW had been discharged from the service and testified as a civilian.

[23] At the time of trial, SSG EW had been discharged from the service and testified as a civilian.

Though Dr. FT saw no sign of psychosis, there was a real constriction **[*65]** in appellant's functioning. Dr. FT opined that appellant was repressing his feelings and emotions which normally causes people to lose energy and strength, and leads to depression. Appellant appeared to be depressed at the time and had a lot of unmet dependency needs. Appellant also did not identify with people and had a real lack of attachment to any parent image or to people in general.

According to Dr. FT, further testing revealed that appellant's greatest fear was "being a bum on the street corner" and that he worried "about becoming a nothing." The happiest time of appellant's life was when he was in the country, away from his uncle and step-father.[24] Appellant indicated his desire to go to college and revealed his bad feelings about his treatment of his siblings. On some level, appellant felt responsible for his siblings as he is the oldest child. Appellant informed Dr. FT that he had problems falling asleep because of intrusive or obsessive thoughts and that he was annoyed with his mother for not protecting the children. Additionally, appellant indicated that he does not trust anyone which further emphasized his lack of attachment. Appellant stated he felt like he was losing **[*66]** control and he did not know how to reestablish self-control, he wanted to earn money; when he is alone he cries; and he hates his step-father. Appellant describes himself as being very quiet in school and not interested in dating. The one thing appellant wished for most was to be happy all the time.

Dr. FT spent four hours with appellant and during this time appellant showed no normal emotions when talking about significant traumatic things or happy joyful matters. Though Dr. FT would have preferred more time to evaluate appellant, the time was sufficient for him to make a diagnosis. He noted that appellant could not relate to people and diagnosed appellant with an adjustment disorder and depressed mood associated with a mixed specific developmental disorder.[25] Appellant's symptoms did not meet the full diagnosis for one of the ten major personality disorders; however, Dr. FT would have diagnosed him with a personality disorder not otherwise specified associated with paranoid and schizo-typical features. With the information Dr. FT had at the time he saw appellant in 1986, he would give appellant a General Adaptive Functioning (GAF) score **[*67]** of 60, which shows a moderate level of problems.[26] Dr. FT has not seen appellant since 1986 and did not review any information pertaining to the charges.

Dr. FT has treated thousands of children with problems similar to the appellant. At the time of treatment, appellant's prognosis was guarded because he had a **[*68]** lot of serious things to overcome; however, improvements could be made if appellant sought counseling, remedial assistance, family therapy, and protective supervision. Dr. FT had no information as to whether his recommendations were followed. If the recommendations were not followed, appellant was at risk of further deterioration of his mental state in the future.

At the conclusion of Dr. FT's direct testimony, a copy of the report prepared by Dr. FT was admitted into evidence without objection. (Def. Ex. D). The report summarized Dr. FT's direct testimony and was available to the panel members for findings and sentencing.

Mr. PT

The defense next called Mr. PT as a witness. Mr. PT was a college roommate and good friend to appellant while they studied at the University of California at Davis. Mr. PT testified that appellant talked about his goals but sometimes had problems sticking to them. He observed that appellant was not very social and spent time by himself. Mr. PT often saw appellant pacing, talking to himself, and getting sweaty and clammy. Initially, Mr. PT thought it was normal until these things started happening excessively. There were quite a few evenings when appellant would **[*69]** not sleep but instead would be pacing. Mr. PT testified that appellant

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[24] Appellant's step-father abused his sister.

[25] Both diagnoses fit on Axis I of the DSM-IV. "Axis I is for reporting all the various disorders or conditions in the Classification except for the Personality Disorders and Mental Retardation (which are reported on Axis II) . . . . Also reported on Axis I are Other Conditions That May Be a Focus of Clinical Attention." *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 27 (4th ed., text revision, 2000) (DSM-IV-TR).

[26] The GAF score gauges an individual's overall level of functioning and his or her ability to carry out activities of daily living. Scores range from 0 to 100. A score of 1 indicates a persistent danger of severely hurting oneself or others. A score of 100 indicates superior functioning in a wide range of activities. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed., text revision 2000) (DSM-IV-TR).

had strong religious beliefs about taking care of himself; as such, he did not smoke or drink alcohol nor did he curse. During the time they lived together, there was only one time that Mr. PT thought appellant might hit him. Mr. PT returned to the apartment and appellant was very angry over a wrestling incident that had occurred two years prior. Appellant confronted Mr. PT and Mr. PT apologized and appellant seemed okay. The only other time Mr. PT saw appellant in an agitated state was when appellant was telling him about his sister being molested or violated. The two talked about it, and Mr. PT believed the incident had just occurred or that appellant had just found out about it.

On cross-examination by the government, Mr. PT testified that initially appellant was a better student then he was; however, as they continued to live together, appellant seemed to be struggling and did not have the same focus. Based on questions from the panel, Mr. PT testified that appellant had another name but changed his name because he is Muslim. He did not remember why appellant chose "Hasan" or how old he was when he changed his **[*70]** name.

Specialist CS

Specialist (SPC) CS was called by the defense and knew appellant when they were both assigned to the 326th Engineers. He believed appellant was a poor NCO who was not able to carry out minor tasks and unable to transfer knowledge to his junior enlisted soldiers. Specialist CS testified that other NCOs viewed appellant as under-qualified, and they did not believe he should be a leader. As far as SPC CS knew, appellant did not have a social life. Prior to the deployment, SPC CS noted that appellant isolated himself from conversations and would instead pace and talk to himself. Appellant also had difficulty staying awake as he would fall asleep during class. Even after being told to stand up he would fall asleep while standing. Other soldiers would also fall asleep; however, appellant fell asleep more than other soldiers and more than other NCOs. Prior to the deployment, SPC CS heard soldiers using derogatory terms towards Iraqis or Muslims such as "Punjab," "raghead," and "camel jockey." Specialist CS testified that sometimes these terms were used to refer to appellant behind his back but that it was possible appellant overheard some of these conversations. Specialist **[*71]** CS recalls hearing soldiers basically say, "Hey look at that moron; that fricken—one of those ragheads. He is always screwing up." Specialist CS also testified about a conversation wherein appellant expressed concerns to Sergeant First Class (SFC) TM, appellant's platoon sergeant, about going to war against other Muslims. Sergeant First Class TM allegedly responded that if appellant did not kill the enemy, SFC TM would kill him.

Specialist JR

The defense also called SPC JR, another soldier in appellant's platoon. He testified that he saw appellant daily and was aware that appellant had sleep apnea. He presumed that sleep apnea contributed to appellant's unflattering and negative performance. While in Iraq, SPC JR observed appellant pacing, laughing, and smiling at inappropriate times. He further testified that, prior to the move across the LOD, appellant began staring at the ground when eating chow or during downtime. Appellant appeared detached and when orders were issued, appellant's team leaders took care of what needed to be done, freeing appellant up to "deal with himself."

Sergeant First Class TM

Sergeant First Class TM was appellant's platoon sergeant. He testified that appellant's **[*72]** substandard performance did not reflect his education. Sergeant First Class TM confirmed that he had a conversation with the squad leaders about a possible deployment to Afghanistan during which he asked appellant, "[I]f we were to deploy on a mission, and we were approached by an enemy soldier, I said, the word, raghead, --'Would you engage an enemy soldier'?" Appellant responded that "[i]t depended on the level of jihad the enemy soldier was on." Sergeant First Class TM dismissed appellant and immediately reported the incident to his chain of command. Sergeant First Class TM denied that he ever told appellant he would kill him if he refused to kill enemy soldiers.

Staff Sergeant SB

Staff Sergeant SB was called to testify. He was appellant's squad leader when appellant was a team leader. He testified that appellant had poor duty performance, did not have friends, and fell asleep often.

Sergeant First Class BR

Sergeant First Class BR was another one of appellant's

platoon sergeants called to testify about appellant's sleep apnea and about the use of hateful statements within the unit. SFC BR first testified that he was aware of appellant's sleep apnea and felt that it impacted his duty **[*73]** performance. He next stated that he overheard other NCOs use derogatory terms for Iraqis and Muslims, and that he may have used derogatory terms himself when he deployed to Iraq. Sergeant First Class BR further testified that appellant called him at home, very early in the morning, to ask if his unit was going to rape and kill women and children. Though SFC BR found this strange, he did not report the phone call. On cross-examination, SFC BR testified that prior to deployment he asked appellant about fighting other Muslims, and appellant said he was ready to go and looking forward to making a lot of money.

Special Agent DF

The defense offered into evidence a stipulation of expected testimony from FBI Special Agent (SA) DF, who interviewed and investigated appellant's family members. (Def. Ex. FF). SA DF stated that appellant's half-brother, Mr. MB, believes that the CIA, U.S. Army, and FBI are tapping his phone, shooting infrared rays into his home, and spraying chemicals on the trees at his residence. Based upon the interview and his observations, SA DF believed that appellant's half-brother is unstable and out of touch with reality. SA DF also stated that appellant's father was on **[*74]** parole for aggravated rape and subsequently arrested for violating the terms of his parole by possessing firearms. Mr. MB informed SA DF that he had recently been discharged from the United States Air Force and that he was not allowed to pray when he wanted to while in the Air Force. He also believes that Muslims are discriminated against in the United States. Based upon the interview and his observations, SA DF believes that Mr. MB is unstable and out of touch with reality. SA DF found no evidence that indicated appellant or his family members had any links or contacts with any terrorist or extremist organizations.

Dr. GW

Dr. GW, an expert in forensic psychiatry testified. Dr. GW became involved in appellant's case in October 2004. To diagnose appellant he used methodology in three areas: family and genetic information; environment and medical; or psychological information. He reviewed appellant's family history, academic records, and military records, to include his medical records and his diary. He conducted three forensic interviews with appellant over an eight-hour period. Additionally, Dr. GW reviewed statements from appellant's roommate, a 1986 psychological evaluation, and records **[*75]** regarding appellant's mother's homelessness. The raw data from psychological tests was also provided to Dr. GW as well as a redacted copy of the 2003 R.C.M. 706 board report and a copy of the Article 32, UCMJ, proceedings.

According to Dr. GW, genetics are important when looking at disorders of perception because when more than one family member has a perception disorder it increases the likelihood that other family members will have similar disorders. The family history included information pertaining to appellant's father having a history of depression, sleep problems, and previous suicidal issues. The history also included the military records of appellant's maternal uncle which revealed that he was discharged from the Marines for psychiatric problems. Dr. GW also reviewed the interview of appellant's half-brother which was conducted by SA DF and noted significant paranoia. These disorders generally develop in adolescence. In this case, Dr. GW concluded appellant began to manifest signs of a perception disorder during his teen years in high school. Dr. GW used appellant's diary and high school and college behavior to show how these changes manifested.

Dr. GW testified that appellant **[*76]** had difficulty picking up social cues, perceiving situations accurately, and differentiating reality from non-reality. He developed profound sleep problems where he was unable to sleep at night and could not stay awake during the day. He testified that the perception disorder could also be seen in appellant's academic and social deterioration. It took appellant seven years to complete college. Appellant's pacing in college showed that his psycho-motor skills are agitated. Dr. GW testified that there is a parallel between appellant's college behavior and his behavior in the military, in that appellant initially performed well in both. By March 2003, however, appellant was deteriorating. He was pacing, talking to himself, receiving no respect from soldiers and peers, and struggling with basic tasks.

Dr. GW administered a variety of psychological tests. These revealed that the appellant was depressed, paranoid and his thinking was unusual and bizarre. The tests also showed that appellant was not malingering. Dr. GW was not able to make a definitive diagnosis because of various symptoms, such as bizarre thinking,

decompensation under stress, history of depression, paranoia, suspicion, inability **[*77]** to read social cues, sleep problems, psychomotor agitation, and impulsivity. However, Dr. GW made three differential diagnoses, all on the schizophrenia spectrum, each of which translate to appellant's inability to perceive reality accurately, typically under stress: (1) schizotypal disorder, an Axis II disorder; (2) Schizophrenia paranoid type, an Axis I disorder; and (3) Schizoaffective disorder, an Axis I disorder. Of particular importance, Dr. GW opined that symptoms which resulted in his diagnosis impacted appellant's actions on 22 March 2003 by causing him to be overwhelmed emotionally and to not think clearly. Nevertheless, Dr. GW concluded that appellant is sane and when he threw the grenades into the tents, he understood the lethality of the weapon and was capable of understanding the natural consequences of his actions.

Using Dr. GW, the defense admitted several pieces of evidence, but did not admit appellant's diary.[27] Instead Dr. GW testified about those portions admitted by the government. He stated that appellant's diary was reflective of appellant's personal perspective and shows a clear level of paranoia and suspicion. Dr. GW opined that appellant's diary does not reflect **[*78]** that he was capable of planning but shows that appellant is trying to put something together to understand why his life is the way it is. He also testified, "I think it is important to look at the diary as a whole" and that the appellant's capabilities are impacted by his symptoms. Appellant's paranoia, suspicion, and inability to understand social cues, combined with his stress, damaged his capability to understand the consequences of his actions.

It is of note that, on cross-examination, Dr. GW testified that he did not review appellant's statements from the R.C.M. 706 board because the copy he received **[*79]** had been redacted to remove several damaging statements made by appellant.[28] He acknowledged that the R.C.M. 706 board was conducted six weeks after the incident; however, he relied on appellant's version of the events during their interviews. Dr. GW opined that all of the test results were valid and showed no signs of the appellant malingering. The R.C.M. 706 board did not find appellant suffering from any of the three diagnoses that Dr. GW found. Although Dr. GW did not make a definitive diagnosis of schizophrenia, he expressed concern that it was nonetheless present.

In response to questions from the panel, Dr. GW testified that a person with a schizotypal disorder **[*80]** can tell the difference between right and wrong. People can function normally with these schizotypal disorders, but they can be dangerous to other people because they do not understand their environment. There is a passage in appellant's diary about killing battle buddies about a month prior to the attack but the passage goes on to talk about his plans after the military. Dr. GW's diagnosis of schizotypal disorder is consistent with appellant's ability to think something out for a month. Dr. GW does not believe that appellant received any psychological treatment before deployment and did not seek counseling other than at school, though he did seek help for his sleep problems. It was appellant's belief that the statements were made to him and, particularly a statement made on the evening of 22 March 2003, meant that he was to be killed. People with mental illnesses are more vulnerable to misinterpreting the environment and have fewer coping mechanisms.

In closing argument, the defense counsel continued with the theme that appellant could not have premeditated these murders. Their argument focused on Dr. GW's testimony and the testimony of the various soldiers in reference to appellant's **[*81]** bizarre behavior. The defense strategy was reasonable and the defense counsel's performance in executing this strategy did not "fall measurably below expected standards." *Polk, 32 M.J. at 153*. Accordingly, appellant's allegations that his defense counsel were ineffective during the findings phase of his court-martial are without merit.

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[27] Other evidence introduced through Dr. GW included: appellant's birth certificate and amended birth certificate (Def. Ex. AA); appellant's medical records from Fort Knox and UC Davis (Def. Exs. BB and CC); appellant's name change; previous diagnosis of obstructive sleep apnea; transcripts from UC Davis (Def. Ex. R); the military records of appellant's uncle, which indicate he was discharged from the U.S. Marine Corps due to a diagnosis of emotionally unstable personality (Def. Ex. KK); and appellant's Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test results (Def. Ex. RR).

[28] In post-trial affidavits, appellant's defense counsel stated that they recognized the incredibly damaging statements appellant made to the sanity board and chose not to make these statements discoverable. (Gov. App. Ex. 1). Dr. GW did not rely on statements appellant made to the R.C.M. 706 board. This issue was litigated during the court-martial. The military judge ruled that the government was not entitled to this portion of the R.C.M. 706 board as they were the ones who elicited testimony from Dr. GW on this issue.

H. Presentencing Phase

At presentencing the government presented witnesses who described their injuries and the impact on the command and the surviving family members. As appellant points out, once the government rested, the defense's presentencing case lasted only thirty-eight minutes—a presentencing case that appellant claims was constitutionally infirm.

We agree that thirty-eight minutes is not sufficient to tell the life story of a person facing the death penalty. On the record, the defense presentencing case spans thirty-eight minutes; however, their case goes far beyond that. Prior to the defense starting its presentencing case, defense counsel requested that each panel member be provided a binder which consisted of fifteen documents. The defense requested that the panel members be allowed to take the binders home and review them prior to the defense **[*82]** calling their first witness. Their request was granted.

Each member was provided a binder which contained the following defense exhibits: a complete copy of appellant's diary (Def. Ex. A); a law enforcement review of the diary (Def. Ex. B); a forensic social worker's analysis of appellant's diary (Def. Ex. C); a social history prepared by a mitigation specialist (Def. Ex. C); a search authorization for appellant's email account (Def. Ex. I); definitions of relevant Islamic terms taken from "The Oxford Dictionary of Islam," (Def. Ex. K); appellant's petition for change of name (Def. Ex. L); an interview of appellant's high school guidance counselor (Def. Ex. N);[29] an interview of one of appellant's high school teachers (Def. Ex. O);[30] an interview of appellant's college advisor and counselor (Def. Ex. P);[31] an interview of a college acquaintance (Def. Ex. T);[32] memoranda from two soldiers (Def. Exs. U and V);[33] an

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[29] The interview of appellant's high school guidance counselor, Ms. DD, was conducted by appellant's mitigation specialist, Ms. DG. According to Ms. DD, appellant **[*83]** had potential for college so she referred him for college counseling. Appellant had no problems in school and he was always very quiet. Ms. DD met appellant's mother once and she appeared rigid and was difficult to engage in conversation.

[30] Ms. RC taught leadership to appellant his senior year. Ms. RC was interviewed by appellant's mitigation specialist, Ms. DG. Ms. RC said that appellant always followed through with his commitments and was a high achiever; however he was not socially able to have relationships. Appellant respected men more than women. Ms. RC believed college would have been difficult for appellant because more whites would be at UC Davis than appellant had been previously exposed to and it was located in the country as opposed to the city. She was surprised he joined the Army and believed that appellant's lack of social skills would cause him serious difficulties. She was shocked when she heard appellant was charged with murder.

[31] Mr. JM was interviewed by Ms. DG on November 17, 2003. Mr. JM was appellant's college advisor and counselor. When appellant attended Locke High school, the school was about 90% African-American and 10% other ethnicities, and there were a lot **[*84]** of gangs and gang-related activity. According to Mr. JM, appellant was very serious and studious. Appellant was a member of the academic decathlon and participated at the highest level. The academic decathlon required students to prepare in ten separate categories and prepare a speech. His recollection is that the appellant did very well, "probably had the highest score on the team." Appellant was a peer counselor which included counseling students to fill out college applications. While in high school, appellant had good study habits and he would have expected him to do well in college. Mr. JM notes that appellant was almost always a loner who studied a lot. Appellant was very polite but seldom smiled. Appellant was always dressed neatly in slacks and printed shirts and never wore jeans. To the best of Mr. JM's knowledge appellant did not have problems staying awake. He took appellant home on some occasions and believed that appellant was living with an aunt in a notoriously rough area. He also believed appellant's mother was supportive and that appellant came from a low-income family. He was surprised to learn that appellant had joined the military and states that he never said anything **[*85]** that would have led him to predict that appellant would be capable of such acts. Pictures of Locke High School depicting the high gates surrounding the school were attached to this interview.

[32] Ms. CI is the ex-wife of appellant's college roommate. She stated that appellant was not sociable and was struggling financially in college. She stated appellant could not always understand things that other people could understand. Appellant also had horrible eating habits, often "fasting." Ms. CI said that appellant gave her a Koran for a wedding gift and talked to her about converting to Islam.

[33] Staff Sergeant CC was in the same unit as the appellant, and SFC PL was the brigade equal opportunity advisor. Staff Sergeant CC stated appellant was in three to four different platoons. Appellant was moved because he was incompetent and messed up all the time. One platoon sergeant told appellant that he wanted to place appellant in his squad before they deployed, but that he would only accept appellant as an E-4 not as an NCO. He further stated that appellant's duty performance in Kuwait was substandard as usual and that appellant could not be trusted with an important detail. SFC PL stated that she **[*86]** taught classes on how to treat Muslims. She stated that she heard several derogatory terms used to describe Iraqis and cautioned soldiers not to use them.

interview of appellant's childhood Imam (Def. Ex. W);[34] and the criminal records of appellant's father (Def. Ex. HH).[35]

Without objection, the military judge provided the following instruction to the panel members:

> Members, as I just stated, we're going to go ahead and recess for the day. The defense has requested, the government does not oppose, and I'm going to allow you to take several defense exhibits with you when we recess for the day in a few moments. They are in the black binders in front of you. **[*87]** The exhibits contain a lot of material, and it will help if you have read through the documents before the defense calls its witnesses starting tomorrow. Since counsel estimate it may take some time to do so, rather than require you to read it in open court, which is what would normally happen, I'm going to let you read it at home or work.
>
> A couple cautionary instructions however. You are only to read the exhibits. Please do not conduct any independent research based on anything you may read. Also, please, do not discuss the exhibit with anyone, to include friends and family members, or yourselves. You can only discuss the exhibits with each other once you begin your formal deliberations, which probably won't happen until Thursday. Also do not copy the exhibits or let anyone else read them. And please bring them back with you when you return to court tomorrow morning at 9 a.m.

Court adjourned at 1139 on 26 April 2005 to give panel members time to read and review the evidence they had been provided. Court was called to order at 0900 on 27 April 2005.

With the binder of materials as their backdrop, the defense called three witnesses to provide additional information about appellant. Two **[*88]** witnesses repeated testimony about appellant's poor duty performance as an NCO. The other witness was appellant's high school teacher. He testified that the school was in a rough neighborhood with gangs and poverty and that appellant was an excellent physics student who was never in any trouble. The witness had no interaction with appellant outside of the classroom and no contact with appellant since 1991.

At the close of the testimony, defense provided additional exhibits to each panel member. The first exhibit was questions provided to Ms. RW, a high school classmate of appellant's. (Def. Ex. F). Ms. RW recalled that appellant was a part of the advanced placement program and student government. Appellant also spent a lot of time by himself reading. She admitted that they were not friends because appellant had very specific views about the role of women. Ms. RW believed that appellant had an abundance of potential.

The second exhibit consisted of questions to and answers by appellant's younger brother, MA. (Def. Ex. H). According to MA, his second child was due any day; therefore, he was not able to leave his wife's side to testify for his brother. MA's first son is named after appellant **[*89]** because of all the things appellant has done for him. MA describes appellant as a very quiet, caring person who will do anything for his family. He does not believe appellant has very many friends as he does not know how to relate to others. As children, both appellant and his brother grew up in a very poor environment and they were constantly moving. There were even times they had to sleep in the car or on the floor. There was very little contact with their father while they were growing up. In fact, it was not until appellant was arrested that he had any contact with his father. Their mother always tried to provide for them and she worked hard and did her best under the circumstances.

When appellant was in college, MA went to live with him for periods of time because his mother was having trouble supporting him. Appellant also sent money to his mother, sometimes going without money himself. When appellant left college he came home to live with his mother until he could find a job; however, appellant was kicked out because their mother was tired of him arguing with her about his sisters' behavior. When appellant left his mother's house, he stayed with MA for a short period of time **[*90]** and then joined the Army. MA had been previously kicked out of his mother's house because he was dating the woman who is now his wife and she is not Muslim. Appellant allowed MA to withdraw money from his account so that MA could take

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[34] Imam AH led the mosque that appellant attended as a child. He recalled meeting appellant when he was approximately ten years old. He stated that appellant was a "nerd." Appellant would not start a conversation but would engage in a conversation. He did not see appellant as very religious, but he was accepting of the religion because of his parents. He stated that he was surprised appellant could survive boot camp.

[35] Appellant's father was found guilty of aggravated rape and sentenced to imprisonment at hard labor in the Louisiana state penitentiary for life. His sentence was commuted to thirty-two years in 1979 and he was paroled on 1 February 1980.

care of his family and he has never asked for the money back. Before appellant deployed, he and MA talked about starting a video store, once appellant left the Army. MA would be the "people person" while appellant would be responsible for the books because appellant was not good at relating to others and is not outgoing. Appellant was anxious about his deployment but wanted to do his duty. Appellant was also hoping there would not be a war and that he would be home soon.

Prior to appellant's unsworn statement the defense counsel informed the military judge they would not be calling any additional witnesses. The military judge inquired about Ms. RW and appellant's parents because they were listed on appellant's witness list. Counsel indicated they had discussed this with appellant and they had sound tactical reasons for not calling these witnesses.

Appellant gave the following unsworn from the witness stand:

> ADC: Sergeant Akbar, you and I prepared an unsworn **[*91]** statement for you, correct?
> ACC: Yes, sir.
> ADC: In fact, I typed it out; is that correct?
> ACC: Yes, sir.
> ADC: It added up to about 6 pages?
> ACC: Yes, sir.
> ADC: My advice to you was just to give the panel members those 6 pages, let them read what you had to say?
> ACC: Yes, sir.
> ADC: You decided you didn't want to do that, correct?
> ACC: Yes, sir.
> ADC: Instead, you believed you wanted to address the panel members directly?
> ACC: Yes, sir.
> ADC: Because you believed the 5 or 6 pages sounded more like an excuse?
> ACC: Yes, sir.
> ADC: Sergeant Akbar, I'm going to give you the opportunity now to go ahead and address the panel.
> ACC: I want to apologize for the attack that occurred. I felt that my life was in jeopardy, and I had no other options. I also want to ask you to forgive me.
> ADC: Please take your seat.

HN31[↑] All evidence properly admitted during the findings phase is to be considered on sentencing. R.C.M. 1001(f)(2). In his sentencing instructions, the military judge advised the panel members that they should consider the following mitigating circumstances, which came from evidence presented by the defense both in findings and in the presentencing phase:

> One, Sergeant Akbar's age at the time of the offenses of **[*92]** 32;
> Two, the lack of any previous convictions;
> Three, Sergeant Akbar's education, which includes a bachelor's degree in Mechanical and Aeronautical Engineering;
> Four, that Sergeant Akbar is a graduate of the following service schools: Basic Training, Satellite Communications AIT, Combat Engineering AIT, Sapper School, and PLDC;
> Five, the 768 days of pretrial confinement;
> Six, Sergeant Akbar's impoverished childhood, as referenced in the interview of Imam [AH], the Department of Social Services records, and Sergeant Akbar's diary;
> Seven, the statement of Ms. [RW] concerning Sergeant Akbar's involvement in leadership and academic activities in high school and his inability to make good friends, as referenced by [DG]'s interviews of [Ms. DD, Ms. RC, and Mr. JM];
> Eight, the testimony of Mr. [DD] regarding the difficult academic environment at Locke High School, Sergeant Akbar's exceptional performance as a student, and that the offenses were out of character for him, as also referenced in the interviews of [Ms. DD, Ms. RC, and Mr. JM];
> Nine, Dr. [FT]'s and Dr. [GW]'s testimony that Sergeant Akbar lacked a proper father figure as a child;
>
> Ten, [DG]'s and Special Agents [TN's] and [ER]'s conclusions **[*93]** that, in his 13 year diary, Sergeant Akbar reveals the difficulties in his life, his low sense of self-esteem, and his preoccupation with his academic progress, financial difficulties, loneliness, social awkwardness, sleep difficulties, lack of any parental guidance, and his grandiose plan to earn a PhD, become a respected and wealthy businessman, provide for his mother and siblings, and protect the down trodden of the world;
> Eleven, the FBI profile of Sergeant Akbar in which Special Agents [TN] and [ER] opine that Sergeant Akbar's main motivations for keeping his diary were loneliness and a need to convey his inner most thoughts, plans, dreams, and fears; and that Agents [TN] and [ER] believe that the diary became a substitute confidante because SGT Akbar had

nobody with whom to share these thoughts and no one else to communicate with;

Twelve, the FBI assessment that Sergeant Akbar's diary reflects many years of lonely struggle to attain the love, affection, and respect he so anxiously needed with the root of this need being traced to feeling unloved and unvalued at home; that years of perceived failures and rejections took their toll on SGT Akbar; that besides contributing to his already **[*94]** low self image, they caused sleep disturbances which in turn only added to his stress, his trouble concentrating, his difficulty staying awake, his difficulty thinking clearly, and rendered him vulnerable to even the slightest insult;
Thirteen, Dr. [FT]'s 1986 psychological evaluation of Sergeant Akbar when he was 14 years and 10 months old, and Dr. [FT]'s testimony that Sergeant Akbar was dealing with a significant amount of underlying depression and had very few coping skills as well as an inability to identify with others on an emotional level plus the significant impact of his stepfather's molestation of his sisters;
Fourteen, that Dr. [FT] recommended that Sergeant Akbar receive therapy and treatment for his mental illness;
Fifteen, the sleep disturbance suffered by Sergeant Akbar before and in the Army, and its effect on his academic achievements and his duty performance, as discussed in Sergeant Akbar's diary, documented in his medical records, and testified to by Sergeant First Class [DK], Sergeant First Class (Retired) [TM], Captain [DS], Captain [JE], Staff Sergeant [BR], Specialist [CP], Specialist [CS], Specialist [DR], Staff Sergeant [SB] and [Mr. EW];

Sixteen, Dr. [GW]'s **[*95]** testimony and Agents [TN's] and [ER]'s analysis of the diary that Sergeant Akbar discussed being the object of ridicule and abuse by his military peers;
Seventeen, the abusive nature of Sergeant Akbar's childhood to include an emotionally absent mother and a physically abusive stepfather;
Eighteen, the financial difficulties experienced by Sergeant Akbar as a young adult as reflected in the social services records, Sergeant Akbar's diary, the interview of Ms. [CI] and the testimony of Mr. [PT];
Nineteen, that it took Sergeant Akbar 9 years to obtain his bachelor's degree;
Twenty, the testimony of Captain [GS], Sergeant First Class [DK], Sergeant First Class (Retired) [TM], Captain [DS], Captain [JE], Staff Sergeant [BR], Specialist [CP], Specialist [CS], Specialist [DR], Staff Sergeant [SB] and [Mr. EW] that Sergeant Akbar was a poor leader, a substandard duty performer, got his stripes too soon, struggled as a leader and was incapable of accomplishing minor tasks;

Twenty-one, the testimony of Specialist [CP], Specialist [CS], Staff Sergeant [SB], Sergeant First Class [sic] [BR] and Sergeant First Class (Retired) [TM] that soldiers used such derogatory terms as Punjab, camel jockey, raghead, **[*96]** sand nigger, towelhead, and skinny in Sergeant Akbar's presence and recited derogatory jody calls during company runs.
Twenty-two, Specialist [CP]'s testimony that Sergeant Akbar's squad leader, while the unit equal opportunity advisor, used derogatory terms towards Iraqis;
Twenty-three, Dr. [GW]'s testimony that the MMPI-2 test results show that Sergeant Akbar had elevated levels of paranoia, depression, and schizophrenia;
Twenty-four, Dr. [GW]'s testimony regarding Sergeant Akbar's family history of mental illness;
Twenty-five, that Sergeant Akbar frequently paced and talked to himself;
Twenty-six, the testimony of Dr. [GW] that Sergeant Akbar believed unit members were ridiculing Muslims and threatening to do acts of violence against them, to include raping Iraqi women;
Twenty-seven, that the FBI found no ties between any extremist organizations and Sergeant Akbar;
Twenty-eight, that Sergeant First Class [DK], Captain [DS], Captain [JE] and Staff Sergeant [CC] recommended against taking Sergeant Akbar to Kuwait;
Twenty-nine, that numerous soldiers observed odd behavior exhibited by Sergeant Akbar in Kuwait and did not report it to the chain of command;

Thirty, that, notwithstanding his belief **[*97]** that Sergeant Akbar may be suicidal, Captain [JE] did not request any mental evaluation or assessment be done, even though services were available in Kuwait; and
Thirty-one, Sergeant Akbar's expression of regret and remorse and request for forgiveness.
You are also instructed to consider in extenuation and mitigation any other aspect of Sergeant Akbar's character and background and any other extenuating or mitigating aspect of the offenses you find appropriate. In other words, the list of extenuating and mitigating circumstances I just gave to you is not exclusive.

> You may consider any matter in extenuation and mitigation, whether pre-offense or post offense; whether it was presented before or after findings; and whether it was presented by the prosecution or the defense. Each member is at liberty to consider any matter which he or she believes to be a matter in extenuation and mitigation, regardless of whether the panel as a whole believes that it is a matter in extenuation and mitigation. A panel member may also consider mercy, sympathy and sentiment in deciding the weight to give each extenuating and mitigating circumstance and what sentence to impose.

Defense counsel continued their **[*98]** pursuit of a sentence less than death in their closing argument. They recommended to the panel that appellant be given a sentence of life without the possibility of parole. Argument then focused on appellant's mental health, appellant's diary ("a unique look into his mind"), the analysis of appellant's diary by both Ms. DG and the FBI, appellant's sleep apnea, his poor performance as an NCO, his poor family and lack of loving parents, neglect, a background of religious and racial intolerance, his difficulties with education, and appellant's lack of friends.

Appellant now contends that there is other evidence that should have been considered by the panel. We disagree. Appellant avers that Dr. GW did not have all of the information necessary to reach his opinions and conclusions at trial. During his testimony, Dr. GW determined that he had sufficient information to make a diagnosis. He further stated:

> I think the idea that a name somehow defines the work is not accurate. What is accurate are the symptoms that Sergeant Akbar shows. The fact that it may not be called schizophrenia or what have you is, in the long run, less important because a person can be schizophrenic and not be paranoid **[*99]** for example. So I think the real issue is: What are the symptoms that Sergeant Akbar has shown consistently. The fact that it's not -- it may not be called schizophrenia is not clinically relevant.

At trial Dr. GW testified confidently and never indicated that he needed additional testing. However, in his post-trial affidavit to this court, Dr. GW now contends that he needed additional information at the time of trial.

In addition, Ms. LJ-T, the appellate mitigation specialist, contends in her post-trial affidavit that there are other mitigation tasks that should have been completed. It is of note that Ms. LJ-T has never consulted with trial defense counsel in this case nor was she involved with any of the case preparation for trial.

> It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions . . . . But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance . . . . That other witnesses could have been called or other testimony **[*100]** elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, but perfection is not the standard of effective assistance.
>
> The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight-except perhaps the rule that we will not judge trial counsel's performance through hindsight. We reiterate: The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.

Grossman v. McDonough, 466 F.3d. 1325, 1347 (11th Cir. 2006) (quoting *Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Cir. 1995)* (citations, internal quotation marks, and alterations omitted)).

Appellant alleges that his diary should not have been submitted in its entirety without any substantive analysis and without appropriate regard for the highly aggravating **[*101]** and prejudicial information it contained. Though the defense counsel successfully kept the diary out during findings, it became relevant during sentencing. Two analyses of appellant's diary were submitted in an attempt to explain its contents, particularly those admitted during the government's case. Additionally Dr. GW testified, "I think it is important to look at the diary as a whole." Though there may have been some aggravating and prejudicial information in the diary, there were also mitigating matters in the diary as well as insight into appellant's childhood and family life. Again we defer to qualified counsel to determine

what evidence should be presented and presume that because counsel in this case were qualified, their strategic decisions were sound; therefore, appellant did not receive ineffective assistance of counsel.

CONCLUSION

We have considered the record of trial, the assigned errors, the supplemental errors, the briefs submitted by the parties, the oral arguments by both parties on the assignments of errors raised, and the Petition for New Trial.

We hold that there was no constitutional infirmity in the delegation, prescription, and pleading of the aggravating factor, **[*102]** nor in the investigation or referral of the capital charges of which appellant was convicted. We also conclude that the military judge did not abuse his discretion by denying appellant's motion to suppress his inculpatory statements to MAJ KW. In addition, we hold appellant's ineffective assistance of counsel claims lack merit.***HN32***[↑] "When we look for effective assistance, we do not scrutinize each and every movement or statement of counsel. Rather we satisfy ourselves that an accused has had counsel who, by his or her representation, made the adversarial proceedings work." *Murphy, 50 M.J. at 8* (citing *United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986))*. The adversarial process worked in this case because MAJ DB and CPT DC, through their due diligence and hard work, provided appellant with competent representation. Finally, we conclude appellant's remaining assignments of error, as well as the grounds supporting his petition, lack merit.

The Petition for New Trial is denied. On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior **[*103]** Judge SIMS and Judge GALLAGHER concur.

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United States v. Lasalle

United States Air Force Court of Criminal Appeals

August 21, 2019, Decided

No. ACM 38831 (reh)

Reporter
2019 CCA LEXIS 337 *

UNITED STATES, Appellee v. Elis M. LASALLE, Airman Basic (E-1), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Lasalle, 2019 CAAF LEXIS 831 (C.A.A.F., Nov. 20, 2019)

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: James Dorman (arraignment); John Harwood (rehearing). Approved sentence: Dishonorable discharge and confinement for 7 years. Sentence adjudged 18 October 2017 by GCM convened at Sheppard Air Force Base, Texas.

United States v. Lasalle, 2014 CCA LEXIS 70 (A.F.C.C.A., Feb. 10, 2014)

Core Terms

sentence, military, convening, post-trial, pretrial confinement, confinement, unsworn statement, original trial, session, corrected, asserts, due process violation, court-martial, announcement, promulgated, processing, factors, weighs

Case Summary

Overview

HOLDINGS: [1]-An unsworn victim impact statement was a permissible means for a victim to be "reasonably heard" in court-martials occurring between the effective date of Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b, and the promulgation of R.C.M. 1001A, Manual Courts-Martial. As a result, the military judge did not abuse his discretion by considering A1C MR's written unsworn statement; [2]-Appellant was not entitled to relief for the post-trial delay between the conclusion of his trial in April 2014 and the convening authority's initial action; [3]-The omission of the credit for pretrial confinement in the convening authority's action following the rehearing required correction.

Outcome
The court affirmed the approved sentence and returned the record to the The Judge Advocate General for remand to the convening authority for a corrected action.

LexisNexis® Headnotes

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

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

HN1 **Evidence, Evidentiary Rulings**

The court reviews a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse of discretion. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable.

Criminal Law &

Procedure > Sentencing > Imposition of Sentence > Victim Statements

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN2 **Imposition of Sentence, Victim Statements**

In 2013, Congress enacted Unif. Code Mil. Justice (UCMJ) art. 6b, *10 U.S.C.S. § 806b*, pursuant to the National Defense Authorization Act (NDAA) for Fiscal Year 2014. Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013) (codified as *10 U.S.C.S. § 806b*). Art. 6b, UCMJ, incorporated additional rights of crime victims in presentencing provided in the Crime Victims' Rights Act (CVRA), *18 U.S.C.S. § 3771*, with an effective date of 26 December 2013. Art. 6b, UCMJ, generally mirrors the rights afforded to victims in civilian criminal trials under the CVRA and establishes that a victim has the right to be reasonably heard at a sentencing hearing related to the offense. *10 U.S.C.S. § 806b(a)(4)(B)*. The article provides no further guidance on the manner in which a victim could exercise that right and does not address the victim's right to be heard at presentencing in terms of presenting victim impact. On 17 June 2015, the President promulgated R.C.M. 1001A, Manual Courts-Martial, providing guidance on how to implement art. 6b(a)(4)(B), UCMJ, and expressly permitting a victim to make an unsworn statement orally, in writing, or both. R.C.M. 1001A(e), Manual Courts-Martial.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN3 **Imposition of Sentence, Victim Statements**

An unsworn victim impact statement was a permissible means for a victim to be "reasonably heard" in court-martials occurring between the effective date of Unif. Code Mil. Justice art. 6b, *10 U.S.C.S. § 806b*, and the promulgation of R.C.M. 1001A, Manual Courts-Martial.

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

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

HN4 **Courts Martial, Posttrial Procedure**

Whether an appellant has been deprived of his due process right to speedy appellate review, and whether constitutional error is harmless beyond a reasonable doubt, are questions of law reviewed de novo.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN5 **Procedural Due Process, Scope of Protection**

When the convening authority does not take action within 120 days of the completion of trial, the delay is presumptively unreasonable. If there is a Moreno-based presumption of unreasonable delay or an otherwise facially-unreasonable delay, the court examines the claim under the four factors set forth in Barker: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of ability to present a defense at a rehearing. The court analyzes each factor and make a determination as to whether that factor favors the Government or appellant. Then, the court balances its analysis of the factors to determine whether a due process violation occurred. No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding. However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Judicial

Review > Courts of Criminal Appeals

HN6[] Posttrial Procedure, Actions by Convening Authority

Recognizing its authority under Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, the court also considers whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation.

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

HN7[] Courts Martial, Posttrial Procedure

The factors enumerated in Gay include: (1) how long the delay exceeded the standards set forth in Moreno; (2) what reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case; (3) whether there is evidence of harm to the appellant or institutionally caused by the delay; (4) whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and whether relief is consistent with the dual goals of justice and good order and discipline; (5) whether there is any evidence of institutional neglect concerning timely post-trial processing; and (6) given the passage of time, whether this court can provide meaningful relief in this particular situation.

Counsel: For Appellant: Major Dustin J. Weisman, USAF; Joseph M. Owens, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Michael T. Bunnell, USAF; Mary Ellen Payne, Esquire.

Judges: Before MAYBERRY, MINK, and KEY, Appellate Military Judges. Senior Judge MINK delivered the opinion of the court, in which Chief Judge MAYBERRY and Judge KEY joined.

Opinion by: MINK

Opinion

MINK, Senior Judge:

This case is before us for the second time. In April 2014, a general court-martial composed of a military judge alone found Appellant guilty, pursuant to his plea, of attempting to persuade a child to engage in sexual activity that violated state law, contrary to *18 U.S.C. § 2422(b)*, a crime or offense not capital in violation of *Article 134, Uniform Code of Military Justice (UCMJ)*, *10 U.S.C. § 934*. The military judge also found Appellant guilty, contrary to his plea, of using force to cause Airman First Class (A1C) MR to engage in sexual intercourse in violation of *Article 120, UCMJ*, *10 U.S.C. § 920* **[*2]** .[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 15 years, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence. In his initial appeal, Appellant raised six assignments of error, and we granted relief as to one of them by setting aside the *Article 134, UCMJ*, enticement conviction because Appellant's guilty plea was improvident, but affirmed the *Article 120, UCMJ*, rape conviction. We also set aside the sentence and authorized a rehearing on both the set aside offense and the sentence. *United States v. LaSalle, No. ACM 38831, 2016 CCA LEXIS 749 (A.F. Ct. Crim. App. 23 Nov. 2016)* (unpub. op.).

On 6 March 2017, the general court-martial convening authority ordered a rehearing on the enticement offense and for the purpose of sentencing Appellant. Appellant was arraigned at Fort Leavenworth, Kansas on 24 May 2017 and the rehearing was held at Sheppard Air Force Base (AFB), Texas from 16-18 October 2017. A general court-martial composed of a military judge alone found Appellant not guilty of the *Article 134* enticement offense and then sentenced Appellant for the previously affirmed sexual assault offense. The adjudged **[*3]** and approved sentence consisted of a dishonorable discharge and confinement for seven years.

Appellant now asserts three assignments of error: (1) whether the military judge erred by considering A1C MR's unsworn statement when deciding on a sentence; (2) whether Appellant is entitled to sentence relief based on a facially unreasonable post-trial processing delay after his trial in April 2014; and (3) whether the convening authority's action and the court-martial order should be corrected to reflect the pretrial confinement

[1] These offenses to which Appellant was found guilty are from the *Manual for Courts-Martial, United States* (2012 ed.) (*MCM*). All other references in this opinion to the UCMJ and the Rules for Courts-Martial (R.C.M.) are from the 2016 *MCM*, unless otherwise indicated.

credit awarded Appellant by the military judge.[2] While Appellant also requests that we reconsider our decision on the assignments of error raised in his initial appeal, we decline to do so.[3]

We find the military judge did not abuse his discretion in considering A1C MR's unsworn statement and that Appellant is not entitled to relief for the post-trial delay between the conclusion of his trial in April 2014 and the convening authority's initial action. We further find that the omission of the credit for pretrial confinement in the convening authority's action following the rehearing requires correction. We affirm the approved sentence and we return the record to the The **[*4]** Judge Advocate General for remand to the convening authority for a corrected action.

I. Background

A1C MR, who was the victim of the offense for which Appellant was sentenced at the rehearing, testified at Appellant's original trial in April 2014 but did not do so at the rehearing on sentence. Instead, A1C MR submitted a written unsworn statement for consideration by the court at the rehearing.

II. Discussion

A. Victim Impact Statement

At the rehearing on sentence, trial defense counsel objected to the military judge's consideration of A1C MR's unsworn statement because Rule for Courts-Martial (R.C.M.) 1001A, permitting an unsworn statement from the victim, had not yet been promulgated at the time of Apellant's original trial in April 2014. The military judge overruled the objection, relying in part on our unpublished decisions in *United States v. Parr, No. ACM 38878, 2017 CCA LEXIS 86 (A.F. Ct. Crim. App. 7 Feb. 2017)* (unpub. op.), and *United States v. Rowe, No. ACM 38880, 2017 CCA LEXIS 89 (A.F. Ct. Crim. App. 8 Feb. 2017)* (unpub. op.). In each of those cases, which were tried before the promulgation of R.C.M. 1001A, we held that the military judges had not abused their discretion by allowing consideration of a victim's unsworn statement based on the provisions of *Article 6b, UCMJ*, *10 U.S.C. § 806b*. On appeal, Appellant asserts that the military judge abused **[*5]** his discretion by considering the unsworn statement. We disagree.

1. Law

HN1[↑] We review a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse of discretion. *United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009)* (citing *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000))*. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)* (citing *United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997)*; *United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987))*. "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010)* (citing *United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008))*.

HN2[↑] In 2013, Congress enacted *Article 6b, UCMJ*, pursuant to the *National Defense Authorization Act (NDAA) for Fiscal Year 2014. Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013)* (codified as *10 U.S.C. § 806b*). *Article 6b, UCMJ*, incorporated additional rights of crime victims in presentencing provided in the *Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771*, with an effective date of 26 December 2013. *Article 6b* generally mirrors the rights afforded to victims in civilian criminal trials under the CVRA and establishes that a victim has **[*6]** "[t]he right to be reasonably heard . . . at [a] sentencing hearing related to the offense." *10 U.S.C. § 806b(a)(4)(B)*. The article provides no further guidance on the manner in which a victim could exercise that right and does not address the victim's right to be heard at presentencing in terms of presenting victim impact.

On 17 June 2015, after the date of Appellant's trial, the

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[2] The assignments of error were reordered by the court.

[3] As stated above, Appellant raised six assignments of error in his initial appeal. We granted relief on one issue, decided three issues contrary to Appellant, held that one issue was made moot by our decision, and held that an allegation of unreasonable post-trial processing was not yet ripe for appellate review. The issue of unreasonable post-trial processing delay has been raised again by Appellant and we address it below.

President promulgated R.C.M. 1001A, providing guidance on how to implement Article 6b(a)(4)(B), and expressly permitting a victim to make an unsworn statement orally, in writing, or both. *See* R.C.M. 1001A(e).

2. Analysis

Appellant acknowledges that Article 6b, UCMJ, was enacted prior to Appellant's original trial in April 2014. However, Appellant erroneously asserts that the plain language of the NDAA, § 1701, specifies that Article 6b did not become effective until the President promulgated R.C.M. 1001A in July 2015, more than a year after Appellant's original trial. Appellant argues that because Article 6b was not in effect at the time of Appellant's original trial, the military judge abused his discretion by considering A1C MR's unsworn statement because it would not have been authorized at Appellant's original trial. We are not persuaded.

As noted above, Section 1701 of the NDAA was effective on 26 December **[*7]** 2013, prior to Appellant's original trial. "While it is true that R.C.M. 1001A was not in existence at the time of trial, a victim's right to be heard at sentencing pursuant to Article 6b was." United States v. Turpiano, No. ACM 38873, 2018 CCA LEXIS 276, at *51 (A.F. Ct. Crim. App. 24 May 2018) (unpub. op.) Moreover, at the time of Appellant's rehearing on sentence, R.C.M. 1001A was in effect.

In overruling the trial defense counsel's objection at the rehearing, the military judge cited both the CVRA and Article 6b as providing victims a right to be "reasonably heard" at sentencing, and he noted that federal courts have interpreted this phrase to mean allowing an unsworn victim impact statement in sentencing. The military judge also noted that this court had addressed this exact issue in *Rowe* and *Parr*, finding that **HN3**[] an unsworn victim impact statement was a permissible means for a victim to be "reasonably heard" in court-martials occurring between the effective date of Article 6b and the promulgation of R.C.M. 1001A. As a result, we find the military judge did not abuse his discretion by considering A1C MR's written unsworn statement.[4]

[4] We would reach the same conclusion that the military judge did not abuse his discretion if we assumed, *arguendo*, that the military judge was required to follow the same procedural requirements at the rehearing on sentence as were required during Appellant's original trial.

B. Post-Trial Delay

1. Additional Background

As noted above, Appellant's original trial concluded on 3 April 2014. On 20 May 2014, the record of trial (ROT) was sent to **[*8]** the military judge for authentication. The military judge then discovered an error in the announcement of sentence and ordered a post-trial session pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a). The post-trial Article 39(a) session was held on 24 November 2014, following a series of delays detailed in a Post-Trial Chronology Memorandum dated 17 April 2015 which was included in the original ROT. Following the authentication of the ROT, including the transcript of the post-trial Article 39(a) session, on 9 January 2015 the court reporter from Sheppard AFB, Texas, discovered an error in the marking of exhibits during the post-trial session. As a result, the convening authority ordered a second post-trial Article 39(a) session. After a series of scheduling delays—again detailed in the Post-Trial Chronology Memorandum—the second post-trial session was held on 26 March 2015.

The convening authority's staff judge advocate (SJA) signed the SJA recommendation (SJAR) on 28 April 2015. Appellant submitted his clemency matters for consideration by the convening authority on 28 May 2015. The convening authority took action on 5 June 2015, 428 days after the announcement of sentence in Appellant's original trial.

As **[*9]** he did in his original appeal, Appellant asks this court to grant him sentence relief for unreasonable post-trial processing delay between the announcement of his original sentence on 3 April 2014 and initial action by the convening authority on 5 June 2015. Even though a total of 428 days elapsed, Appellant specifically asserts that he is only claiming that a total of 390 days constituted "unreasonable" post-trial processing delay, which comprised the period from 3 April 2014 until 28 April 2015, the date of the SJAR. Appellant's stated reason for only claiming unreasonable delay for this reduced period of time is his concession that "a substantial portion" of the delay between the date of the SJAR and the date of the action was attributable to himself. Appellant makes no claim that he suffered any prejudice as a result of the delay, but asks for a total of 270 days of credit against his sentence to confinement

for unreasonable post-trial delay.[5]

2. Law

HN4[] Whether an appellant has been deprived of his due process right to speedy appellate review, and whether constitutional error is harmless beyond a reasonable doubt, are questions of law we review de novo. United States v. Arriaga, 70 M.J. 51, 55-56 (C.A.A.F. 2011) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

HN5[] When the convening **[*10]** authority does not take action within 120 days of the completion of trial, the delay is presumptively unreasonable. Moreno, 63 M.J. at 142. If there is a *Moreno*-based presumption of unreasonable delay or an otherwise facially-unreasonable delay, we examine the claim under 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 the right to timely review and appeal; and (4) prejudice." Moreno, 63 M.J. at 135 (citations omitted). *Moreno* identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of ability to present a defense at a rehearing. Id. at 138-39 (citations omitted).

"We analyze each factor and make a determination as to whether that factor favors the Government or [Appellant]." Id. at 136 (citation omitted). Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id.* (citing Barker, 407 U.S. at 533 ("Courts must still engage in a difficult and sensitive balancing process.")). "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.* (citation omitted). However, where an appellant has **[*11]** not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "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).

HN6[] Recognizing our authority under *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, we also consider 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, 221, 225 (C.A.A.F. 2002).

3. Analysis

Whether 390 days or 428 days, the delay between the conclusion of Appellant's trial and the convening authority's action clearly exceeded the 120-day standard for presumptively unreasonable delay established in Moreno. Therefore, we consider the four Barker factors, beginning with the length of the delay itself. In this case, the delay substantially exceeded the *Moreno* standard. The Government concedes this factor weighs in Appellant's favor and we concur.

The Government asserts that the second factor, the reasons for the delay, weigh in its favor. The Government contends that a substantial portion of the delay, even prior to the date of the SJAR, was attributable to Appellant and his civilian defense counsel's admitted unavailability prior to the first posttrial 39(a) session. However, **[*12]** Appellant asserts:

> In short, the entirety of the delay can be explained by three key events: (1) the Military Judge made an error in announcing findings; (2) the Military Judge made an error in conducting [Appellant's] providence inquiry; and (3) the Government made an error in marking the exhibits, and thereafter insisted on an additional (second) Article 39(a) session, over objection by both the Military Judge and trial defense counsel. To be sure, there were numerous intervening issues that arose that contributed to the overall delay (i.e., attorney availability, judge availability, witness availability, courtroom and court-reporter availability, technology issues, etc.); but if the three errors referenced above had not been made then the 390 days of delay referenced above would have been significantly reduced, if not avoided entirely.

We agree with the Government that significant periods of delay were attributable to Appellant and that the Post-Trial Chronology Memorandum, dated 17 April 2015, evidences the Government's efforts and intentions to diligently accomplish the post-trial processing of Appellant's case and ensure the ROT was accurate. However, on balance, we find that this **[*13]** factor also weighs slightly in favor of Appellant.

[5] Appellant calculated the 270-day confinement credit request by subtracting the "120-day metric" stated in *Moreno* from the 390 days of delay between announcement of sentence until the date of the SJAR, the date relied upon by Appellant to end the period of "unreasonable delay."

The Government concedes the third factor, Appellant's assertion of his right to timely review, also weighs in Appellant's favor and we agree. At the second post-trial *Article 39(a)* session, Appellant indicated a desire for speedy appellate processing. It still took approximately 147 more days for Appellant's case to reach initial convening authority action.

As to the fourth and final factor, Appellant has not claimed any prejudice as a result of the presumptively unreasonable post-trial delay and we find none in this case. We also find that this factor weighs against Appellant. The United States Court of Appeals for the Armed Forces (CAAF) has held that "where there is no finding of *Barker* prejudice, 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 affect the public's perception of the fairness and integrity of the military justice system." *Toohey, 63 M.J. at 362*. In this case, the prejudice analysis is determinative.

Because Appellant fails to demonstrate prejudice, and we find the remaining factors are not so egregious—despite the lengthy period of time between **[*14]** the announcement of sentence and initial action of the convening authority—as to impugn the fairness and integrity of the military justice system, we find no violation of Appellant's rights under *Moreno*. Recognizing our authority under *Article 66(c), UCMJ*, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See Tardif, 57 M.J. at 225*. 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)*, we conclude that such an exercise of our authority is not appropriate in this case.[6]

[6] ***HN7***[↑] These factors include: (1) how long the delay exceeded the standards set forth in *Moreno*; (2) what reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case; (3) whether there is evidence of harm to the appellant or institutionally caused by the delay; (4) whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and whether relief is consistent with the dual goals of justice and good order and discipline; (5) whether there is any evidence of institutional neglect concerning timely post-trial processing; and (6) given the passage of time, whether this court can provide meaningful relief in this particular situation.

C. Convening Authority Action

Appellant also asserts that the action of the convening authority is incomplete and erroneous because it failed to include the period of 328 days of pretrial confinement credit awarded by the military judge at the rehearing pursuant to *United States v. Allen, 17 M.J. 126 (C.M.A. 1984)*. This 328 days encompassed the period of time Appellant remained in confinement between the date of our previous decision in this case on 23 November 2016 and the date of the announcement of sentence at the rehearing on 18 October 2016. Despite the lack of any statutory or regulatory requirement to include pretrial confinement credit awarded pursuant to *Allen* in the convening authority's **[*15]** action, the Government concedes that the action should be corrected to reflect the total adjudged confinement credit. Under the particular and unique facts of this case, we agree.

The action of the convening authority states, in pertinent part:

> [Appellant] will be credited with any portion of the punishment served from 3 April 2014 to 23 November 2016, under the sentence adjudged at the former trial in this case. [Appellant] will be credited with 165 days for illegal pretrial confinement [credit] against the sentence to confinement and an additional twenty days of Earned Time Credit.

In his advice to the convening authority, the SJA noted that the military judge awarded Appellant 328 days for pretrial confinement credit pursuant to *Allen* and correctly advised the convening authority that Appellant was to be credited with a total of 165 days of illegal pretrial confinement credit awarded by the military judge. However, the Report of Result of Trial incorrectly stated the amount of pretrial confinement credit to which Appellant was to be credited as 479 days, which was apparently calculated by adding the 328 days of pretrial confinement credit to the erroneous amount of 151 days of illegal **[*16]** pretrial confinement credit. In summary, the military judge granted Appellant 965 days confinement credit for the period from 3 April 2014 until 23 November 2016, 328 days of *Allen* credit, and 165 days of credit for illegal pretrial confinement. The convening authority granted Appellant an additional 20 days of Earned Time Credit.

The amount of total confinement credit Appellant was awarded by the military judge and the convening authority equaled 1,478 days. In the action, the

convening authority acknowledged Appellant's credit for time spent in confinement from the date of Appellant's original sentence until the date of our original opinion in this case. In accordance with R.C.M. 1107(f)(4)(F), the convening authority is required to state in the action the amount of illegal pretrial confinement credit awarded. As noted above, the convening authority's action correctly states that Appellant was awarded 165 days illegal pretrial confinement credit by the military judge. In addition, the action states that the convening authority awarded Appellant 20 additional days of Earned Time Credit against his sentence to confinement. However, even though not required, the omission of the 328 days of *Allen* credit **[*17]** from the action in this case, coupled with the error in the Report of Result of Trial, creates an action that is misleading and could result in the erroneous conclusion that Appellant is only entitled to 1150 days, instead of 1478 days, of credit against his sentence to confinement. Therefore, under these unique circumstances, we return the record for corrected action to include the 328 days of pretrial confinement credit awarded pursuant to *Allen*.

III. CONCLUSION

The approved findings were previously affirmed. The approved sentence 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) (2016)*. We return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the recent action and substitute a corrected action. Further, we order the promulgation of a corrected court-martial order reflecting the correct action.[7] The case need not be returned to us for further review. Accordingly, the approved sentence is **AFFIRMED**.

End of Document

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[7] In addition, the SJA's advice to the convening authority erroneously stated the sentence adjudged by the court-martial. However, the court-martial order stated the correct sentence. Also, the court-martial order incorrectly listed "specifications" instead of "specification" in the introductory paragraph of the order. In view of our returning this case for corrected action, we trust that this error in the court-martial order will also be corrected.