**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br>*Appellee*, | ) | BRIEF ON BEHALF OF<br>THE UNITED STATES |
| v. | ) | |
| | ) | Crim. App. Dkt. No. 36785 (reh) |
| Senior Airman (E-4),<br>ANDREW P. WITT, USAF,<br>*Appellant.* | ) | USCA Dkt. No. 22-0090/AF |

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# BRIEF ON BEHALF OF THE UNITED STATES

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

## ISSUE PRESENTED:

**DURING SENTENCING PROCEEDINGS THE TRIAL COUNSEL URGED THE PANEL MEMBERS TO CONSIDER HOW THE SENTENCE THEY IMPOSED WOULD REFLECT ON THEM PERSONALLY AND PROFESSIONALLY, AND SUGGESTED THAT THE MEMBERS WOULD BE RESPONSIBLE FOR ANY HARM APPELLANT COMMITTED IN THE FUTURE. DID THE TRIAL COUNSEL'S SENTENCING ARGUMENT CONSTITUTE PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF?**

## STATEMENT OF STATUTORY JURISDICTION

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

[1] Unless otherwise noted, all references in this opinion to the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), and the Military

## STATEMENT OF THE CASE

Appellant's Statement of the Case is correct. Even though Appellant's case was referred as capital, the members did not adjudge the death penalty. Instead, the members unanimously sentenced Appellant to life without the possibility of parole. (JA at 761.)

## STATEMENT OF FACTS

*Summary*

In the early morning hours of 5 July 2004, Appellant murdered a fellow Airman, AS, and his wife, JS, by stabbing them to death with a knife. (JA at 002.) Appellant also attempted to murder another Airman, JK, by stabbing him multiple times with the same knife. (Id.) JK survived despite suffering grievous wounds. (Id.)

*Background*

On the evening of 4 July 2004, AS and his wife, JS, visited the on-base home of JK and his wife to celebrate Independence Day. United States v. Witt, 72 M.J. 727, 736 (A.F. Ct. Crim. App. 2013). The couples lived near one another on Robins AFB, Georgia. Id. JK's wife fell asleep around 0100 on 5 July 2004. Id. AS, JS, and JK remained awake and continued talking. Id. JS confided in AS and

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Rules of Evidence (Mil. R. Evid.) are to the Manual for Courts-Martial (MCM), United States (2016 ed.), which was the version of the MCM in effect at the time of Appellant's rehearing. The relevant punitive articles in this edition of the MCM are substantially the same as those in effect at the time of Appellant's offenses.

JK that Appellant made a sexual advance toward her the previous evening while Appellant was a guest in AS and JS's home. Id. Specifically, Appellant attempted to kiss JS, but she pulled away. (JA at 476.) The couple considered Appellant a friend, so AS was angry to find out Appellant tried to kiss his wife. (JA at 452-53.)

At 0137 that same morning, AS phoned Appellant to confront him. Witt, 72 M.J. at 743. During the call, AS told Appellant that he intended to tell their leadership about Appellant's sexual advances toward both JS and another officer's wife. (JA at 481.) Appellant later told his roommate that AS threatened to disclose Appellant's advance toward JS, as well as his affair with someone else. (JA at 482.) AS' last called Appellant at 0212 on 5 July 2004. Witt, 72 M.J. at 753. At 0221, Appellant called AS and they spoke for 33 minutes. Id. The phone calls eventually ended as AS was "over it." (JA at 454.)

*Planning and Execution*

At some point during the phone call exchanges, Appellant changed into his Battle Dress Uniform (BDUs). (JA at 502.) His uniform consisted of a camouflage blouse, pants, ball cap, and military-issued boots. (JA at 493.) He retrieved an 11-and-a-half inch hunting knife from his closet, placed the knife in the trunk of his car, and drove onto base. (JA at 113.) The knife's blade was just over 6 inches in length. (Supp. JA at 835.) The knife had serrations on one side, and a smooth, sharpened edge on the other side. (Id.) The tip of the knife was

sharpened on both edges. (Supp. JA at 840.) The knife was capable of cutting through an inch of steel. (Supp. JA at 834.) With his sharpened hunting knife in tow, Appellant arrived on base at approximately 0315. Witt, 72 M.J. at 736.

Unbeknownst to the three victims, Appellant parked his car in the base housing area, around the corner from JK's home. (JA at 490.) There, in the darkness, Appellant watched his three friends "from behind the bushes and trees" because he "wanted to know what they were doing [and] what they were up to." (JA at 490-91.) Appellant wore BDUs so he could "observe them unseen to see what was going on" and so that the group "wouldn't see [him]." (JA at 687.) He stayed there, hidden, "in the shadows," observing them for one half an hour. (JA at 113.)

Around 0400, AS, JS, and JK drove from JK's house to AS and JS's house, which was approximately 0.2 miles away and still located in base housing. Witt, 72 M.J. at 737. Appellant watched the three get into a car and drive away. Id. Then, Appellant retrieved the knife he stashed in the trunk of his car, put it in his right cargo pocket, and departed his hiding spot. (JA at 493.) He pursued the three victims on foot through the neighborhood. (JA at 491-92.)

*The Burglary*

After the trio entered AS and JS's home, Appellant followed them inside. (JA at 033.) He did so without notice or invitation and while still wearing his BDUs. (Id.) Appellant first encountered AS in the front hallway of the home.

(Id.) AS yelled at Appellant, "Get out of my house. Why are you here?" (JA at 458.) But Appellant did not leave. (Id.) JK "noticed a commotion…coming down the hallway." (JA at 459.) When Appellant saw JK, he remarked, "Oh good, you're here too." (JA at 456.)

Despite being told, "Get out," Appellant walked further into the home and toward the living room. (JA at 457-58.) There, a "scuffle" began between Appellant and AS. (JA at 492.) JK attempted to intervene by using a "headlock" to get Appellant away from AS. (JA at 457-58, 492.) JK then yelled at Appellant that he needed to leave. (JA at 493.)

*The Massacre Begins*

When JK told Appellant he needed to leave, Appellant pulled the hidden knife from his cargo pocket and stabbed JK in the chest. (JA at 458.) The blade of the knife went through JK's chest cavity and into his kidney. (JA at 474, 493.) JK "backed into the kitchen," screaming, "He's got a knife!" (JA at 458, 493.) As JK backed up, JS screamed, "Oh my God, you're bleeding!" (JA at 459.) JK looked down and saw "blood everywhere." (JA at 460.) At this point, "everyone started screaming and running." (JA at 087.)

Appellant next stabbed AS twice. (Id.) The first stab wound was to the lower back, penetrating AS' diaphragm and perforating his liver. (JA at 100, 534.) The second stab wound was to the upper back, cutting through AS' backbone and severing his spinal cord. (JA at 100, 522-23, 525, 2667.) Immediately, AS was

"completely paralyzed" from the waist down. (Id.) He crumpled to the floor "like a marionette." (JA at 525.)

When JS saw her husband fall to the floor, she fled to their master bedroom where she locked herself in. (JA at 087.) Amid the attacks, and still bleeding profusely from his stab wound to the chest, JK attempted to escape the home through the backdoor. (JA at 460.) But when he reached the door, it was locked with a deadbolt. (Id.) As he struggled with the deadbolt, Appellant attacked again, stabbing JK in the back. (JA at 460.) JK managed to open the door, but Appellant "chased him out the door and stabbed him again." (JA at 494.) JK continued to run. (Id.) Appellant continued to stab him. (Id.) As JK struggled to get away, Appellant stabbed him again in the back and lacerated his arm. (JA at 461, 494.) In total, Appellant stabbed JK a total of four times—once in the chest and three times in the back. (JA at 461.) Appellant also lacerated JK's arm down to the bone. (Id.)

*"I didn't want to leave any evidence"*

Appellant left JK for dead outside and went back into the home to kill AS and JS. (Supp. JA at 832-33.) Appellant did so because he "didn't want to leave any evidence" or "witnesses." (Id.) When Appellant returned inside the house, he found AS paralyzed on the floor on his cell phone with 9-1-1. (JA at 113.) AS called 9-1-1 at 0407. (JA at 445.) When the 9-1-1 dispatcher answered the call, she heard "a lot of screaming" and "distress." (JA at 447.) AS screamed, "Oh my

God! Oh my God! Oh my God! Oh my God! Oh my God!" (JA at 360.) The 9-1-1 call then captured two more screams—JS, as Appellant began stabbing her. (Id.) AS called out Appellant's name: "Andy! Andy!" (Id.) As the 9-11 dispatcher asked, "Where? Where?" AS pleaded to Appellant, "I swear to God I won't tell anybody! Please don't do this! Please don't do this!" (Id.) After stabbing JS, Appellant returned to AS and smashed the phone because "he didn't want the police coming." (JA at 447.) Appellant disconnected the 9-1-1 call and threw the cell phone out of JS' reach. (JA at 361.)

*Slaying JS*

Next, Appellant killed JS. (JA at 091.) By his own admission, he did not want to "leave a witness." (Id.) When Appellant reentered the home, he discovered JS had barricaded herself in the back bedroom. (JA at 495.) Determined, Appellant kicked the door a couple of times and used his shoulder to "bust down the door." (JA at 088.) When Appellant busted down the bedroom door, he found JS cowering "behind the door in the fetal position." (JA at 495.) Appellant stabbed her multiple times behind the door as she tried to defend herself. (JA at 495-96.)

At some point during the attack, Appellant removed the denim skirt JS was wearing after she had been stabbed at least once. (JA at 560.) Her body was found wearing only a shirt and underwear. (JA at 033; 279.) Her skirt was found on the floor a few feet from her body, unbuttoned and unzipped. (Id.) When her body

was discovered, JS had multiple abrasions on her knees consistent with "trying to scramble to get away" from Appellant as he stabbed her. (JA at 551.) She also suffered a buckling fracture of her left forearm close to her wrist, consistent with the impact of falling on an outstretched hand. (JA at 459-550.)

JS was stabbed a total of six times. (JA at 561.) She was alive for every single one. (JA at 557.) "It would have taken time to sustain these wounds." (JA at 560.) Three of the stab wounds, from the knife that could cut through an inch of steel, penetrated through JS' diaphragm. (Supp. JA at 837-38.) These knife strokes sliced into her lungs and spleen, causing her chest cavity to fill with blood and both of her lungs to collapse. (Supp. JA at 839.) Appellant also inflicted a cutting wound along JS' side, digging the knife into her rib bones. (Supp. JA at 836-37, 841.) On JS' lower back, Appellant stabbed through her right kidney and into her liver. (JA at 544.)

Each of Appellant's blows made it harder and harder for JS to breathe and diminished her ability to call for help. (JA at 547, 554, 562.) The wounds made JS' every breath a painful experience. (JA at 555.) The final and most serious blow came as Appellant drove his sharpened knife deep into JS' back, cutting far enough to sever portions of her heart and esophagus. (JA at 556.) As one expert testified, the blood "essentially pour[ed] out of her body," and JS bled to death in significant pain. (JA at 559, 562, Supp. JA at 844.)

But JS did not die suddenly. (JA at 558.) Her heart continued to beat until she lost all her blood. (Id.) With each pump of her heart, she was bleeding to death. (Id.) With each breath, her lungs were collapsing. (Id.) Each breath was "more difficult than the last" as she gasped, making "a gurgling, rattling noise." (JA at 563.) Her death was a "drawn out process." (JA at 558.) JS eventually died of hemorrhaging and respiratory distress. (JA at 562.) She was 24 years old. (JA at 101.)

From AS' position, lying paralyzed on the floor, he could see and hear Appellant murder his wife. (JA at 563.) The 9-1-1 call AS placed captured his wife's screams and AS' pleas to Appellant to let his wife live. (JA at 092; 762.) AS was able to hear his wife's "gasping" for air as her lungs collapsed. (JA at 563.)

*Murdering AS "with a blow to the heart"*

As JS lay slumped in a pool of her own blood dying behind the bedroom door, Appellant walked back down the hallway to AS, who was still lying on the floor, paralyzed. Witt, 72 M.J. at 737. As AS lie paralyzed on his back, Appellant stabbed him a third time. (JA at 522.) In Appellant's own words, he "finished him with a blow to the heart." (JA at 090.) Appellant stabbed AS with such force that he drove the knife between AS' ribs, through the heart, and lodged the blade tip into the bone of AS' back. (JA at 522-23.) This death blow to the chest pierced through the front and back of the left ventricle of AS' heart. (JA at 530.) AS bled

to death from this stab wound to the heart. (JA at 531.) He was 25 years old. (JA at 093.)

*Concealing Evidence*

After the murders, Appellant "bolt[ed] out of the house." (JA at 090.) He ran down the street and "threw the knife into a neighbor's yard." (JA at 496.) He then "got into his vehicle and drove off." (Id.) After Appellant returned home and showered, he noticed blood on his BDU boots and cap. (JA at 264.) So, Appellant returned to base and threw his bloody uniform away in a dumpster near the childcare center. (JA at 484.) He threw away his blood-soaked uniform "so one would find it." (JA at 113.)

*"Tell my wife and daughter that I love them"*

As Appellant massacred AS and JS inside their home, JK fought for his life outside. (JA at 462.) Despite his wounds, he managed to make it "to the first house with a light on." (Id.) JK "made a loud commotion" by knocking on the door and ringing the doorbell. (Id.) When the neighbor opened the door, he found JK "bleeding all over the place from his right side." (Supp. JA at 825.) JK told the neighbor, "Call 9-1-1. I've been stabbed" before collapsing. (JA at 462.)

First responders found JK on the neighbor's doorstep, "bleeding profusely" from multiple "large" and "gaping" stab wounds. (Supp. JA at 826, 829.) As they administered first aid, JK thought he was going to die. (JA at 462.) He asked the first responders to tell his wife and daughter that he loved them. (Id.) Indeed, JK

was "very close to death." (Supp. JA at 829.) As paramedics rushed JK to the hospital, a Security Forces member sat in the ambulance with JK, holding his bloody hand to give him strength. (Supp. JA at 860.) JK repeated "over and over again, 'Make sure you tell my wife and my daughter that I love them.'" (Id.)

*The Fight to Save JK's Life*

Upon arrival at the hospital, JK required emergency surgery to save his life. (JA at 463.) He was in "critical" condition. (JA at 478.) JK suffered a stab wound to the chest that went "nearly through the entire chest cavity" and it "punctured [JK's] left lung and caused bleeding into the chest cavity." (JA at 474.) The multiple other stab wounds Appellant inflicted also "cut [JK's] splenic artery" and lacerated his left kidney. (Id.) The splenic injury was "over 6 inches" in depth. (Id.) Any one of these stab wounds could have caused JK to bleed to death. (JA at 477-48.) The surgeon who operated on him described them all as "lethal." (JA at 477.)

When JK was admitted to the emergency room all his wounds were still "actively bleeding." (JA at 474.) JK was "in shock," "pale," his "pulse was thready, weak" and his blood pressure was "plummeting." (JA at 475.) He needed to be taken to the operating room immediately. (Id.) JK "crashed" at least once in the emergency room, but doctors brought him back to life. (Supp. JA at 861.)

Appellant used "a lot of force" to make JK's injuries go so deep and "do the damage that was done." (JA at 477.) The trauma around JK's chest wound was

"quite forceful." (JA at 478.) Appellant stabbed JK in the chest so deep that the handle of the knife actually hit the skin. (Id.) The stab wound to JK's arm cut down to the bone. (Supp. JA at 860.) The attending surgeon who treated JK was surprised that JK survived the attack. (JA at 478.)

*JK's Physical and Emotional Trauma*

In the days and weeks after the attack, JK underwent several multi-hour surgeries to repair the damage Appellant inflicted on his internal organs and chest cavity. (JA at 479.) There was so much "blood loss and damage" from the chest wound that it required re-operation. (JA at 476.) Surgeons had to go back into JK's chest and repair part of the damage, pulling out scar tissue that had accumulated from progressive blood loss from the original injury. (Id.) JK finally left the hospital after 15 days. (JA at 462-63.) However, he underwent four to five follow-up surgeries, spending 30 cumulative days hospitalized. (JA at 475.)

When JK finally left the hospital, he returned home with a chest tube and a colostomy bag. (Supp. JA at 862.) A subsequent malfunction with the chest tube forced JK to undergo yet another surgery. (Supp. JA at 863.) This time, four individuals held down JK as the doctor "shoved [a] hose right through [his] ribs." (Id.) JK likened this procedure to "being tortured." (Id.) On a separate occasion, JK was rushed back to the hospital after internal bleeding collapsed a lung and resulted in a staph infection. (Id.) The colostomy bag alone caused JK tremendous embarrassment because it left his home smelling like fecal matter in front of

visitors, including his military leadership. (Supp. JA at 864.) JK described this as "the most depressing, embarrassing thing you can imagine." (Id.) The colostomy removal resulted in yet another hospital stay, but this time with a meningitis infection. (Id.)

Mentally, Appellant's murders changed JK into "a very different person." (Supp. JA at 857.) JK stopped trusting people, he ceased communications with others, and he withdrew from social interaction. (Supp. JA at 865, 858-59, 867.) JK struggled through sleepless nights, and he experienced recurring nightmares of the murders and "being chased" by Appellant. (Supp. JA at 858, 865-67.) For five straight years, JK slept on the couch away from his wife so he could "be close to the door." (Supp. JA at 857-58.)

JK felt so traumatized by Appellant's actions that he could not even "go [] through an effective psychotherapy program." (Supp. JA at 866.) JK feared that therapy would cause his condition to worsen, and he "[couldn't] handle worse." (Id.) The untreated stress and anxiety caused JK to develop serious addictions to alcohol and pain killers, which he used daily. (Supp. JA at 867-68.) At its worst, JK drank himself into a state of near-continual unconsciousness. (Id.) Although JK ultimately overcame his addictions, he still "feels raw" and finds "there's nothing there to numb the hurt." (Supp. JA at 868.) JK received a slew of mental health diagnoses that stemmed from Appellant's attack, including post-traumatic stress disorder, survivor's guilt, anxiety, and depression. (Supp. JA at 865.)

As a result of the fallout from Appellant's attacks, JK's wife divorced him. (Supp. JA at 859.) This led to a strained relationship with JK's daughter. (Supp. JA at 859-60.) In turn, this left JK's daughter with professionally-recognized "abandonment" and "anxiety" issues. (Supp. JA at 859.) For his part, JK's mental health condition forced him out of the Air Force and back into his parent's home. (Supp. JA at 869k.) JK now lives a solitary life where his mother is "the only person in the world" he can talk to. (Id.)

*Other Victims of the Murders*

Appellant murdered AS and JS days before they were scheduled to separate from the military. (Supp. JA at 872.) AS and JS "[were] so excited to get the next chapter started" near their friends and family. (Id.) Instead, they were buried together back home in Illinois. (JA at 569.) Appellant's murders left "a gaping hole" for the families AS and JS left behind. (Supp. JA at 847.)

After the murders, AS' brother and JS' father identified their respective bodies at the morgue. (JA at 568, Supp. JA at 849-50.) AS' brother, a veteran and special agent with the FBI, was "a mess." (Supp. JA at 845, 850.) JS' family was too afraid to look at her body once they heard what happened. (JA at 568.) They were worried her face would be "cut to bits." (Id.) JS' father went to the morgue to claim the body alone. (Id.) He held his daughter's body in the morgue. (Id.) "She looked like an angel." (Id.) His "little girl." (JA at 569.)

Approximately 1,500 people attended the joint funeral for AS and JS. (Supp. JA at 850.) At Robins Air Force Base, Appellant's actions sent repercussions across the base community – "[i]t hit everybody hard . . . it shook everybody up." (Supp. JA at 870-71.)

Appellant's murders shattered multiple families. Surviving siblings continue to live with feelings of "anger" and "despair." (Supp. JA at 846, 854.) JS' mother could not bear to look at pictures of her daughter's body or any of the evidence in the case. (Supp. JA at 851.) Even years later, the case was still "too much to handle," and she struggled to even talk about JS. (Supp. JA at 851-52.) JS' mother continually struggled to be emotionally and physically involved with her surviving children and grandchildren. (Supp. JA at 874.) She "found if you just let yourself cry all day, then maybe the next day you can face things again." (Supp. JA at 878.) She described that "there's always that deep sadness that [her] whole family's not there." (Supp. JA at 879.) For his part, AS' father has found himself in his car and driving "a hundred miles," because he "just can't deal with it." (JA at 579.)

The surviving families discovered new wounds as they felt the absence of AS and JS "around the happy moments in [] life," such as childbirths and weddings. (Supp. JA at 875.) At the holidays, "nights that were joyous and fun and celebratory are now filled with grieving and pain." (Supp. JA at 873.) AS'

parents felt his absence so deeply that they never put up a Christmas tree again. (JA at 579, Supp. JA at 877.)

Fifteen years later, AS' death is taking on a new meaning. After AS was killed, his brother had twin boys. (JA at 576.) These boys, who would have been AS' nephews, read about their uncle's murder on the internet when they were 12 years old. (JA at 576-77.) They understandably had questions for their grandpa. (Id.) As tears rolled down their eyes, the boys asked, "Papa, was Uncle [AS] killed with a knife?" (JA at 577.) The family struggled how to tell their grandchildren. (Id.)

The day before he was murdered, AS called his parents. (JA at 576.) After AS' mother spoke with him, she asked AS' father if he wanted to talk to AS. (Id.) He replied, "No, I'll catch him tomorrow." (Id.) But, "tomorrow never came." (Id.) The next time AS' father heard his son's voice was screaming out in tortured pain on a 9-1-1 call. (JA at 576.) When he reminisces about his son's life now, AS' father "can't get away from…[the] last ten minutes of his life." (JA at 579.)

The surviving families are "broken" because Appellant murdered a fourth-generation combat veteran and his wife in such a "gruesome" fashion that their lives are now permanently defined by "a world of murder." (JA at 569, Supp. JA at 876, Supp. JA at 830, Supp. JA at 853.)

## SUMMARY OF ARGUMENT

Trial counsel's arguments did not amount to plain error because they were ultimately grounded in the well-recognized sentencing principles of societal retribution, deterrence, protection of society, and maintaining good order and discipline in the military. It was not plain error for trial counsel to ask the members what they "stand for" and where they would "draw the line" because this was a proper appeal to the members' sense of responsibility as the conscience of the military community. Furthermore, this language was aimed at asking how far societal retribution should go.

There is currently no binding military case law on the propriety of arguing metaphorical line-drawing and "what do you stand for" idioms. And Appellant cites no case law finding prosecutorial misconduct under similar facts. But these arguments are akin to "conscience of the community" arguments that civilian courts have endorsed as proper. Most federal circuit courts have reached the conclusion that arguments that appeal to the jury to act as the "conscience of the community" are proper so long as the comments are not intended to inflame the passions of the jury. The parameters for permissibly arguing for "line drawing" and "what do you stand for" are too uncharted in military appellate courts and too nuanced in other appellate courts for this Court to find plain and obvious error here.

It was likewise not plain error for trial counsel to ask the members what risk they were willing to accept on behalf of others, because future dangerousness is relevant to the sentencing principles of general deterrence and protection of society. Trial counsel merely asked the members to weigh Appellant's future dangerousness as part of their moral judgment in deciding an appropriate sentence. The words "what risk will you accept" did not foreclose the possibility that the members might decide the potential risk did not warrant the death penalty. And trial counsel certainly did not go so far as to tell the members they would be personally responsible if Appellant committed future crimes.

Even if this Court finds plain error, however, Appellant suffered no prejudice. It cannot be overstated that trial counsel argued vociferously for Appellant to be sentenced to death. Yet, despite trial counsel's best efforts, the members unanimously sentenced Appellant to life without the possibility of parole. If trial counsel's argument was improper, it did not unduly sway the members because the members rejected outright trial counsel's only sentencing recommendation. And they did so unanimously.

The verdict conclusively shows the members did not permit the alleged impropriety of trial counsel's comments to infect its deliberations. Furthermore, the members would have returned the same life sentence even without trial counsel's questionable remarks because, given the sheer brutality of the two premeditated murders and attempted murder Appellant committed, the evidence

supporting life without the possibility of parole was overwhelming. This Court should therefore affirm the decision of the Air Force Court of Criminal Appeals.

## ARGUMENT

**TRIAL COUNSEL'S SENTENCING ARGUMENT DID NOT AMOUNT TO PLAIN ERROR AND APPELLANT HAS NOT DEMONSTRATED PREJUDICE.**

### *Additional Facts*

Trial counsel's sentencing argument lasted a little over two hours and spanned 34 pages of the transcript. (JA at 670, 689, 691, 704.) Trial counsel's argument centered on a series of rhetorical, reflexive questions: "What will you stand for?" (JA at 671); "Where will you draw the line?" (JA at 671); and "What risk will you allow?" (JA at 673.) Trial counsel also argued:

> Colonel Vitantonio, members, when you go back into the deliberation room and you're deciding on what your sentence will be, I want to ask yourselves what will you stand for. From E-6 to O-6, as an individual, what will you stand for as an individual, as an Airman? Where will you draw the line?

(JA at 670-71.)

> When you're deliberating on a sentence – and make no mistake, the government is asking you for a sentence of death – ask yourself, "Where will I draw the line? What will I stand for? What will you stand for? Base housing. Took one of our own. Committed in uniform. What will you allow? What will you stand for in the future?

(JA at 673.)

> What will you stand for? Will you stand for this when

> you're deciding your sentence? Will you stand for this? Will you allow it, or will you draw a line as an individual, as an Airman? Will you draw a line?

(JA at 697.)

> Your sentence has to address this [describing what AS saw when Appellant murdered his wife]. It has to. Where will you draw the line? Where? Where is it? If not here, where would you ever? If not this, where [sic] you ever? Where would death ever be appropriate if not right here, right here? From E-6 to O-6, where else in your career will you have the opportunity to draw the line as an individual, and as an Airman on what you will allow? What will you allow? And what risk will you accept in the future on someone else's behalf? Where [sic] you draw the line? Where? If not here, we'll never draw it ever, ever.

(JA at 699.)

> What will you stand for? Where will you draw the line? Your sentence will say it. It will tell these families, it will tell where you stand as an individual, it will tell where you stand as an Airman. What will you stand for? If not this case, what case? We ask that you return a verdict, a sentence of death.

(JA at 704.)

Between the initial argument and rebuttal, trial counsel asked some version of "what will you stand for?" and "where will you draw the line?" over 70 times. Trial defense counsel never objected.

The only one of trial counsel's rhetorical questions that the defense objected to was, "What risk will you accept on someone else's behalf?" (JA at 703.) The objection was overruled by the military judge. (JA at 704.) By the time trial defense counsel objected, trial counsel had asked some form of rhetorical question

regarding Appellant's future risk 13 times.

The defense began its sentencing argument by responding to trial counsel's line-drawing theme:

> In this case, and in any case any jury ever sits on in a death penalty case, *their job is not to draw a line*. Their job is *not to say what we do and don't stand for.* Their job is to make an individual moral decision based on the facts before them, and not just the facts of the crime, but all the facts in the case. That is your job. That is the job of this panel. *Not to draw a line, not to stand for something*. The law has already said we don't stand for murder. No one in this room will ever say we stand for murder. *The law drew a line* when it convicted him 14 years ago and said that this is absolutely wrong.

(JA at 705) (emphasis added.)

The defense then revisited this theme throughout its argument: "The law has already defined the line in the sand. The law has already taken a stand" (JA at 705), and "You were not selected to draw a line in the sand." (JA at 706.)

The defense sentencing argument lasted a little over two hours and spanned 45 pages of the transcript. (JA at 705; JA at 750.) The defense had the last word in sentencing, opting to deliver a surrebuttal. (JA at 751-52.)

The members deliberated for eight hours, with a recess overnight, before unanimously returning a sentence that spared Appellant's life. (JA at 756-761.)

## Standard of Review

When no objection is made to improper argument at trial, this Court reviews for plain error. United States v. Rodriguez, 60 M.J. 87, 88 (C.A.A.F. 2004). To

establish plain error, the appellant bears the burden of demonstrating: (1) there was error; (2) such error was plain, obvious, or "clear under current law"; and (3) the error resulted in material prejudice to a substantial right. Id. at 88-89; United States v. Olano, 507 U.S. 725, 734 (1993).

In determining whether prejudice exists, military courts balance three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). In United States v. Halpin, this Court extended this test to improper sentencing arguments. 71 M.J. 477, 480 (C.A.A.F. 2013). Reversal for an improper sentencing argument is only appropriate if "trial counsel's comments, taken as a whole, 'were so damaging that [the Court] cannot be confident that [the appellant] was sentenced on the basis of the evidence alone.'" United States v. Frey, 73 M.J. 245, 259 (C.A.A.F. 2014) (quoting Halpin, 71 M.J. at 480).

**Law**

Over seventy-five years ago, the Supreme Court admonished prosecutors to "refrain from improper methods calculated to produce a wrongful conviction . . . ." Berger v. United States, 295 U.S. 78, 88 (1935). The line separating zealous advocacy from prosecutorial misconduct is not always bright. Our adversarial system allows a prosecutor to "prosecute with earnestness and vigor." Id. Trial counsel is "charged with being as zealous an advocate for the

Government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 266 (C.M.A. 1986). In this regard, it is appropriate for trial counsel "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000).

This often-fine distinction may be blurred by the emotionally charged atmosphere inherent at trial. As Learned Hand observed: "It is impossible to expect that a criminal trial shall be conducted without some showing of feeling; the stakes are high, and the participants are inevitably charged with emotion." United States v. Wexler, 79 F.2d 526, 529-530 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936).

Perhaps the most fertile ground for emotion in the courtroom lies within the realm of sentencing arguments. The law has long recognized that summation is not a "detached exposition," Wexler, 79 F.2d at 530, with every word "carefully constructed . . . before the event," Donally v. DeChristoforo, 416 U.S. 637, 646-47 (1974). Because closing and sentencing arguments frequently require "improvisation," courts will "not lightly infer" that every statement is intended to carry "its most dangerous meaning." Id. It is appropriate for trial counsel—who is charged with being a zealous advocate for the Government—to be "emphatic, forceful, blunt and passionate in addressing the legitimate concerns and objectives of sentencing." United States v. Baer, NMCM 97 02044, 1999 CCA LEXIS 180,

at *6 (N-M Ct. Crim. App. 30 June 1999) (unpub. op.), *aff'd*, 53 M.J. 235 (C.A.A.F. 2000).

"If every remark made by counsel outside of the testimony were grounds for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (quoting Dunlop v. United States, 165 U.S. 486, 498 (1897)). To that end, courts have struggled to draw the "exceedingly fine line which distinguishes permissible advocacy from impermissible excess." Fletcher, 62 M.J. at 183 (internal citations omitted).

## Analysis

### A. Both of Appellant's claims are subject to plain error review.

Broadly, Appellant challenges two categories from trial counsel's sentencing argument: First, trial counsel urged the members to consider how the sentence they imposed would reflect on them personally and professionally. Second, trial counsel suggested to the members that they would be responsible for any harm Appellant committed in the future. As Appellant rightly acknowledges, his first claim is subject to plain error review as he did not object at trial. (App. Br. at 24.) But his second claim is too.

1. *Trial defense counsel did not object with sufficient specificity to preserve a claim that trial counsel improperly suggested the members would be responsible for Appellant's future harm.*

After trial counsel argued Appellant's future risk 13 times, trial defense counsel objected to the comment, "What risk will you accept on someone else's behalf?" (JA at 703). This was the only objection. Trial defense counsel's basis for objecting was, "Improper argument. There [is] no evidence of future dangerousness in this case. It is not an aggravator." (JA at 704.) Trial counsel responded, "Your Honor, they put on risk assessment, and I've walked through that exhaustively in this argument, about the future risk that Doctor Reidy acknowledged existed through other variants." (Id.) Defense counsel did not interject further. (Id.) The judge overruled the objection. (Id.) Trial defense counsel did not object again.

While the law "does not require the moving party to present every argument in support of an objection, it does require argument sufficient to make the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context.'" United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting Mil. R. Evid. 103(a)(1)). Trial defense counsel's objection, while couched as "improper argument" was more akin to a "facts not in evidence" objection than it was implying that the members would be personally responsible for future harm caused by Appellant. (JA at 704.) Given his response to the objection, this is how trial counsel interpreted the objection when he responded by

referring to the risk assessment testimony the defense elicited from their expert, Dr. Reidy. (JA at 704.) Trial defense counsel did not correct the Government or offer any argument that it was worried trial counsel was attempting to "inflame the passions and prejudices of the panel" or that trial counsel was suggesting the members would be responsible for future harms, which is now what Appellant claims for the first time on appeal. (App. Br. at 23-24.)

The only "specific ground" for the objection at trial was that the defense did not believe Dr. Reidy's testimony opened the door to arguments regarding future dangerousness. Datz, 61 M.J. at 42. The military judge properly overruled that specific objection because the defense's expert acknowledged Appellant's future risk on cross-examination. (JA at 704.) It was not apparent from the context of the brief objection that trial defense counsel was alleging that trial counsel improperly suggested that the members would be responsible for any of Appellant's future crimes. If Appellant had made that particular objection, then perhaps the military judge would have ruled on the objection differently. As a result, Appellant's claim of prosecutorial misconduct was forfeited and is now subject to plain error review.

2. *The lack of binding precedent addressing the complained-of arguments tends to show there was no plain error.*

Appellant cites no precedent from any court holding that "where do you draw the line?" or "what will you stand for?" or "what risk will you accept?" arguments are improper. In fact, Appellant cites little law in support of his

argument altogether. The CCA likewise cited little law. (JA at 066-67.) Accordingly, this appears to be a matter of first impression in military courts. "The absence of any controlling precedent strongly undermines Appellant's argument that the military judge committed plain or obvious error by [not interrupting trial counsel's sentencing argument.]" United States v. Bench, ___M.J. ____, No. 21-0341, 2022 CAAF LEXIS 571, at *14 (C.A.A.F. 8 August 2022) (citing United States v. Lange, 862 F.3d 1290, 1296 (11th Cir. 2017) ("there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it" (internal quotation marks omitted) (citation omitted)); *see also* United States v. Akbar, 74 M.J. 364, 398-99 (C.A.A.F. 2015) (explaining that absence of case law "is not dispositive" for plain error analysis but "does tend to show that" there was no plain or obvious error).

**B. It is not plain error to remind the panel that their sentence expresses the conscience of the military community.**

While no Court has addressed the specific arguments made in this case, federal courts have addressed similar ones. Federal circuit courts have routinely accepted arguments that appeal to the jury to act as the "conscience of the community" so long as the comments are not intended to inflame the passions of the jury. United States v. Ebron, 683 F.3d 105, 146 (5th Cir. 2012); United States v. Alloway, 397 F.2d 105, 113 (6th Cir. 1968); United States v. Shirley, 435 F.2d 1076, 1079 (7th Cir. 1970); United States v. Johnson, 968 F.2d 768, 770 (8th Cir.

1992); United States v. Koon, 34 F.3d 1416, 1444 (9th Cir. 1994), *aff'd in part and rev'd in part*, 518 U.S. 81, (1996); United States v. Bailey, 123 F.3d 1381, 1401 (11th Cir. 1990).

Trial counsel posed rhetorical questions to the members to impress upon them their "grave responsibility" in deciding Appellant's fate. (JA at 669.) Trial counsel permissibly argued to the members, "Anything less than the death penalty is a message you cannot send. What will you stand for?" This is precisely what the prosecutor argued in Ebron, 683 F.3d at 145 ("What message would a life sentence send []? It would send the wrong message, without a doubt. That message would be: Carry on with your killings. No punishment will be waiting for you when you do.") The Fifth Circuit held the statements "invited the jury to take on the permissible task of acting as the conscience of the community on the question of the appropriate sentence for [the appellant.]" Id. This holding is sound.

The Supreme Court has recognized the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Jones v. United States, 527 U.S. 373, 382 (1999) (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988)). And this is precisely what trial counsel encouraged throughout his argument. Suggesting that the panel should not stand for anything less than the death penalty is properly arguing that the members "have an obligation to do something about serious crime." State v. McNeil, 324

N.C. 33, 53, 375 S.E.2d 909, 921 (1989), *vacated on other grounds*, 494 U.S. 1050 (1990).

Trial counsel never impermissibly invited the members to sentence Appellant based on community expectations. Nor did he state the Air Force was expecting or demanding a particular sentence; rather, trial counsel sought to convince the members to return the death penalty by rhetorically reflecting on their own moral response to the aggravation properly before them in evidence. *See, e.g.*, State v. Artis, 325 N.C. 278, 329, 384 S.E.2d 470, 499 (N.C. 1989), *vacated on other grounds*, 494 U.S. 1023 (1990) (finding no error with a prosecutor telling the jury, "The eyes of Robeson County are on you. You speak for Robeson County, and you say by your verdict how you feel about such vile acts there in the community. You send a message. You send a message to [the appellant]." )

Likewise, trial counsel's argument is similar to the community standards argument the prosecutor made in Halvorsen v. Simpson, 2014 U.S. Dist. LEXIS 150549, at *143-44 (E.D. Ky. 22 October 2014), *aff'd*, 746 F. App'x 489 (6th Cir. 2018). In Halvorsen, the prosecutor repeated a rhetorical refrain asking the members what type of standard they wanted to set in their local community:

> Well do you want to establish a standard in this community that you can murder three people in cold blood and have no legitimate fear of the death penalty? Do we want that standard in Lexington? A life sentence in this case tells these defendants and potential defendants that you're safe if you limit your victims to three. Well *where*

> *do you draw the line* in Fayette County? Is it at five, four, five, six victims before the death penalty is appropriate?

Id. (emphasis added).

The District Court in Halvorsen found these comments properly appealed "to a verdict's deterrent effect." Id. at *147. Similarly, here, trial counsel asked the members "where will you draw the line?" to emphasize to the members that their sentence would show potential offenders that, in the military, the death penalty would be a consequence for a double-murder and attempted murder.

Moreover, it is not error to employ "rhetorical devices reasonably calculated to make relevant points." United States v. Taylor, 814 F.3d 340, 365-66 (6th Cir. 2016). The philosophical questions trial counsel posed in this case were designed to call on the members to make an "individual moral decision" whether Appellant lived or died. (JA at 706.) Asking the members rhetorically "where do you draw the line" is akin to asking them to take a position—to translate their individual values into a sentence. "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay v. Florida, 463 U.S. 939, 950 (1983). Trial counsel's approach called the members to appreciate "the gravity of their choice and [] the moral responsibility reposed in them as sentencers." California v. Ramos, 463 U.S. 992, 1011 (1983). After all, "capital punishment is an expression of society's moral outrage at particularly offensive conduct." Gregg v. Georgia, 428 U.S. 153, 183 (1976).

Appellant concedes that the panel members are "entrusted to represent the community at large in arriving at an appropriate sentence." (App. Br. at 25.) And in no context does the jury "express the conscience of the community" more than in a capital case when they must decide "the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). It is not error to tell them so in argument. Id.

1. *Trial counsel properly emphasized the members' sense of individual responsibility by addressing them by their rank and status as individuals and Airmen.*

Appellant labels trial counsel's pointing out the members ranks ("from E-6 to O-6") an "exhortation" designed to "pressure" the members to base their sentencing decision on how others would view them. (App. Br. at 26.) But this tactic merely reminded the members what they had affirmed during voir dire and what the military judge reiterated before closing to deliberate: "the decision to vote for death is each member's *individual* decision." (JA at 063) (emphasis added). Referring to the members by their rank, as individuals, and as "an Airman," were all proper methods to impress upon the members their sense of individual responsibility. *See* State v. Gell, 351 N.C. 192, 197, 524 S.E.2d 332, 337 (2000) (holding it was not improper when the prosecutor called each juror by name and informed the juror that it was time to impose the death penalty).

If anything, it is improper for a prosecutor to argue anything that "*diminishes* the juror's sense of personal responsibility in deciding whether to inflict capital

punishment." Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985) (emphasis added). Here, trial counsel did the opposite. He impressed on the members their "sole responsibility for the awesome life or death decision." Brooks v. Kemp, 762 F.2d 1383, 1405 (11th Cir. 1985), *vacated on other grounds*, 478 U.S. 1016 (1986).

Ultimately, the individualized approach was to the defense's benefit. Defense only needed one holdout to avoid the death penalty. *See* United States v. Simoy, 50 M.J. 1, 2 (C.A.A.F. 1998) ("If at any step along the way there is not a unanimous finding, this eliminates the death penalty as an option.") Here, the Defense had twelve holdouts.

*2. Trial counsel's arguments were a fair cry for societal retribution.*

In general, many of trial counsel's arguments were about how far the sentencing concept of societal retribution should go. *See* R.C.M. 1001(g) (2016 ed.) (listing social retribution as a sentencing philosophy trial counsel may refer to during argument.) The Supreme Court has held that the death penalty serves two principal social purposes: retribution and deterrence. Gregg, 428 U.S. at 183. As the Eleventh Circuit said in Brooks, "A Georgia jury is charged with implementing the state's capital punishment scheme in a particular case" and "[t]ranslating facts into a penalty is an ethical operation requiring consideration of the accepted justifications of the particular punishment." 762 F.2d at 1407. Likewise, a court-martial panel is charged with implementing the military's capital punishment

scheme. And trial counsel was merely asking the members to reflect on at what point the military's need for retribution (not to mention upholding good order and discipline) would make imposition of the death penalty appropriate.

Trial counsel asked the members several times if they did not adjudge the death sentence in Appellant's case, "Where would you ever?" (JA at 062.) Building on this theme, trial counsel suggested if the members did not sentence Appellant to death, "we'll never draw [the line] ever, ever." (Id.) Finally, he argued, "If not here, where? If not in this case, when would you ever?" (Id.) These rhetorical questions were "a fair comment on the strength of the case." State v. Weaver, 912 S.W.2d 499, 513 (Mo. 1995) (finding no error when the prosecutor rhetorically argued, "If these facts don't justify, don't cry out for the death penalty, then which facts do?" and "Well, if this isn't [the proper case for the death penalty], what would be?").

As a zealous advocate, trial counsel may "forcefully assert reasonable inferences from the evidence." United States v. Coble, No. 201600130, 2017 CCA LEXIS 113, *10 (N-M. Ct. Crim. App. 23 February 2017) (unpub. op.) (quoting Cristini v. McKee, 526 F.3d 888, 901 (6th Cir. 2008)). Appellant argues this line of rhetorical questioning was "drilling into the members that they had a moral responsibility as Airmen to adjudge a death sentence and, if they failed to do so, there would be no line an accused could cross that would warrant capital punishment." (App. Br. at 25.)

But the Supreme Court has directed, "a Court should not lightly infer" that trial counsel's statements were intended to carry their "most damaging meaning" or that the members would automatically draw the most damaging meaning from the statements. DeChristoforo, 416 U.S. at 646-47. Another, more appropriate, interpretation of trial counsel's argument is that he was reflecting on the "seriousness of the offense." R.C.M. 1002(f) (2019 ed.). Rhetorically asking if the members did not adjudge death in this case, "Where would you ever?" is a reasonable, forceful inference from the evidence, and a fair comment on the strength of the Government's aggravation evidence.

3. *Trial counsel properly argued general deterrence and upholding good order and discipline.*

Appellant argues it was wrong for trial counsel to say the adjudged punishment would send a message about who the members were as Airmen and what they would be willing to stand for in the future. (App. Br. at 24.) But the very nature and purpose of military law, in pertinent part, is to "assist in maintaining good order and discipline in the armed forces." MCM, Preamble, Pt. I, ¶ 3. While not in effect at the time of Appellant's trial, R.C.M. 1002(f) (2019 ed.) is a reflection of proper considerations in sentencing, and it echoes the sentiment of the Preamble that the sentence needs "to promote justice and to maintain good order and discipline in the armed forces", and, among other things:

> (A) Reflect the seriousness of the offense;

(B) Promote respect for the law;

(C) Provide just punishment for the offense;

(D) Promote adequate deterrence of misconduct; and

(E) Protect others from further crimes by the accused.

R.C.M. 1002(f).

The military judge's instructions in this case listed similar reasons for sentencing, including, "Punishment," "Protection of society," "Preservation of good order and discipline," and "Deterrence." (JA at 251). Trial counsel's arguments strongly tied into the court-martial's need to impose a sentence that upheld good order and discipline.

"A severe sentence may better assist in maintaining good order and discipline than a lenient sentence." United States v. Mabe, 30 M.J. 1254, 1269 (N-M.C.M.R. 1990). By its sentence, a court-martial panel necessarily sends a message to "those who know of [Appellant]'s crime and his sentence from committing the same or similar offenses." United States v. Ohrt, 28 M.J. 301, 305 (C.M.A. 1989). The impact of the sentence on good order and discipline must be carefully weighed: "In a large city, or large federal judicial division, an unusually light or harsh sentence may not even be noticed. The same cannot be said of a military unit." Captain Denise K. Vowell, To Determine an Appropriate Sentence: Sentencing in the Military Justice System, 114 Mil. L. Rev. 87, 180 n. 481 (1986). A sentence sends a message and, in turn, upholds good order and discipline in the

armed forces as it deters others in the close-knit military community from committing crimes.

Trial counsel's argument that the sentence would "send a message" is akin to arguing that the sentence will "make a statement," which the Sixth Circuit endorsed in Irick v. Bell:

> With your verdict, you make a statement…You will make a statement about the value of [the victim]'s life. You will make a statement about what this man did and your willingness to tolerate it. You will make a statement to everybody else out there what is going to happen to people who do this sort of thing.

565 F.3d 315, 324-25 (6th Cir. 2009).

The Sixth Circuit concluded the similar "make a statement" argument was proper because appeals to general deterrence are permissible in sentencing arguments. Id. at 325. Here, trial counsel was asking the members to adjudge a sentence that would not only deter others but would also maintain good order and discipline by sending the message that the military will not tolerate crimes like Appellant's.

4. *Trial counsel did not pressure or threaten the members with the specter of contempt or ostracism if they rejected his sentence recommendation.*

Appellant interprets trial counsel's remarks as improperly "pressur[ing] the members to base their sentencing decision on how others would view them, and how their sentence would tell the victim's families, the Air Force, and the public where they stand." (App. Br. at 26.) Indeed, the bulk of Appellant's arguments

are premised on this Court interpreting trial counsel's remarks in the most sinister light rather than seeing those remarks as arguing within the recognized sentencing principles. But this Court does not "lightly infer" that trial counsel's statements were intended to carry their "most damaging meaning" or that the members would automatically draw the most damaging meaning from the statements. Donnally, 416 U.S. at 646-47.

Appellant argues that trial counsel threatened the members with contempt or ostracism when he argued that their sentence would send a message about "where they stood" and "where they drew the line." (App. Br. at 27.) Appellant likens trial counsel's argument to the "inflammatory hypothetical scenario with no basis in evidence" this Court condemned in United States v. Norwood, 81 M.J. 12 (C.A.A.F. 2021). (App. Br. at 32.) But this case is distinguishable from Norwood. The trial counsel in Norwood gave the members a specific, vivid hypothetical—imagining a return to their normal duties at the conclusion of the court-martial and someone asks them, "Wow, what did [the appellant] get for that?" 81 M.J. at 19. Then, the Norwood trial counsel rebuked the members, "do you really want your answer to be nothing?" Id.

Unlike Norwood, trial counsel here did not posit any hypothetical to the members. He did not assume anyone would ask them about the sentence imposed, no less a military co-worker. Trial counsel in Norwood made the members accountable to hypothetical fellow servicemembers who questioned their

decision—trial counsel here merely made the members silently accountable to their own conscience. Therefore, trial counsel did not "threaten the court members with the specter of contempt or ostracism if they reject [their] request." Id. (quoting United States v. Wood, 40 C.M.R. 3, 9 (C.M.A. 1969)).

In Wood, the trial counsel also began his argument with a series of questions. Id. But, unlike trial counsel here, the counsel in Wood then followed his questions with the admonishment: "If you answer 'no' and you vote for retention or for not confining this man, you are selfish, self-centered, and not fulfilling your responsibility to your society or the Air Force." Id.

Here, while trial counsel unapologetically asked the members to sentence Appellant to death, he did not scold or scourge the members like the trial counsel in Wood. He did not "admonish" the members that if they did not vote for the death penalty, they would not be "doing your job as jurors" as in United States v. Young, 470 U.S. 1, 21 (1985). He did not warn of the speculative community scorn that would ensue if the members did not return the death penalty. *See* Bryan v. Bobby, 114 F. Supp. 3d 467, 519 (N.D. Ohio 2015) (it was error to argue to jury that their sentence would be published in the paper and, if they failed to return the death penalty, their sentence would tell the community "that it's okay to shoot a policeman now.").

Relying on the CCA's opinion, Appellant also argues that trial counsel "coerced the panel members into rendering a more severe sentence based on

concerns that they would be adversely judged by the victims' families." (App. Br. at 17.) But this Court has already rejected a challenge to this type of argument before. In United States v. Loving, a capital case, trial counsel argued during sentencing, "Americans, members of society, need to know that they will be protected and that we will protect and we will vindicate society's victims." 41 M.J. 213, 292 (C.A.A.F. 1994). This Court found the argument properly invoked "vindication of wrongs" and so held the argument was proper. Id.

A similar conclusion sprang from People v. Martinez, also a capital case. 47 Cal. 4th 911 (2010). There, the prosecutor argued that the jury's sentence would show the public that justice is done: "They can see and the families can see that justice…takes into account…the impacts that [the defendant's conduct] had on the ones who suffered." Id. at 965. The Supreme Court of California found no error, concluding that "the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes." Id. at 966. Here, trial counsel argued that the member's sentence would tell the victims' families where they drew the line and where the members stood as individuals and as Airmen. (JA at 704.) This was proper argument as it urged the members to consider victim impact in imposing a severe punishment for Appellant's crimes.

Trial counsel asked the members to express the values of the military community on behalf of the victims and to show society that the victims would be

vindicated. Again, this type of argument supports the sentencing philosophies of societal retribution and upholding good order and discipline in the military. Contrary to Appellant's claims, trial counsel did not suggest the members should be concerned with contempt from the public or from the victims' families when voting on the sentence, but instead repeatedly impressed upon them the seriousness of their moral verdict. This was not plain error.

5. *Trial counsel's comments were not calculated to inflame the passions of the members.*

On balance, trial counsel's comments were not calculated to inflame the members. Trial counsel did not invite the panel to satisfy its passions by looking beyond the evidence before it in rendering a sentence. *Cf., e.g.*, Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993) (vacating conviction where the prosecutor throughout closing argument "urged the jury to view this case as a battle in the war against drugs, and the defendants as enemy soldiers"); United States v. Beasley, 2 F.3d 1551, 1560 (11th Cir. 1993) (arguing that the jurors had an active role in a nationwide "war on drugs" battling "to save folks" all over the country from enslavement from drugs); Johnson, 968 F.2d at 771 (finding improper the prosecutor's exhorting jury in drug case to act as a "bulwark against… putting this poison on the streets").

Under a plain error standard, trial counsel's arguments were grounded in recognized and accepted sentencing principles and did not cross the "exceedingly

fine line which distinguishes permissible advocacy from permissible excess", especially in light of the dearth of case law proscribing the specific arguments trial counsel made. Fletcher, 62 M.J. at 183.

### C. Trial counsel properly argued Appellant's future risk and protection of society.

Appellant cites no case law that prohibits a rhetorical argument of "what risk will you accept?" The only case Appellant cites in support of his argument is a Sixth Circuit case where the prosecutor argued that if the jury did not convict, some calamity would consume their community. (App. Br. 25.); Belford v. Collins, 567 F.3d 225, 234 (6th Cir. 2009). But this portion of Belford dealt with improper findings argument. It is certainly improper to goad the members into a *conviction* based on a hypothetical community calamity, but there is a different interest in sentencing.

The current version of the Rules for Courts-Martial recognizes that the members are charged with crafting a sentence that will "protect others from further crimes by the accused." R.C.M. 1002(f) (2019 ed.). Even before the 2019 rules were promulgated, this Court has long identified evidence of future dangerousness as a proper matter for sentencing. *See* United States v. George, 52 M.J. 259, 261 (C.A.A.F. 2000). And in this case, the military judge instructed the members that one of the principal reasons for the sentence was "[p]rotection of society from the wrongdoer." (JA at 251.) When trial counsel asked the members, "what risk will

you accept?" he was merely highlighting that the members are the ones who must make the ultimate decision in the case. After all, translating facts into a sentence is an ethical operation requiring consideration of the accepted justifications of the particular punishment. *See* Spaziano v. Florida, 468 U.S. 447 (1984) ("in the final analysis, capital punishment rests on not a legal but an ethical judgment…") (Stevens, J., dissenting).

It was not error for trial counsel to argue that the members should consider Appellant's future dangerousness because trial counsel never stated or implied the members would be personally responsible for Appellant's future harm if they spared his life. Instead, his statements merely emphasized that future risk is something the members should consider. While trial counsel referred to a potential future risk on "someone else's behalf," "another family's behalf," and "a correction officer's behalf," he did not elaborate on what that non-descript risk would be. (JA at 062). In this regard, his reference to future victims was far less flagrant than similar comments that other courts have found acceptable. *See, e.g.*, State v. Compton, 104 N.M. 683, 690-91, 726 P.2d 837, 844-45 (1986) ("you cannot give this man the chance to hurt somebody else"); Brooks, 762 F.2d at 1404 ("[w]hose daughter will it be next time?"). While trial counsel's arguments may have been dramatic, they were directly relevant to the consideration of whether Appellant would remain a threat to society. Id. at 1411. Trial counsel's legitimate future dangerousness argument should not be rendered improper merely because

he referred to possible future victims, such as another family or a confinement officer. Id. at 1405.

Rather than interpreting trial counsel's comments in the most damaging light, which the Supreme Court has cautioned courts not to do, trial counsel's comments are better understood as requesting that the members *consider* Appellant's future dangerousness in making their individual, moral judgments on a sentence. Donally, 416 U.S. at 646. Although trial counsel was ultimately arguing for the death penalty, the way he posed the questions left open the possibility that the members might decide that the future risk Appellant posed was insufficient to warrant death. Asking the members what risk they would allow is no different than the metaphorical reminder to the members that, "the buck stops with you today" — a reminder the Eleventh Circuit found was an appropriate reference to the fact that the jury must make the ultimate decision. Brooks, 762 F.2d at 1412.

Appellant analogizes trial counsel's argument on future dangerousness to the "inflammatory argument" in Frey, a child molestation case, where the trial counsel argued that the appellant would likely molest other children in the future. (App. Br. at 28.) But this case is distinguishable from Frey. In Frey, there was no evidence of recidivism. 73 M.J. at 247-48. There was no "expert testimony", "empirical research", or "scientific and psychological" evidence presented. Id. at 250. As a result, trial counsel urged the members to apply their "common sense, ways of the world, about child molesters" to conclude that the appellant would

recidivate, while repeatedly acknowledging a total absence of evidence of the appellant's future dangerousness. Id. at 249.

Unlike Frey, there was ample evidence regarding Appellant's future dangerousness here. The defense called Dr. Reidy, a forensic psychologist, to provide his expert opinion regarding Appellant's future risk for violence. (Supp. JA at 881.) Dr. Reidy presented empirical research in the area of violence risk assessments in prison. (Supp. JA at 882.) He presented scientific and psychological evidence regarding Appellant's risk for violence. (JA at 883-84.) Trial counsel then cross-examined the defense expert at length regarding Appellant's "prediction of future offending." (Supp. JA at 885-86.) Unlike Frey, trial counsel here did not once ask the members to rely on their common sense and knowledge of the ways of the world to assume Appellant would reoffend. Instead, he properly argued "the evidence of record" from Dr. Reidy's testimony and made "reasonable inferences fairly derived from such evidence." Baer, 53 M.J. at 237. Trial counsel argued that Dr. Reidy's research supported the Government's case because it showed Appellant's risk levels for future violence in prison were "not low." (JA at 675.) Accordingly, trial counsel's arguments on future dangerousness were not only proper comment on the defense's evidence, but proper aggravation as well. George, 52 M.J. at 261.

Given the "exceedingly fine line which distinguishes permissible advocacy from permissible excess," trial counsel's future dangerousness argument was not

improper. Fletcher, 62 M.J. at 183. The remarks did not ask the members to sentence Appellant on anything other than the evidence – which in this case included evidence about the possibility that Appellant would reoffend. This Court should therefore not infer the "most damaging" meaning from trial counsel's references to future risk. Donally, 416 U.S. at 646. And considering the absence of binding law condemning such statements, this Court should decline to find plain error.

**D. There is no prejudice because the members unanimously rejected trial counsel's call for the death penalty.**

Even if some of trial counsel's statements were error, his effort to "cultivate a severe sentence did not bear fruit." United States v. Ramos, 42 M.J. 392, 397 (C.A.A.F. 1995). As a result, the CCA correctly concluded that any error was harmless under the Fletcher factors given the members' "clear rejection" of the death penalty. (JA at 067.)

Improper argument advocating for the death penalty is not harmful where, like here, the members rejected the death penalty and imposed life imprisonment. Parker v. Allen, 565 F.3d 1258, 1275 (11th Cir. 2009) (misconduct in sentencing relating to uncharged offenses was not harmful where the jury rejected the death penalty and imposed life imprisonment instead); *see also* United States v. Wilson, No. ACM 39387, 2021 CCA LEXIS 284, at *142 (A.F. Ct. Crim. App. 10 June 2021) (unpub. op.), *pet. denied*, No. 21-0358/AF, 2021 CAAF LEXIS 1075

(C.A.A.F. 16 December 2021) ("the alleged errors primarily related to whether the Government had met the requirements for the imposition of the death penalty, and the court-marital did not sentence Appellant to death.")

Improper sentencing argument does not automatically warrant relief. Relief will only be granted if the trial counsel's misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." Fletcher, 62 M.J. at 178.

1. *Trial defense counsel's lack of objection, despite ample opportunity, demonstrates the lack of severity of the alleged misconduct.*

In analyzing the first Fletcher factor, assuming some of trial counsel's arguments amounted to plain error, the severity of the misconduct must have been low as Appellant made no effort to object to any of trial counsel's arguments on the grounds now asserted on appeal.

Appellant's trial defense counsel demonstrated the minimal impact trial counsel's line-drawing argument had on the case when he chose to not object more than 70 times during the sentencing argument. (JA at 670-704.) Similarly, trial defense counsel chose not to object 13 times to trial counsel's future dangerousness arguments. And when he did finally object, it was not even on the grounds he now asserts on appeal. Defense counsel's failure to object to trial counsel's argument is "some measure of the minimal impact of [the] prosecutor's improper argument." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001).

After all, trial defense counsel "was in the best position to determine the prejudicial effect of the argument." United States v. Scamahorn, No. NMCCA 200201583, 2006 CCA LEXIS 71, at *42 (N-M Ct. Crim. App. 27 March 2006) (unpub. op.). Appellant's counsel should not be able to sit silently through dozens of possible objections during sentencing argument – making no attempt to cure the alleged errors – and then claim on appeal that the argument was so prejudicial that it requires set aside of the sentence.

The lack of objection was a "tactical decision." *See* Darden v. Wainwright, 477 U.S. 168, 182 (1986) (finding no prejudice from prosecutorial misconduct where a defense counsel made "tactical decision[s]" in case strategy.) After allowing trial counsel's arguments to proceed, without interruption, defense counsel aptly re-framed the debate: "The law has already said we don't stand for murder…The law drew a line when it convicted him 14 years ago and said this is absolutely wrong." (JA at 705.) Defense counsel deflated trial counsel's lengthy line-drawing and standing-for argument succinctly: "The law has already defined the line in the sand. The law has already taken a stand." (Id.)

Defense counsel's own argument explains why he acquiesced to trial counsel's argument—he did not think the argument was effective. To that end, defense counsel was able to succinctly, and persuasively, convince the members to reject trial counsel's plea to adjudge the death penalty. Therefore, the improper comments were neutralized by trial defense counsel's argument. Thus, Appellant's

tactical decision to counter, rather than object to trial counsel's earlier argument should not be held against the United States. *See* Norwood, 81 M.J. at 24 (Sparks, J., dissenting) ("Defense counsel in this case was best situated to determine which parts of trial counsel's argument were worth objecting to and which were not.")

Instead of objecting, trial defense counsel chose to rebut the themes brought up by trial counsel in his own sentencing argument. This not only proved successful, as Appellant avoided the death penalty, but it also obviated any possible need for a curative instruction from the military judge. *See* United States v. Gulley, NMCM 94 00626, 1995 CCA LEXIS 495, at *5 (N-M Ct. Crim. App. 27 September 1995) (unpub. op.) (rather than objecting, trial defense counsel echoed trial counsel's "send a message" argument theme by arguing the appropriate message was already sent by the fact that the appellant was tried by a public court-martial).

Finally, the defense had the last word in surrebuttal. This was a curative measure. United States v. Phillips, 914 F.2d 835, 845 (7th Cir. 1990) (citing Darden, 477 U.S. at 182-83) ("The defense's opportunity to rebut the prosecutor's improper remark is a factor militating against a finding of prosecutorial misconduct."). Here, the last word the members heard was trial defense counsel's plea for "mercy." (JA at 752.) With mercy in mind, the members returned the next day with a sentence that spared Appellant's life. Trial defense counsel aptly

rebutting trial counsel's comments in both argument and surrebuttal thus dissipated the effect of any improper argument.

2. *The standard instructions given by the military judge and defense counsel's argument were sufficient to cure any allegedly improper insinuations by trial counsel.*

Appellant argues that "there was a total lack of curative measures" to address trial counsel's misconduct. (App. Br. at 35.) In the absence of any objection from defense, the military judge did not give specific curative instructions. But he did give the standard instruction, "You are advised that the arguments of trial counsel and his or her recommendations are only his or her individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel." (JA at 670.) Appellant did not object to the instruction or request additional instructions. (Id.) The military judge's instruction was sufficient to neutralize Appellant's complaint that the members perceived an expectation to return a specific sentence based on demands of society or the victims' families. After all, members are presumed to follow the judge's instructions. United States v. Ricketts, 50 C.M.R. 567, 570 (C.M.A. 1975).

The military judge provided the members "complete and correct instructions" and informed them "that these instructions should control their deliberations." United States v. Palacios Cueto, ___M.J. ____, No. 21-0357, 2022 CAAF LEXIS 517, at *32 (C.A.A.F. 19 July 2022). That is considered a curative measure. Id.

There were also curative measures taken by trial defense counsel through initial argument and surrebuttal argument. *See* Palacios Cueto, CAAF LEXIS 517, at *32 ("Civilian defense counsel also effectively responded to most of what trial counsel said, especially with respect to the suggestion that justice required a finding of guilt."). The panel's unanimous rejection of trial counsel's individual sentencing recommendation shows the members followed the military judge's instructions and independently assessed the evidence.

3. *The overwhelming weight of the evidence supporting the sentence adjudged heavily weighs in the Government's favor.*

Though Fletcher recommended a balancing of all three factors, it did not assign a particular value to each or comment whether these factors should be weighed equally. In Halpin, this Court found that the third Fletcher factor weighed "so heavily in favor of the Government" that it could be fully confident the appellant was sentenced based on the evidence alone. 71 M.J. at 480. The Court should likewise find the third Fletcher factor so heavily weighs in the Government's favor as to deny relief.

Even more so than Halpin, the weight of evidence supporting the sentence adjudged in this case was not just strong—it was overwhelming. The murders were bloody, brutal, and barbaric. The Government alleged four different statutory aggravators when only one could have been enough to sentence Appellant to death. (JA at 264.) Trial counsel's 2-hour sentencing argument paled in comparison to

the 16 days the members spent hearing about the horrific nature of Appellant's crimes. Trial counsel's argument could not possibly have inflamed the members' passions "more than did the facts of the crime." Payne v. Tennessee, 501 U.S. 808, 832 (1991). As compared to the abhorrent aggravation, trial counsel's comments were "bland and pale" and were of "minimal impact on the members" as evidenced by their unanimous verdict. United States v. Hutchinson, 15 M.J. 1056, 1066-67 (N-M.C.M.R. 1983), *vacated on other grounds*, 18 M.J. 281 (C.M.A. 1984).

Appellant hunted and stalked his victims like prey. His planning and premeditation to murder was cold and calculated. He ruthlessly slaughtered two of his friends in a cruel and cold-blooded attack. Their deaths were unprovoked and senseless. The way JS slowly bled to death from six different knife wounds, and the way her husband was forced to helplessly watch, and listen, to her murder was nothing less than inhumane. Trial counsel's argument could not possibly have inflamed the members' passions more than the 9-1-1 call admitted into evidence.

Appellant was merciless. He butchered three victims when they were their most vulnerable—paralyzed (AS), back turned trying to escape (JK), and cowering in the fetal position (JS). The crime scene was gruesome. AS was stabbed three times with an 11-and-a-half inch hunting knife and bled to death; his wife was killed by six thrusts of that same knife; and their friend, despite critical wounds that penetrated completely through his body, from front to back, survived—only to

lose his life as he knew it. Appellant caused three people to experience agonizing anguish and he left countless others forever mourning their loss.

*i. It was a foregone conclusion that Appellant, at a minimum, would be sentenced to life without the possibility of parole.*

There can be no prejudice when it was a foregone conclusion that Appellant was, at a minimum, going to be sentenced to life without the possibility of parole. It is normally harder for Government to meet its burden to show harmlessness in sentencing because of the "broad spectrum of lawful punishments that a panel might adjudge." United States v. Edwards, 82 M.J. 239 (C.A.A.F. 2022). But here, the members' sentencing options were limited. Unlike Edwards, an unpremeditated murder case, the law imposed a mandatory minimum sentence of confinement for life for the offenses of premediated murder in Appellant's case. (JA at 253.) *See* Wilson, 2021 CCA LEXIS, at *142-43 (explaining the "limited" sentencing options in a premeditated murder case).

While it is normally difficult to calibrate the effect of a sentencing argument's emotional appeal, here, the members returned a unanimous decision on the sentence. This means that trial counsel's argument did not sway a single member to vote for death. Therefore, once the members unanimously rejected the death penalty, they only had two options: (1) life with the possibility of parole; or (2) life without the possibility of parole. They unanimously chose life without parole. And for good reason.

Trial defense counsel was not just "*focused* on life versus death." (App. Br. at 18) (emphasis added). It was the entire thrust of their case. As early as opening statements, the defense framed the issue before the members as a choice between life and death: "Death is not a required sentence in this case…A life sentence will be justice for all." (Supp. JA at 823-24.) The defense's singular focus throughout the entire 16-day proceeding was avoiding the death penalty. To that end, the defense did not even mention the possibility of parole during the opening statement. (*See* Supp. JA at 808-824.)

Similarly, during its case-in-chief, the defense did not put on evidence of "Appellant's ability to integrate back into society but concentrated on whether he could live an existence in prison without posing a threat to others." (JA at 067.) The defense called Dr. Reidy to testify to "*prison* risk for a person *in prison*." (JA at 744) (emphasis added). From Dr. Reidy's testimony, the defense concluded, "It says he can live *in jail* without incident, without a problem." (JA at 745) (emphasis added). In fact, when trial counsel cross-examined Dr. Reidy on studies relating to violence in the community, trial defense counsel was quick to clarify to the members that the focus was not on "people in the community." (JA at 744-45.)

Thus, the defense presented no evidence on Appellant's risk if he were paroled, living in the local community. On the contrary, the defense made a consistent plea for life without the possibility of parole: "Why do we have to kill him? Why can't he live in this prison population? Why can't he be there for those

other inmates, right?" (JA at 746.) He went on: "He also has the structure of the prison to help him control stress. And he has counseling to give him constant reality feedback." (JA at 748.)

Considering the singular focus on avoiding the death penalty, the CCA soundly reasoned, "Appellant's own trial defense counsel did not make a plea for a sentence including eligibility for parole, which is a strong indication that Appellant's own defense team saw the true debate in the case as being between life and death—not whether parole should be available." (JA at 067.) Thus, even trial defense counsel recognized it was a foregone conclusion that, at a minimum, Appellant would receive life without the possibility of parole. Therefore, even in the absence of any improper argument by trial counsel, the members would have adjudged the sentence they did.

125 years ago, the Supreme Court made clear that juries should use their "sound common sense" in deciding cases. Dunlop, 165 U.S. at 499-500. Appellant's crimes were so brutal and senseless, and the chance of future dangerousness was sufficiently strong, that the members would have had to "abdicate their common sense" to rationally think the possibility of parole was appropriate. Id. at 500.

*ii. Appellant's rebutted mitigation does not support a sentence of life with the possibility of parole.*

The strength of the Government's case was not undermined by the defense's extenuation and mitigation – and certainly not to the point that but-for trial counsel's improper argument the members would have seriously entertained the possibility of parole, as Appellant now claims. (App. Br. at 39.)

The military judge instructed the members on 26 potential extenuating and mitigating circumstances. (JA at 753-755.) But both at trial, and now on appeal, Appellant only focused on two—Appellant's purported mental health issues and a Traumatic Brain Injury (TBI) sustained from a motorcycle accident. (App. Br. at 4-9.) In rebuttal at the trial, the Government presented both lay witnesses and expert testimony that refuted these two conditions.

*TBI*

Four lay witnesses, including Appellant's prior roommates and co-workers, testified he did not have a drinking problem, nor did they ever observe odd, awkward, or inappropriate social behavior from him before or after the motorcycle accident. (Supp. JA at 887-92, 893-94, 902-05, 906-07, 908-10, 911-13, 909 914.) The physician's assistant who treated Appellant after his motorcycle incident testified that the CT scan of Appellant's brain was "normal." (Supp. JA at 900-901.) A neuroradiology expert performed additional imaging scans on Appellant's brain and found no "[c]lear evidence" of TBI. (Supp. JA at 899.)

*Mental Health Conditions*

An expert forensic psychiatrist testified that Appellant did not meet the diagnostic criteria for Schizotypal Personality Disorder (SPD). Furthermore, he found no evidence of legitimate psychosis or delusional beliefs by Appellant on the night of the murders. (Supp. JA at 897-98.) In response to Appellant's assertion of family history of mental illness, the psychiatrist testified that family history does not serve to satisfy the diagnostic criteria for SPD. (Supp. JA at 896.) Nine other mental health providers also evaluated Appellant, and none of them diagnosed him with SPD. (Supp. JA at 895.) In sum, nothing Appellant presented in mitigation was sufficient to mitigate the Government's aggravation.

Any error from trial counsel's sentencing argument was not "particularly egregious" such that it warrants another rehearing or disapproval of the sentence. Young, 470 U.S. at 15. The plain-error doctrine should be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Id. This is not such a circumstance. The circumstances of these murders were unimaginably horrible. Granting any relief is too drastic a sanction when the members opted for mercy by sparing Appellant's life. This Court can be confident that Appellant was appropriately sentenced to confinement for life without the possibility of parole because of his vicious and vile crimes.

## CONCLUSION

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

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 September 2022.

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/s/_____

MORGAN R. CHRISTIE, Maj, USAF

Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 6 September 2022

# APPENDIX

Cited Unpublished Opinions

**User Name:** Morgan CHRISTIE
**Date and Time:** Sunday, September 4, 2022 10:48:00 AM CDT
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## Document (1)

1. *United States v. Baer, 1999 CCA LEXIS 180*

**Client/Matter:** -None-
**Search Terms:** 1999 CCA LEXIS 180
**Search Type:** Natural Language
**Narrowed by:**

| Content Type | Narrowed by |
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| Cases | -None- |

# United States v. Baer

United States Navy-Marine Corps Court of Criminal Appeals

June 30, 1999, Decided

NMCM 97 02044

**Reporter**
1999 CCA LEXIS 180 *; 1999 WL 447327

UNITED STATES v. William J. BAER, 172 58 0140
Lance Corporal (E-3), U.S. Marine Corps

**Notice: [*1]** AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

**Prior History:** Sentence adjudged 18 January 1997. Military Judge: W.P. Hollerich. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, HI.

**Disposition:** Specification 2 under Charge I, and Charge IV and its sole specification are dismissed. The remaining findings and sentence are affirmed.

## Core Terms

sentence, military, trial counsel, offenses, photographs, assigned error, murder, stipulation of facts, co-conspirators, multiplicious, specification, aggravating, prejudicial, sit, aggravated assault, inelastic, tape, unpremeditated murder, appropriate sentence, challenge for cause, premeditated murder, contradicted, conspiracy, convicted, responses, uncharged, assault, robbery, admit, bias

## Case Summary

**Procedural Posture**
Defendant challenged the judgment of the General Court-Martial convened by the Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, which convicted defendant of various charges, which included unpremeditated murder, robbery, and assault and sentenced him to a period of confinement.

**Overview**
Defendant, a lance corporal in the United States Marines, was convicted of various crimes, which included unpremeditated murder, robbery, and aggravated assault. The panel of officer members sentenced appellant to a term of confinement. On appeal, defendant contended that the trial judge erred when it overruled his objection to the prosecution's closing argument on sentencing. Defendant also contended that it was error for the trial court to deny his challenge for cause during the member selection process and for failing to dismiss offenses that were multiplicious for sentencing. Defendant also challenged the trial court's admission of his confession because it contradicted a stipulation of fact and the propriety of admitting certain photographs. The court found that the prosecution's closing argument was permissible since it did not ask panel members to put themselves in the victim's place. While, the panel member did not harbor an inelastic opinion, the trial court should have dismissed the multiplicious specification. As to the admission of the confession and photographs, the court found no abuse of discretion in the trial court's decision to admit.

**Outcome**
The court dismissed a certain specification against defendant because it was multiplicious of another specification, but affirmed the trial court's judgment and sentence as to the remaining charges and specifications against defendant.

## LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

*HN1*[] **Closing Arguments, Inflammatory Statements**

The critical bottom line in any criminal prosecution

where guilt has been established is the sentence to be awarded to the accused. In arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows.

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

**HN2 Closing Arguments, Fair Comment & Fair Response**

The trial counsel's argument may forcefully comment on the evidence presented at trial, but it should not seek to improperly incite the passions of the sentencing authority. Clearly, it is appropriate for trial counsel, who is charged with being a zealous advocate for the Government, to argue the evidence of record as well as all reasonable inferences fairly derived from such evidence. Propriety in this regard does not mandate bland or anemic argument; trial counsel may be emphatic, forceful, blunt, and passionate in addressing the legitimate concerns and objectives of sentencing.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

**HN3 Imposition of Sentence, Evidence**

Arguments aimed at inflaming the passions or prejudices of the court members are clearly improper.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

**HN4 Imposition of Sentence, Evidence**

It has been unequivocally established that arguments that ask the court members to place themselves in the position of the victim, or a near relative of the victim, are little more than improper invitations for the members to cast aside the objective impartiality demanded of them as court members and to judge the issue of sentencing from the perspective of personal interest.

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

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

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Military & Veterans Law > Military Justice > General Overview

**HN5 Appellate Review, Standards of Review**

A military judge's decision to deny a challenge for cause is not overturned absent a clear abuse of discretion in applying the "liberal-grant" mandate. Under the "liberal-grant" approach to challenges for cause in the military, a member should normally be excused if there is substantial doubt as to the legality, fairness, or impartiality of having that person sit as a member, pursuant to R.C.M. 912(f)(1)(N). In deciding the propriety of a trial judge's denial of a challenge for cause, the court gives due deference to the trial judge who personally saw the member, heard his answers, and judged his demeanor.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

Military & Veterans Law > Military Justice > General Overview

**HN6 Particular Instructions, Use of Particular Evidence**

Harboring an inelastic opinion concerning an appropriate sentence would almost always be an appropriate ground for challenging a member. The test for an inelastic opinion toward sentence is that the member's bias will not yield to the evidence presented and the judge's instructions. Inelastic attitude toward sentencing involves an actual bias on the part of the member.

Criminal Law & Procedure > ... > Defective Joinder & Severance > Multiplicity > Challenges & Waivers

Criminal Law & Procedure > ... > Defective Joinder & Severance > Multiplicity > General Overview

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

**HN7[] Multiplicity, Challenges & Waivers**

Where the offenses are multiplicious, they are multiplicious for all purposes.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Military & Veterans Law > Military Justice > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

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

**HN8[] Imposition of Sentence, Evidence**

Under R.C.M. 1001(b)(4), in a sentencing hearing, the trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. The determination of whether evidence directly resulted from an offense is within the sound discretion of the military judge, and his judgment is not lightly overturned.

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

Military & Veterans Law > Military Justice > General Overview

**HN9[] Sentences, Presentencing Proceedings**

R.C.M. 1001(b)(4) evidence must be properly considered for admission on its own terms, not those subscribed within a stipulation of fact.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

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

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

**HN10[] Imposition of Sentence, Factors**

The test for prejudice seeks to discern whether an appellant's sentence was greater than that which would have been imposed if the prejudicial error had not been committed.

**Counsel:** LT JOHN D. HOLDEN, JAGC, USNR, Appellate Defense Counsel.

Maj MARK K. JAMISON, USMC, Appellate Government Counsel.

**Judges:** BEFORE CHARLES Wm. DORMAN, R.H. TROIDL, JOHN W. ROLPH. Senior Judges DORMAN and TROIDL concur.

**Opinion by:** JOHN W. ROLPH

## Opinion

ROLPH, Judge:

A military judge sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of three specifications of conspiracy, unpremeditated murder, robbery, aggravated assault, and kidnapping in violation of Articles 81, 118, 122, 128 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 881*, *918*, *922*, *928* and *934 (1994)*. A panel of officer members sentenced the appellant to 25 years confinement, total forfeiture of all pay and allowances, reduction to E-1, and a dishonorable **[*2]** discharge. The convening authority approved the sentence as adjudged.

We have carefully reviewed the record of trial, the appellant's five assignments of error, and the Government's response. Except as noted below, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

**Facts**

The appellant and his three Marine co-conspirators entered into an agreement to lure their victim, LCpl Juan Guerrero, USMC, into one of their homes where they planned to assault and rob him. Under the pretext of promised repayment of an overdue loan, LCpl Guerrero was invited to the home of LCpl Michael Pereira, USMC, which was located on the Marine Corps Base, Hawaii. LCpl Guerrero drove to LCpl Pereira's home alone in his car, expecting to pick up his money and then return to his barracks. Almost immediately after entering LCpl Pereira's home, he was simultaneously attacked by each of the co-conspirators, including the appellant. Using their fists, shod feet, a baseball bat, and a "stun-gun," they ultimately assaulted LCpl Guerrero to the point of complete **[*3]** unconsciousness. They then bound their victim's mouth, hands, arms and legs with heavy duct tape, wrapped his body in a canvas car cover, and loaded him into the back of a co-conspirator's Chevy Blazer. The appellant then removed stereo equipment and other items from LCpl Guerrero's car. Upon completion of this larceny, all four conspirators transported LCpl Guerrero to a remote site on the island of Oahu, where LCpl Darryl Antle summarily executed him with a single pistol shot to the head. LCpl Guerrero's body was then dumped over a railing and into a deep ravine. Almost a month passed before the badly decomposed remains of LCpl Guerrero were discovered. Within days of the discovery of LCpl Guerrero's body, the appellant and his co-actors were identified as possible perpetrators, and two of them (including the appellant) ultimately confessed their involvement in this heinous crime. Various items of LCpl Guerrero's stereo equipment were later recovered from the appellant's home.

**Trial Counsel's Sentencing Argument**

In his first assignment of error, the appellant contends that the military judge abused his discretion when he overruled a defense objection to the Government's **[*4]** closing argument on sentencing, in which the trial counsel ostensibly asked the members to put themselves in the place of the victim as he was being beaten, tortured, and murdered. Appellant's Brief of 30 Sep 1998 at 2.

Specifically, appellant complains of the following two instances during the trial counsel's sentencing argument where he believes prejudicial error occurred:

> ATC: Imagine [LCpl Guerrero] entering the house. Imagine him entering the house, and what happens next? A savage beating at the hands of people [who] he knows, fellow Marines, to which the accused was a willing participant. He's grabbed, he's choked, he's beaten, he's kicked, he's hit with a bat, small baseball bat. ***Imagine being Lance Corporal Guerrero sitting there as these people are beating him***.
> CC: Excuse me, I'm very sorry to interrupt. That's improper argument.
> MJ: I disagree.
> CC: To invite the jury to imagine themselves being in the same situation.
>
> MJ: I disagree. What the trial counsel is trying to do is describe the particular situation in which the victim was in, and that's an appropriate consideration for the members to consider in determining an appropriate **[*5]** sentence.

Record at 550-551(emphasis added).

Three paragraphs and 240 words later, trial counsel again made an argument that appellant claims was objectionable:

> ATC: Imagine. Just imagine the pain and the agony. Imagine the helplessness and the terror, I mean the sheer terror of being taped and bound, ***you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding.*** Maybe they started at the ankles, and the knees, and they went up. Imagine, if you will, what it was like before that piece of tape went across Lance Corporal Guerrero's eyes. Then imagine that tape going across his eyes. The brutal darkness and terror. Maybe he was unconscious, but maybe he wasn't. What were his thoughts? Sheer terror. We don't know and we'll never know. Why? Because the accused stood by while Lance Corporal Antle put a bullet in Lance Corporal Guerrero's brain. Stood 25 feet away and did nothing.

Record at 551-52 (emphasis added).

HN1[] The critical bottom line in any criminal prosecution where guilt has been established is the sentence to be awarded to the accused. In arguing for what is perceived to be an appropriate sentence, **[*6]** the trial counsel is at liberty to strike hard, but not foul, blows. Berger v. United States, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935); United States v. Edwards, 35 M.J. 351 (C.M.A. 1992); United States v. Waldrup, 30 M.J. 1126 (N.M.C.M.R. 1989). HN2[] The trial counsel's argument may forcefully comment on the evidence presented at trial, but should not seek to improperly incite the passions of the sentencing authority. Waldrup, 30 M.J. at 1132. Clearly, it is appropriate for trial counsel -- who is charged with being a zealous advocate for the Government -- to argue the evidence of record as well as all reasonable inferences fairly derived from such evidence. United States v. Nelson, 1 M.J. 235 (C.M.A. 1975); United States v. Edmonds, 36 M.J. 791, 792 (A.C.M.R. 1993). Propriety in this regard does not mandate "bland or anemic" argument; trial counsel may be emphatic, forceful, blunt and passionate in addressing the legitimate concerns and objectives of sentencing. Edmonds, 36 M.J. at 792.

However, HN3[] arguments aimed at inflaming the passions or prejudices of the court members are clearly improper. United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983); ABA Standards for Criminal **[*7]** Justice, The Prosecution Function PP 5.8(c) and (d) (1986). [1] This dimension of advocacy improperly encourages the members to fashion their sentence not upon cool, calm consideration of the evidence and commonly accepted principles of sentencing, but upon blind outrage and visceral anguish. HN4[] It has been unequivocally established that arguments that ask the court members to place themselves in the position of the victim, or a near relative of the victim, are little more than improper invitations for the members "to cast aside the objective impartiality demanded of [them] as [court members] and judge the issue [of sentencing] from the perspective of personal interest." United States v. Shamberger, 1 M.J. 377, 379 (C.M.A. 1976)(trial counsel asked members to place themselves in the position of rape victim's husband, who was restrained and watched as his wife was repeatedly raped) *quoting* United States v. Wood, 18 U.S.C.M.A. 291, 296, 40 C.M.R. 3, 8 (1969)(trial counsel asked members to sentence accused from the perspective that their own sons had been the victims of indecent liberties by the accused). We are asked to decide whether the above referenced argument in this case **[*8]** falls into this unacceptable category of advocacy. We hold that it does not.

In our opinion, the argument made in this case is most analogous to that addressed in United States v. Edmonds, supra. In *Edmonds,* the accused and his co-conspirators assaulted and robbed a taxicab driver in his taxi. The taxicab driver was held down in the front seat of the car by Specialist Edmonds, while the other conspirators seized his wallet and ran. The evidence established that the driver was in fear for his life. During sentencing, trial counsel asked the members to:

> "Imagine [the taxi-cab **[*9]** driver's] fear as he hears another group of individuals coming up to the car to do who knows what to him. Punish the accused also, not only for the fear that [the victim] felt that night, but also for the force that must have been used to hold that frightened man down."

Edmonds, 36 M.J. at 792.

In ruling that this argument was permissible, the then Army Court of Military Review concluded that asking the members to imagine the victim's fear was substantially different from asking them to put themselves in the victim's place. Id. at 793. The Army Court reasoned that this brand of argument simply asks the members to consider victim impact evidence, which is clearly permissible. United States v. Holt, 33 M.J. 400, 408-09 (C.M.A. 1991); RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). [2] We agree, and similarly conclude that the argument by trial counsel in this case simply asked the members to imagine the fear, pain, and suffering that LCpl Guerrero went through on the night of his murder -- that is, to consider the impact that the actions of the appellant and his co-conspirators had on their victim. Such argument is permissible. **[*10]**

We evaluate trial counsel's argument in this case not in piecemeal fashion, but as a whole. In doing this, we can

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[1] These Standards state that "the prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury," and "the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

[2] In the Discussion to R.C.M. 1001(b)(4), it states, "Evidence in aggravation may include evidence of financial, social, ***psychological***, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused . . . ." (Emphasis added).

clearly discern the overall direction, tone, and theme of his approach. We are fully satisfied that the trial counsel's argument was not calculated to inflame the members' passions or possible prejudices. While he struck hard blows on occasion, trial counsel was unquestionably fair. We can discern no error, no abuse of discretion by the military judge, and no material prejudice to the substantial rights of the accused resulting from this argument. Art. 59(a), UCMJ. This assignment of error is without merit.

**Denial of Challenge for Cause**

In his second assignment of error, the appellant asserts that the military **[*11]** judge erred during the member selection process when he denied the appellant's challenge for cause against Major C. Appellant's Brief of 30 Sep 1998 at 5. Appellant alleges that Major C's responses to questions posed to him during voir dire clearly indicated that he harbored an "inelastic attitude towards sentencing" in this case. We disagree.

During voir dire, Major C made a number of comments concerning the appellant's offenses in which he expressed a "fundamental problem" he had with "Marines doing that to Marines." Record at 206. Major C also revealed a conversation he had with his wife after first learning of LCpl Guerrero's murder through media sources. In this conversation he expressed his general disbelief that "Marines would do this to Marines," and stated that, "if they did it they deserve similar [punishment]." *Id*. In explaining to the military judge what he meant by "similar punishment," Major C indicated he was referring to the death sentence or life in prison. Record at 208. The appellant contends that these statements reflected Major C's "inelastic attitude" in regard to fashioning an appropriate sentence in this case, and that the military judge should have **[*12]** granted the appellant's challenge for cause against this member.

HN5[] A military judge's decision to deny a challenge for cause will not be overturned absent a clear abuse of discretion in applying the "liberal-grant" mandate. *United States v. Giles, 48 M.J. 60 (1998)*; *United States v. McLaren, 38 M.J. 112, 118 (C.M.A. 1993)*; *United States v. White, 36 M.J. 284, 287 (C.M.A. 1993)*. Under the "liberal-grant" approach to challenges for cause in the military, a member should normally be excused if there is substantial doubt as to the legality, fairness, or impartiality of having that person sit as a member. R.C.M. 912(f)(1)(N). In deciding the propriety of a trial judge's denial of a challenge for cause, we give due deference to the trial judge who personally saw the member, heard his answers, and judged his demeanor.

HN6[] Harboring an inelastic opinion concerning an appropriate sentence would almost always be an appropriate grounds for challenging a member. R.C.M. 912(f)(1)(N), Discussion. As our Superior Court stated in *United States v. Davenport, 17 M.J. 242, 244 (C.M.A. 1984)*:

> What we have sought to guard against is a member who harbors such bias toward the crime **[*13]** that he, based upon the facts as they develop and the law as it is given by the military judge, cannot put his personal prejudices aside in order to arrive at a fair sentence for the accused.

However, a member who simply possesses an "unfavorable inclination toward an offense" is not automatically disqualified. *Giles, 48 M.J. at 63*. The test for an inelastic opinion toward sentence is that the member's bias will "not yield to the evidence presented and the judge's instructions." *McLaren, 38 M.J. at 118*; *Reynolds* (quoting *United States v. McGowan, 7 M.J. 205, 206 (C.M.A. 1979)*). Inelastic attitude toward sentencing involves an actual bias on the part of the member. *United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987)*; *Giles, 48 M.J. at 63* (Sullivan, J., dissenting); *United States v. Bannwarth, 36 M.J. 265, 268 (C.M.A. 1993)*; *Davenport, 17 M.J. at 245*.

We believe the following colloquy between the military judge and Major C belies the appellant's assertion that Major C harbored an inelastic opinion concerning an appropriate sentence in this case:

> MJ: Now with regard to this one comment that you may have made to your wife about Marines who **[*14]** would do this deserving similar punishment, I take that to be a reference to the death penalty.
> MBR: Well, either that or prison term, long -- life prison term.
> MJ: The main point I want you to understand, of course, is that in this case the penalty of death may not be imposed.
> MBR: Yes, sir.
> MJ: That will not be an authorized punishment in this case.
> MBR: Yes, sir.
> MJ: Does that cause you any personal difficulty with sitting as a member in this case?

MBR: No, sir.
MJ: Do you feel that simply because a penalty of death may not be imposed in this case, that therefore it would automatically be appropriate to instead substitute perhaps a lengthy period of confinement without regard to what the evidence in the case might actually show.

MBR: ***It obviously couldn't be without regard after our discussion just a few minutes ago. It would have to be in regard to all the facts.***
MJ: I'm sorry?
MBR: It would have to be in regard with all the facts.

MJ: Do you feel as you sit here now that you have some opinion about the type or amount of punishment that should be imposed in this case that would be so inflexible that you would **[*15]** not be able to listen to the evidence fairly and base your decision on the evidence in this case?
MBR: No sir.
. . . .
MJ: Will you be able to reserve your judgment as to what type or amount of punishment ought to be imposed in this case until after you've heard all the evidence?

MBR: ***Yes, sir.***
MJ: Now at the end of this case, after you go back to your deliberations, if the other members of the court feel that perhaps an especially severe punishment ought to be imposed, and you were of the view, after hearing all of the evidence, that perhaps a much more lenient punishment out [sic] to be imposed, would you be able to cast your vote on the basis of what you believe to be appropriate and not be influenced by the opinions of the others members?

MBR: ***I'm sure during the discussion and as the facts are exposed I would be able to provide my opinion, yes sir, even in spite of the fact that someone else may think more of a stringent punishment and mine is a lenient position. I could do that.***

MJ: Let me ask you this question. Suppose after the members close for deliberations and they come back and they adjudge a sentence, and then after **[*16]** you go back to your work section the sense you get is that other people consider that to be too lenient. Is that something you would fear in this case?

MBR: ***That would be their opinion. They hadn't sat through the facts. That wouldn't phase me at all.***
MJ: Do you feel, as you sit here now, any pressure from any source to impose any particular type of punishment, an especially lenient punishment or, for that matter, an especially severe punishment?

MBR: ***Feel pressured sir***
MJ: Yes.

MBR: ***No. sir.***
Record at 208-09, 218 (emphasis added).

We must decide this issue of alleged actual bias by examining all of the members' responses to the voir dire questions posed -- not isolated answers taken out of context. Doing so in this case convinces us that Major C was in no way predisposed towards any particular disposition in this case. His responses clearly indicated that, although he had strong feelings about "Marines doing that to Marines," he would conscientiously listen to all the evidence, follow the military judge's instructions, and fashion a sentence appropriate for the accused. We disagree with appellant's assertion **[*17]** that Major C was simply "parroting" responses to leading questions asked by the military judge. Indeed, we found his responses honest, thoughtful and reflective. We cannot discern from those responses, or from the entire record, any actual or implied bias on the part of this member. This assignment of error is without merit.

**Multiplicity**

In his third assignment of error, the appellant asserts that the military judge erred in failing to dismiss offenses that he found "multiplicious for sentencing." Appellant's brief of 30 Sep 1998 at 11. We agree.

The military judge ruled that specification 2 under Charge I (conspiracy to commit aggravated assault) was multiplicious with specification 1 of Charge I (conspiracy to commit robbery), and that the sole specification under Charge IV (aggravated assault) was multiplicious with the sole specification under Charge III (robbery). Record at 122. In this case, the military judge reasoned that the aggravated assault upon LCpl Guerrerro was the means by which the appellant and his co-conspirators ultimately robbed him of his automobile and its contents, and, therefore, the aggravated assault was a lesser included offense of the robbery. **[*18]** Record at 117-122; *see* MANUAL FOR COURTS-MARTIAL, UNITED

STATES (1998 ed.), Part IV, P 47d(4) and (5)(aggravated assault, a violation of Article 128, UCMJ, is a listed lesser included offense of robbery, a violation of Article 122, UCMJ); *United States v. Foster, 40 M.J. 140 (C.M.A. 1994)*.

Whether we agree with these determinations or not, the judge's ruling had a sound basis in law and became the "law of the case" absent plain error. *United States v. McKinley, 27 M.J. 78, 80 (C.M.A. 1988)*. We find no plain error.

Having made these determinations, the judge should have dismissed the multiplicious charge and specifications. ***HN7***[] Where the offenses are multiplicious, they are multiplicious for all purposes. *United States v. Oatney, 41 M.J. 619, 630 (N.M.Ct.Crim. App. 1994)* (en banc). Simply treating these offenses as "multiplicious for sentencing" is inadequate relief where the separate convictions clearly offend the Double Jeopardy principle outlined in *Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932)*; *Ball v. United States, 470 U.S. 856, 861-62, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985)*; *United States v. Savage 50 M.J. 244 (1999)*(unauthorized conviction has potential adverse collateral consequences **[*19]** that may not be ignored, and constitutes unauthorized punishment in and of itself)(citing *Ball v. United States, supra*); *United States v. Earle, 46 M.J. 823, 825 (A.F.Ct.Crim.App. 1997)*. We will grant relief in our decretal paragraph.

**Admission of Appellant's Confession**

The appellant's fourth assignment of error alleges that the military judge erred in admitting the appellant's confession to the Naval Criminal Investigative Service (NCIS) because its contents contradicted the stipulation of fact, Prosecution Exhibit 2, entered into between the Government and the appellant, referenced uncharged misconduct, and undermined the terms of the appellant's pretrial agreement. Appellant's Brief of 30 Sep 1998 at 13. We find this assertion completely without merit.

The fulcrum of the appellant's argument on this issue is the assertion that once the Government enters into a stipulation of fact, they are bound by that stipulation and may not present any evidence that contradicts it (i.e., evidence indicating that the appellant's role in the events at issue was greater than depicted in the stipulation). At issue specifically is that portion of appellant's confession that indicates **[*20]** he had prior knowledge of the fact that his co-conspirators were going to shoot LCpl Guerrero and dispose of the body. Appellant's Brief of 30 Sep 1998 at 14. [3] This information, he argues, would indicate prior knowledge of the murder, suggesting the appellant committed the greater offense of premeditated murder. He claims that putting this statement before the members injected "uncharged misconduct" (i.e., "premeditation") into the proceeding, effectively nullified the provision of his pretrial agreement that allowed him to plead guilty to unpremeditated murder vice premeditated murder, [4] and contradicted the stipulation of fact wherein he and the Government agreed that the offense he committed was unpremeditated murder. [5] We disagree.

**[*21]** ***HN8***[]

In a sentencing hearing, the trial counsel may present evidence as to any "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). The determination of whether evidence directly resulted from an offense is within the sound discretion of the military judge and his judgment will not be lightly overturned. *United States v. Wilson, 47 M.J. 152, 155 (1997)*.

The military judge correctly ruled that the information contained in Prosecution Exhibit 10, including the particular statement complained of, directly related to the offenses to which appellant was found guilty. Record

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[3] The specific language complained of in Prosecution Exhibit 10 is the appellant's statement that, "I was not supposed to be along when they disposed of the body or when they shot him, but ***I had knowledge they were going to do this***." Prosecution Exhibit 10 at 11, P 2 (emphasis added).

[4] *See* Appellate Exhibit 3, PP 11 and 13.

[5] The following provisions of Prosecution Exhibit 2 are germane:

> I agreed to help beat up LCpl Guerrerro and to steal his car stereo equipment. I did nothing to dissuade Pereira, Antle, or Soto from beating up LCpl Guerrerro. Also on the evening of 6 May 1996, Pereira, Antle, Soto and I discussed luring Guerrerro over to Pereira's house and beating him up while he was there.
>
> . . . .
>
> I believed that we would assault Guerrerro that night if he showed up at Pereiria's house, even to the extent that he would suffer great bodily harm, and that after the assault we would steal Guerrerro's car stereo equipment.

at 319. Appellant's statement that he had knowledge of the fact that his co-conspirators were planning to murder LCpl Guerrero did not establish premeditation, but was instead reasonably and directly related to the unpremeditated murder charge to which he pled guilty. R.C.M. 1001(b)(4). It highlighted the fact that appellant had knowledge of the murder plan. Moreover, the statement at issue did not establish "conspiracy to commit premeditated murder" on the part of appellant, or any similar misconduct. It did, however, show that **[*22]** the appellant was "less innocent" than he wanted the members to believe. If the appellant had knowledge of the planned murder the day prior to its occurrence, it certainly made his crime of unpremeditated murder more aggravated since he could have notified authorities and prevented the crime from happening. Even if it had been evidence of "uncharged misconduct," it would still have been admissible as it directly related to the offense of which the appellant was found guilty. *United States v. Wingart, 27 M.J. 128 (C.M.A. 1988)*. [6] Thus, appellant's self-created image of being an uninformed actor in LCpl Guerrero's grisly murder was squarely countered by his own admission. This was classic evidence in aggravation directly relating to the offenses of which the appellant was convicted.

**[*23]** A stipulation of fact sets the stage upon which a criminal trial is thereafter conducted, but it does not necessarily write the final act. We reject the appellant's contention that the Government's evidence in aggravation "contradicted" a binding stipulation of fact in violation of R.C.M. 811(e)(stipulation of fact is binding on the court-martial and may not be contradicted by the parties thereto). To adopt such a literal interpretation of R.C.M. 811(e) would produce absurd results. For example, the Government would never be able to go forward to prove a greater offense than that stipulated to by an accused. Additionally, a stipulation of fact could be used as a sword to sever from consideration by the sentencing authority clearly admissible aggravating circumstances surrounding an offense. This was clearly not the intent of the provision. ***HN9***[⬆] R.C.M. 1001(b)(4) evidence must be properly considered for admission on its own terms, not those subscribed within a stipulation of fact.

[6] Military Rule of Evidence 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), would, of course, still apply in this situation, and the military judge would be obliged to provide proper limiting instructions to the members for how such evidence could be considered by the members (e.g., as evidence of "rehabilitative potential").

The appellant's reliance on *Wingart, supra*, and *United States v. Gordon, 31 M.J. 30 (C.M.A. 1990)* is misplaced. Appellant's Brief of 30 Sep 1998 at 14-15. In *Wingart*, trial counsel offered photographic **[*24]** slides that contained evidence of an **unrelated** sexual assault on an underage girl, where Wingart had already pled guilty to indecent assault. Likewise, in *Gordon*, our Superior Court found that since Gordon was only convicted of negligent homicide, the Brigade Commander's opinion that Gordon's crime had an adverse impact on his soldiers' confidence in one another, was **not related** to the offense of which appellant was convicted. *Gordon, 31 M.J. at 36*. The remaining two cases on which appellant relies both dealt with offenses that were unrelated to the offenses of which each accused was found guilty. Appellant's Brief of 30 Sep 1998 at 15; *United States v. Cole, 29 M.J. 873, 876 (A.F.C.M.R. 1989)*(prejudicial error to elicit evidence of uncharged sodomy offense that had been dismissed pursuant to a pretrial agreement); *United States v. Kinman, 25 M.J. 99, 102 (C.M.A. 1987)*(prejudicial error to admit evidence of other uncharged sexual offenses). Hence, the cases on which appellant relies are clearly distinguishable from the facts in this case, which demonstrate that the evidence was directly related to the appellant's offenses. We find no abuse of discretion **[*25]** in the military judge's admission of this evidence.

Assuming *arguendo* that it was error to admit the disputed statement, we are fully convinced such error did not materially prejudice the substantial rights of appellant. Art. 59(a), UCMJ. ***HN10***[⬆] The test for prejudice in this situation seeks to discern whether the appellant's sentence was "greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985)*. Premeditated murder carries a mandatory minimum of life imprisonment. MCM, Part IV, P 43e(1). The mandatory minimum for conspiracy to commit premeditated murder is life imprisonment. *Id.* P5e. The maximum punishment appellant faced for his offenses included, *inter alia,* confinement for life, and trial counsel vigorously argued for that sentence. Record at 553 and 567. The members awarded appellant only 25 years of confinement. Record at 583. We are convinced that, if error occurred, it was harmless beyond a reasonable doubt. Art. 59(a), UCMJ. This assignment of error is without merit.

**Admission of Photos**

The appellant's final assignment of error challenges the propriety **[*26]** of the military judge's admission of three admittedly disturbing color photographs of LCpl Guerrero's badly decomposed corpse. Appellant's Brief of 30 Sep 1998 at 16-17; Prosecution Exhibits 11-13. He claims that it was an abuse of discretion for the military judge to admit these photographs as they were unduly prejudicial under Mil. R. Evid. 403. We disagree.

The three photographs in this case were clearly relevant evidence that the members could properly consider in aggravation. R.C.M. 1004(b)(4); *United States v. Burks, 36 M.J. 447, 453 (C.M.A. 1993)*. Each was offered for a specific and legitimate purpose. One photograph clearly depicts the manner in which LCpl Guerrero was extensively bound in duct tape prior to his murder. Prosecution Exhibit 11. The other two photographs show the entry and exit wounds of the bullet that killed LCpl Guerrero. Prosecution Exhibits 12 and 13. All three photos were taken during LCpl Guerrero's autopsy, and depict his body in as benign a manner as possible under the circumstances. They demonstrate better than words ever could the serious aggravating circumstances surrounding the appellant's offenses. While they do show the body in an advanced **[*27]** state of decomposition, and ravaged by significant predation, that fact alone does not render the photographs inadmissible. [7] *United States v. White, 23 M.J. 84, 88 (C.M.A. 1986)*.

We do not find these photographs unduly prejudicial **[*28]** to the appellant, and conclude that the military judge did not abuse his discretion in admitting them over defense objection. The judge conducted careful Mil. R. Evid. 403 balancing in deciding whether or not to admit these photographs. Record at 326-27. He specifically concluded that the photographs were relevant, not cumulative, and that their probative value was not outweighed by the danger of unfair prejudice to the appellant. *Id*. We find his logic extremely persuasive. This assignment of error is without merit.

**Conclusion**

Accordingly, Specification 2 under Charge I, and Charge IV and its sole specification are dismissed. No relief on sentence is warranted as the dismissed charges did not affect the maximum possible punishment, and were treated as "multiplicious for sentencing" by the military judge. The remaining findings and sentence as approved on review below are affirmed.

JOHN W. ROLPH

Senior Judges DORMAN and TROIDL concur.

CHARLES Wm. DORMAN

R.H. TROIDL

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[7] The military judge astutely noted in this regard that:

> While I appreciate the fact that the photographs show the condition of the body after it had reached an advanced stage of decomposition, surely when the body was thrown over the rail in that particular remote area, it was obvious to all parties, including the accused, that that is exactly the condition the body would be in in no small amount of time given the climate here in Hawaii and given the location in which [the] body was being disposed of. So under the circumstances, it seems to me that the willingness of the parties to dispose of the body in that manner itself is evidence of a certain heartlessness that the members may find relevant in fashioning an appropriate sentence in this case.

Record at 326.

**User Name:** Morgan CHRISTIE
**Date and Time:** Saturday, September 3, 2022 5:37:00 PM CDT
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## Document (1)

1. *United States v. Coble, 2017 CCA LEXIS 113*

**Client/Matter:** -None-
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| Cases | -None- |

# United States v. Coble

United States Navy-Marine Corps Court of Criminal Appeals

February 23, 2017, Decided

No. 201600130

**Reporter**
2017 CCA LEXIS 113 *

UNITED STATES OF AMERICA, Appellee v. RUSSELL A. COBLE, Lieutenant (O-3), U.S. Navy, Appellant

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

**Subsequent History:** Motion granted by *United States v. Coble, 76 M.J. 268, 2017 CAAF LEXIS 311 (C.A.A.F., Apr. 24, 2017)*

Review denied by *United States v. Coble, 2017 CAAF LEXIS 679 (C.A.A.F., July 10, 2017)*

**Prior History: [*1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Captain Robert J. Crow, JAGC, USN. Convening Authority: Commander, Navy Region Southeast, Jacksonville, Florida. Staff Judge Advocate's Recommendation: Commander Nell O. Evans, JAGC, USN.

## Core Terms

military, opinion testimony, prosecutorial misconduct, substantial rights, instructions, credibility, hotel, sexual assault, cumulative, instructor, misconduct, curative, rebuttal, sexual, sex, government's case, probative value, trial counsel, phone call, prejudicial

## Case Summary

**Overview**
HOLDINGS: [1]-A military judge did not err during a commissioned officer's trial on charges alleging that he violated a lawful general order, made a false official statement, and committed sexual assault on another officer ("victim"), in violation of UCMJ arts. 92, 107, and 120, 10 U.S.C.S. §§ 892, 907, and 920, when he allowed the officer's former commander to testify that the officer's character for truthfulness was "below" his expectations after the officer testified that the victim's conduct led him to believe she consented to sexual intercourse; [2]-The military judge took appropriate corrective action after trial counsel make objectionable arguments in his closing statements, and there was no material prejudice to the officer's rights which required that his convictions be set aside.

**Outcome**
The court affirmed the findings and sentence.

## LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Prosecutors

Military & Veterans Law > Military Justice > Counsel

*HN1*[] **Counsel, Prosecutors**

Prosecutorial misconduct occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual for Courts-Martial rule, or an applicable professional ethics canon.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

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

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

**HN2[] Plain Error, Definition of Plain Error**

Prosecutorial misconduct in the form of improper argument is a question of law reviewed de novo. When a proper objection is made at trial, the United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") will review a trial counsel's comments for prejudicial error. Unif. Code Mil. Justice art. 59, 10 U.S.C.S. § 859. The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. When there is no objection, the NMCCA reviews for plain error. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. Thus, regardless of whether an objection was made at trial, if prosecutorial misconduct is found, the NMCCA cannot reverse without a showing of prejudice to an appellant from the cumulative impact of any prosecutorial misconduct on the appellant's substantial rights and the fairness and integrity of his trial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

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

**HN3[] Trial Procedures, Arguments on Findings**

To determine whether a trial counsel's comments, taken as a whole, were so damaging that it cannot be confident the members of a court-martial convicted an appellant on the basis of the evidence alone, the United States Navy-Marine Corps Court of Criminal Appeals considers (1) the severity of the misconduct, (2) any curative measures taken, and (3) the strength of the Government's case. Indicators of severity include: (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument; (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge.

Military & Veterans Law > Military Justice > Counsel

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

**HN4[] Military Justice, Counsel**

Even in cases where the United States Navy-Marine Corps Court of Criminal Appeals concludes that prosecutorial misconduct occurred, relief is merited only if that misconduct actually impacted on a substantial right of an accused (i.e., resulted in prejudice).

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

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

**HN5[] Courts Martial, Court-Martial Member Panel**

Members of a court-martial are presumed to have complied with a military judge's curative instructions absent evidence to the contrary.

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

Military & Veterans Law > ... > Witnesses > Impeachment of Witnesses > Impeachment by Opinion & Reputation

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

**HN6[] Evidence, Evidentiary Rulings**

The United States Navy-Marine Corps Court of Criminal Appeals reviews the decision to admit opinion testimony for an abuse of discretion. Under Mil. R. Evid. 608(a), Manual Courts-Martial (2012 Supp.), a witness's credibility may be attacked or supported by testimony in the form of an opinion about that character. For a

witness to lay a proper foundation for opinion evidence, the proponent need show only that a character witness personally knows another witness and is acquainted with the witness well enough to have had an opportunity to form an opinion of the witness's character for truthfulness. Foundation does not exist where a witness's opinion is no more than a conclusory observation or bare assertion. This typically excludes the opinion of someone who never met the subject witness, or an opinion based on just one act.

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

Military & Veterans
Law > ... > Witnesses > Impeachment of Witnesses > Impeachment by Opinion & Reputation

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

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

Even if a witness has the requisite foundation to offer an opinion on another witness's character for truthfulness, the opinion testimony is still subject to Mil. R. Evid. 403, Manual Courts-Martial, and a military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. The Rule 403 balancing test is a rule of inclusion. A presumption of admissibility exists, since the burden is on the opponent to show why the evidence is inadmissible. When a military judge conducts a proper balancing test under Rule 403, the ruling will not be overturned unless there is a clear abuse of discretion. However, appellate courts give military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct Rule 403 balancing.

Military & Veterans
Law > ... > Witnesses > Impeachment of Witnesses > Impeachment by Opinion & Reputation

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

**HN8** **Impeachment of Witnesses, Impeachment by Opinion & Reputation**

Evidence directly probative of a witness's truthfulness is always relevant to the issue of credibility.

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

**HN9** **Relevance, Confusion, Prejudice & Waste of Time**

Evidence does not contravene Mil. R. Evid. 403, Manual Courts-Martial merely because it is highly prejudicial; it must be unfairly prejudicial.

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

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

**HN10** **Evidence, Evidentiary Rulings**

Where evidence is erroneously admitted, the United States Navy-Marine Corps Court of Criminal Appeals traditionally evaluates prejudice by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. The burden of demonstrating harmlessness rests with the Government.

**Counsel:** For Appellant: James S. Trieschmann, Jr., Esq.; Lieutenant Christopher C. McMahon, JAGC, USN.

For Appellee: Lieutenant Commander Jeremy R. Brooks, JAGC, USN; Lieutenant Robert J. Miller, JAGC, USN.

**Judges:** Before CAMPBELL, HUTCHISON, and JONES, Appellate Military Judges. Senior Judge CAMPBELL and Judge JONES concur.

**Opinion by:** HUTCHISON

## Opinion

HUTCHISON, Judge:

At a contested general court-martial, a panel of officers found the appellant guilty of one specification of violating a lawful general order, one specification of making a false official statement, and one specification of sexual assault, in violation of *Articles 92*, *107*, and *120*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 892*, *907*, and *920 (2012)*. The convening authority (CA) approved the adjudged sentence of a dismissal and three years' confinement.

The appellant asserts four assignments of error (AOEs), one of which was recently resolved by our superior court,[1] and another which we find wholly without **[*2]** merit.[2] The remaining AOEs are: (1) the trial counsel committed prosecutorial misconduct by repeatedly making objectionable arguments in his closing statements; and (2) the military judge erred in admitting opinion testimony from Commander (CDR) W that the appellant was untruthful. Having carefully considered the record of trial and the parties' submissions, we conclude the findings and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights. *Arts. 59(a)* and *66(c)*, UCMJ.

[1] "IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO INSTRUCT THE MEMBERS, IF, BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF THE CRIME CHARGED, YOU MUST FIND HIM GUILTY.'" Appellant's Brief of 12 Sep 2016, at 1. The Court of Appeals for the Armed Forces found no error in the use of the same challenged instruction in *United States v. McClour, 76 M.J. 23, No. 16-0455, 2017 CAAF LEXIS 51 (C.A.A.F. Jan. 24, 2017)*, and in accordance with that holding, we summarily reject the appellant's supplemental AOE here. *United States v. Clifton, 35 M.J. 79 (C.M.A. 1992)*; *see also* *United States v. Rendon, 75 M.J. 908, 916-17* (N-M. Ct. Crim. App. 2016), *rev. denied. 75 M.J. 908 (C.A.A.F. 2017)*.

[2] "CDR [W]'S PERSONAL PREJUDICE AGAINST LT COBLE COMPOUNDED THE PREJUDICIAL EFFECT OF THE PROSECUTION'S IMPROPER ARGUMENTS." Appellant's Brief at 2. This error was raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. "[C]ross-examination can be expected to expose" an opinion witness' "feelings of personal hostility towards the principal witness." *See* *United States v. Watson, 669 F.2d 1374, 1382 (11th Cir. 1982)* (citations and internal quotation marks omitted).

## I. Background

In September 2014, United States Coast Guard Ensign (ENS) H, a trainee pilot, reported to flight training at NAS Whiting Field, Florida. She met the appellant, an instructor pilot, while conducting her aircraft egress training. After learning that ENS H had served with a friend of his who was also a Coast Guard pilot, the appellant requested and was granted permission to serve as the "on-wing" instructor pilot for ENS H.[3] While serving as the "on-wing," the appellant and ENS H had sexually charged conversations that eventually escalated into phone sex and flirtatious behavior. While on a detachment to New Mexico, in January **[*3]** 2015, the appellant accompanied ENS H on her last training flight, replacing another instructor.[4] During the flight, ENS H and the appellant had another sexually charged conversation, and after landing, ENS H told the appellant they were "never having sex," to which the appellant replied, "I know."[5]

After both returned to their separate (but nearby) hotel billeting, the appellant, ENS H, and three other instructors went to dinner, where ENS H and the appellant consumed alcohol. Afterwards, the group returned to the lobby of the instructors' hotel and continued to drink. While seated next to ENS H, the appellant surreptitiously placed his room key on the table adjacent to where ENS H was seated. The appellant then, trying to conceal his invitation from the other instructors, texted ENS H and encouraged her to join him in his room. ENS H took the room key but responded to the text and declined the appellant's request.[6] Instead, ENS H returned to her room and changed into "underwear, sweatpants and a sports bra."[7] Shortly after ENS H departed, and while the

[3] Record at 358-59. An "on-wing" instructor pilot accompanies a trainee pilot through the roughly ten to twelve training flights that are required before the trainee can fly solo.

[4] *Id.* at 384. ENS H was originally scheduled to complete her last flight with another instructor, but ENS H spoke to the scheduling officer and specifically requested the appellant, since "he likes to take his on-wings out on their last flight[.]" *Id.*

[5] *Id.* at 386.

[6] *Id.* at 428-429. ENS H responded to the appellant's text with "you're nuts" and "what about your neighbor," referencing the fact that the appellant's commanding officer was in a room adjacent to the appellant's.

[7] *Id.* at 393.

appellant remained in the lobby of his hotel, he was informed by a hotel employee that there was an incoming telephone call for him **[*4]** on the hotel's phone. The appellant testified that the phone call came from ENS H; the employee that answered the phone testified that the caller identified herself as the appellant's wife, but noticed that the Caller ID indicated the call came from ENS H's hotel. ENS H testified that she did not remember making any call. After the appellant received the phone call he went directly to ENS H's room.

The appellant knocked on ENS H's door and kissed her when she opened it. She kissed him back, then, "realized what was going on, and . . . pushed him off," saying "we can't do this."[8] Though "hazy," ENS H then recalls the appellant being on top of her, holding her wrists down, and "squeezing them tightly," while "trying to insert his penis into [her] vagina"; while she said, "[n]o," the appellant persisted and started "laughing," saying "I didn't know how strong you were," and "[y]ou're such a tease."[9] Finally, ENS H "laid there, and . . . let him put his penis inside [her]" because she "couldn't fight him back anymore."[10] The next morning, ENS H made restricted reports of sexual assault to a Sexual Assault Response Coordinator and the squadron flight surgeon and went on emergency leave.

In February 2015, **[*5]** ENS H made a pretext phone call to the appellant which was recorded by Naval Criminal Investigative Service (NCIS).[11] During the call the appellant acknowledged that ENS H told him "no" and "stop" and was squirming, but reiterated that he thought she was being "playful."[12] The appellant asserted that at no time did he force ENS H, reminding her that "when you would say like, '[s]top,' I was like, '[h]ey if you want me to go, just—just tell me.'"[13] When ENS H asked the appellant why he pushed himself on her and why he held her wrists after "[she] kept saying '[n]o' and to 'think about [their] careers, think about [their] families,'"[14] the appellant responded:

> [ENS H], my story is not going to change . . . [I]t was a playful thing and I did say, "[h]ey if you want me to go, tell me," but you never once said . . . "[o]kay, I want you to leave."[15]

Finally, when asked by ENS H why he did not stop that night, the appellant answered, "I was under the impression that it was—that we were joking around and that it was like that you didn't want to, but you wanted to, and that's the impression I was on . . . ."[16]

Two days after the pretext telephone call, NCIS interviewed the appellant. He denied going to her hotel room and having sex with **[*6]** ENS H. The appellant repeated those denials even after the NCIS agent advised him that lying to an NCIS agent was a crime.

At trial, over defense objection,[17] CDR W, the

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[8] *Id.* at 394.

[9] *Id.* at 395.

[10] *Id.* at 398.

[11] Prosecution Exhibit 6. [Transcript of call is contained in PE 7].

[12] PE 7 at 7. During the call with the appellant, ENS H explained that she was "look[ing] into [his] eyes" and saying "[n]o," and that she was "not joking;" she reminded the appellant that he simply responded by saying "[w]ow you're so strong," and by holding her wrists and "squeeze[ing] them really tightly[.]" In response, the appellant answered "[w]ell, it's [be]cause I thought we were playing around, you know . . . and that's my honest to God" truth, and insisted that he had offered to leave if she wanted him to.

[13] *Id.* at 5. The appellant further explained to ENS H "[t]here was never one time that I was like literally. . . forcefully forcing myself on you, it was more of a playful whatever, and you were like, "[n]o, no," but I was like, "[l]ook, if you want me to go, I will go. . . .there was never a time that I was no—like no kidding, like okay, this is going to happen type thing, it was just like a playful whatever, you know[.]"

[14] *Id.* at 8.

[15] *Id.* at 9.

[16] *Id.* at 19.

[17] *Id.* at 624. In overruling the objection, the military judge explained:

> I'm going to permit the testimony. I mean I think it's a close call based on the foundational nature, and I find it a little bit heightened in that it's coming from a former Commanding Officer in this case. However, I also find that, as the government just argued, it's apparent that the Commander has well thought out his rationale that forms his opinion, and defense, I think you did a very good job cross-examining and/or impeaching that opinion on the specific instances if you choose to go there, that's obviously a defense choice. The government cannot go there unless the defense chooses to do so, so based upon his interactions, I do find that he does have a sufficient foundation, even though based primarily upon two incidents which again I think he'll concede that he's

appellant's Commanding Officer (CO) at the time of the allegations, testified as a government rebuttal witness that in his opinion, the appellant's "character for truthfulness" was "[b]elow [his] expectations."[18]

During the government's closing argument, the trial counsel (TC) made a number of arguments that the appellant now claims were improper. On four occasions, trial defense counsel (TDC) raised a timely objection to TC's argument, and the military judge sustained each objection.[19] Other times, however, TDC raised no objections, and the appellant alleges error for the first time on appeal.[20]

## II. Discussion

### A. Allegations of prosecutorial misconduct

*HN1*[↑] "Prosecutorial misconduct occurs when trial counsel overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Hornback, 73 M.J. 155, 159 (C.A.A.F. 2014)* (citations and internal quotation marks omitted). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)* (citing *Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)*).

*HN2*[↑] Prosecutorial misconduct in the form of improper argument is a question of law reviewed *de novo*. *United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)* (citing *United States v. Marsh, 70 M.J. 101, 106 (C.A.A.F. 2011)*. When a proper objection is made at trial, we will review those comments for prejudicial error. *United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)* (citing *Art. 59*, **[*8]** UCMJ). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)*. When there is no objection, we review for plain error. *United States v. Rodriguez, 60 M.J. 87, 88 (C.A.A.F. 2004)*. "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Fletcher, 62 M.J. at 179* (citation omitted). Thus, regardless of whether an objection was made at trial, if prosecutorial misconduct is found, we cannot reverse without a showing of prejudice to the appellant from "the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Id. at 184* (citation omitted). *HN3*[↑] To determine whether the TC's comments, taken as a whole, were "so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone[,]" we consider: (1) the severity of the misconduct, (2) any curative measures taken, and (3) the strength of the government's case. *Id.*

> Indicators of severity include (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct **[*9]** was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge."

*Id.* (citation omitted).

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> not positive they were actually lies, but I'm going **[*7]** to permit the testimony. *Id.*

[18] *Id.* at 627.

[19] *Id.* at 669 (objecting to trial counsel's "personal attacks"); *id.* (objecting to trial counsel's characterization of CDR W's testimony); *id.* at 688 (objecting to trial counsel's argument that the military judge did not instruct the members on any "magic words defense"); *id.* at 703-04 (objecting to trial counsel's statement, "[i]f you don't believe [the appellant], they've got a problem," as an improper burden shift).

[20] Appellant's Brief at 16 (alleging trial counsel personally vouched for the credibility of witnesses when he "offered substantive commentary on the truth or falsity of the evidence," and improperly inserted himself into the proceedings by using personal pronouns); *id.* at 18 (alleging as improper trial counsel's argument that the appellant "clearly cannot deal with the truth about himself"); *id.* (alleging trial counsel intentionally "inflame[d] the passions of the jury" by mischaracterizing testimony regarding a second sexual encounter between the appellant and ENS H). We have reviewed these instances raised by the appellant for the first time on appeal, and find no plain or obvious error. *See United States v. Tanksley, 7 M.J. 573, 579 (A.C.M.R. 1979)*, *aff'd*, ***10 M.J. 180 (C.M.A. 1980)*** (finding "that the trial counsel's" use of "personal pronoun[s]" was "within the bounds of propriety," and that his "alleged expressions of personal opinion as to the guilt of the appellant" were "merely deductions from the evidence properly adduced at trial and incorporated in his argument that the Government had met its burden of proof").

Citing several instances in the record, the appellant argues that the trial counsel committed prosecutorial misconduct during his closing and rebuttal arguments by personally vouching for the credibility of witnesses, making disparaging remarks about the appellant, arguing facts not in evidence, improperly instructing the members, and shifting the burden to the appellant.[21]

We are not compelled to address every comment of TC here, because, as noted *supra*, ***HN4***[] "[e]ven were we to conclude that prosecutorial misconduct occurred, relief is merited only if that misconduct 'actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice).'" *United States v. Pabelona, 76 M.J. 9, No. 16-0214, 2017 CAAF LEXIS 58, at *5 (C.A.A.F. Feb. 1, 2017)* (quoting *Fletcher, 62 M.J. at 178*). Here, we find no such material prejudice to the appellant's substantial right to a fair trial.

*1. Severity of misconduct*. The severity of the TC's actions was low and did not permeate the trial. Rather, the TC's statements cited by the appellant are **[*10]** isolated comments within a summation and rebuttal totaling over 30 pages. Moreover, to the extent trial counsel's argument was improper—if at all—it resulted from his inartful attempt to "forcefully assert reasonable inferences from the evidence." *Cristini v. McKee, 526 F.3d 888, 901 (6th Cir. 2008)*. For instance, in attempting to draw a comparison between telling the truth regarding trivial or unimportant matters and telling the truth when there are consequences, the TC stated, "even pathological liars probably tell the truth most of the time when it doesn't matter."[22] While the appellant alleges that this was a personal attack, the military judge sustained the objection, reminding the TC to "keep it to evidence in the case."[23] The members deliberated for approximately 90 minutes on essentially a single specification of sexual assault, where the only issue substantially contested was whether ENS H consented to the sexual encounter with the appellant.[24] In response to defense objections, the military judge corrected the trial counsel—who abided by the military judge's direction—and provided curative instructions.

*2. Curative measures taken*. The military judge sustained each of TDC's objections and issued a curative instruction where appropriate, **[*11]** specifically directing the members to disregard portions of TC's argument.[25] ***HN5***[] Members are presumed to have complied with a military judge's curative instructions absent evidence to the contrary. *United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990)*. Besides the curative instructions, the military judge instructed the members that the arguments of counsel are not evidence, that they must base their decision on the evidence as they remember it, and to disregard any comments of counsel that conflict with the judge's instructions,[26] and reminded the members of their exclusive duty to determine witness credibility.[27] Therefore, any concern that the TC's arguments improperly influenced the members was adequately addressed by the military judge. *See United States v. Tanksley, 7 M.J. 573, 579 (A.C.M.R. 1979)*, *aff'd*, *10 M.J. 180 (C.A.A.F. 1980)* ("[A]ny possible ambiguities in the [TC]'s argument that may possibly have been construed as personal opinion were adequately offset by the trial judge's instructions on findings to the effect that counsel's arguments are not evidence and the court members are not to give them any further credence or attach to them any more importance than the court members' own recollections of the evidence compel.").

*3. Strength of the government's case*. The government's case, although primarily based upon **[*12]** the testimony of ENS H, was reasonably strong when taken as a whole. ENS H reported the assault the same day it occurred and testified credibly and consistently. The appellant, on the other hand, initially corroborated many of the details surrounding the sexual assault during the pretext phone call, then wholly denied any sexual encounter when interrogated. Given this evidence, we

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[21] Appellant's Brief at 16-21.

[22] Record at 669.

[23] *Id.*

[24] Although the appellant pleaded not guilty to the *Articles 92* and *107, UCMJ*, offenses, trial defense counsel conceded the appellant's guilt in his opening statement and closing argument, deciding instead to focus on the more serious *Article 120*, UCMJ charge.

[25] *E.g.*, Record at 692; *id.* at 703-04 ("MJ: . . . No shifting of the burden of proof. Disregard the last statement of trial counsel."). *See United States v. Mason, 59 M.J. 416, 424-25 (C.A.A.F. 2004)* (holding that an isolated comment "improperly impl[ying] that the burden of proof had shifted to" the appellant, was harmless beyond a reasonable doubt because the military judge had properly instructed the members that the burden of proof was on the government).

[26] *Id.* at 663.

[27] *Id.* at 658.

are confident in the members' ability to adhere to the military judge's instructions and to put counsel's arguments in their proper context. We are equally confident that the members convicted the appellant on the basis of the evidence alone.

**B. Testimony of CDR W**

The appellant avers that CDR W's opinion testimony both "lacked sufficient foundation" and that its "probative value was substantially outweigh[ed] by its highly prejudicial effect."[28] We disagree as to both claims.

*1. Foundation*

***HN6***[] We review the decision to admit opinion testimony for an abuse of discretion. *United States v. Goldwire, 55 M.J. 139, 142 (C.A.A.F. 2001)*. Under MILITARY RULE OF EVIDENCE 608(A), SUPPLEMENT FOR THE MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), "[a] witness's credibility may be attacked or supported by . . . testimony in the form of an opinion about that character." For a witness "to lay a proper foundation for opinion evidence, **[*13]** the proponent" need show only "that the character witness personally knows the witness and is acquainted with the witness well enough to have had an opportunity to form an opinion of the witness' character for truthfulness." *United States v. Toro, 37 M.J. 313, 317 (C.M.A. 1993)*.[29] Foundation does not exist where a witness' opinion is "no more than a conclusory observation" or "bare assertion." *United States v. Turning Bear, 357 F.3d 730, 734 (8th Cir. 2004)* (citations and internal quotation marks omitted). This typically excludes the opinion of someone who never met the subject witness,[30] or an opinion based on just one act.[31]

Here, CDR W testified to *personally* knowing the appellant since becoming the squadron's executive officer (XO) in June of 2013; that, he remained the appellant's XO and then later CO until relinquishing command in October 2015; that he *saw* the appellant "three to four times throughout the course of a normal work week;" and that he supervised the appellant's collateral duty of ground safety officer.[32]

Prior to CDR W's testimony, the TDC objected on the grounds of foundation. In an *Article 39(a)*, UCMJ, session, CDR W stated his negative opinion of the appellant's character for truthfulness stemmed from two aircraft safety issues—use of unauthorized gear in the aircraft and **[*14]** a hard landing where the tail of the aircraft struck the ground—where CDR W believed the appellant was less than truthful in explaining the incidents. In neither instance was CDR W sure that the appellant had lied to him.[33] Even if, as the appellant claims, these two instances did not "articulate a concrete example of why [CDR W] thought [the appellant] was untruthful,"[34] the nature and quality of these two specific acts does not determine whether CDR W meets the foundational requirements to offer an opinion.[35] Rather, the fact that CDR W's testimony might have been based solely on these two incidents goes to the weight such opinion evidence should be

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[28] Appellant's Brief at 24.

[29] *See* *Goldwire, 55 M.J. at 144-45* (finding no abuse of discretion in the admission of a first sergeant's opinion as to Goldwire's truthfulness, because he had seen the "appellant numerous times, both before and after the date of the offense, and was personally involved with . . . disciplinary actions against [the] appellant" for uncharged misconduct); *United States v. Turning Bear, 357 F.3d 730, 734 (8th Cir. 2004)* (finding daily contact over four to six months to be sufficient foundation for a witness to offer an opinion on the subject witnesses' character for truthfulness).

[30] *See* *United States v. Whitmore, 359 F.3d 609, 617-18, 360 U.S. App. D.C. 257 (D.C. Cir. 2004)* (excluding the opinion of a reporter that a law enforcement officer was untruthful, where the reporter had never met the law enforcement officer).

[31] *See* *United States v. McElhaney, 54 M.J. 120, 127 (C.A.A.F. 2000)* (upholding the military judge's decision to exclude a witness' testimony on the "victim's character for untruthfulness" based on an allegedly false rape allegation, because witness had "insufficient foundation for an opinion as to [victim's] truthfulness").

[32] Record at 524, 607-08, 613.

[33] *Id.* at 614 ("I don't know whether he used it in flight or not . . ."); *id.* at 610 (noting that the appellant's description of the events leading up to the tail strike landing "[wa]s possible").

[34] Appellant's Brief at 28.

[35] *See* *Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 895 A.2d 405, 421-22 (N.J. 2006)* (noting that although the opinion witness "may have considered" specific "instances of [the subject witness'] misconduct" in formulating an opinion on the subject witness' character for truthfulness, this "d[id] not render the . . . opinion . . . evidence inadmissible").

given, not to its admissibility.[36] After all, "cross-examination can be expected . . . to reveal reliance" of the opinion witness "on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principal witness," or to "expose defects of lack of familiarity." *United States v. Watson, 669 F.2d 1374, 1382 (11th Cir. 1982)*.

Given that CDR W personally knew the appellant, saw him three to four times per week for over two years, served as both his XO and CO, and directly supervised his collateral duty performance, the military judge did not abuse his **[*15]** discretion in finding adequate foundation for CDR W to give opinion testimony.

*2. MIL. R. EVID. 403*

***HN7***[↑] Even if a witness has the requisite foundation to offer an opinion on the subject witness' character for truthfulness, the opinion testimony is still subject to MIL. R. EVID. 403.[37] "The military judge may exclude relevant evidence if its probative value is *substantially outweighed* by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." MIL. R. EVID. 403 (emphasis added). The MIL. R. EVID. 403 balancing test "is a rule of inclusion." *United States v. Banker, 60 M.J. 216, 223 (C.A.A.F. 2004)*. "[A] presumption of admissibility exists[,] since the burden is on the opponent to show why the evidence is inadmissible." *Id.*

Here, TDC objected to CDR W's opinion testimony not only on foundational grounds,[38] but also because it was "cumulative evidence and a waste of the members' time."[39] "When a military judge conducts a proper balancing test under MIL. R. EVID. 403, the ruling will not be overturned unless there is a clear abuse of discretion." *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)* (citation and internal quotation marks omitted). However, appellate courts give "military judges less deference if they fail to articulate their balancing **[*16]** analysis on the record, and no deference if they fail to conduct the Rule 403 balancing[.]" *Id.* (citation omitted).

Since the military judge's ruling here did not directly address the MIL. R. EVID. 403 aspects of trial defense counsel's objection,[40] we will examine the record ourselves.[41] The appellant argues that "the strength of proof" or probative value "underlying [CDR W's] testimony was minimal," compared to "the highly prejudicial influence the testimony of an accused's commander is likely to have over the members."[42] We disagree. After the appellant testified to a different

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[36] *See* *Goldwire, 55 M.J. at 141* (agreeing with military judge's admission of a first sergeant's opinion testimony, formed from a single incident of dishonesty, where the military judge instructed the members to "consider that fact in determining the weight you'll accord [his] opinion.").

[37] *See* *United States v. Luce, 17 M.J. 754, 756 (A.C.M.R. 1984)* (agreeing with a military judge's determination to exclude testimony regarding a witness' truthfulness potentially "admissible in rebuttal under [MIL. R. EVID.] 608(a)," because it was "of minimal probative value" under "Mil. R. Evid. 403").

[38] Record at 604-05 ("DC: . . . . We don't believe [CDR W] has a strong foundation to give an opinion of character for untruthfulness . . . ."); *Id.* at 619 ("DC: . . .We[]. . . retain our objection. . . I just don't believe we have the foundation.").

[39] *Id.* at 623 ("DC: . . . [W]e don't think this witness adds anything. . . . [T]he defense has already acknowledged that [the appellant] did lie so . . . we just find this is kind of *cumulative evidence and a waste of the members' time*.") (emphasis added). Accordingly, we do not agree with the appellee's contention that the appellant's "[f]ailure to object to the admission of the evidence at trial under MIL. R. EVID. 403 forfeit[ed] appellate review of the issue absent plain error." Appellee's Brief of 12 Dec 2016 at 39 (citation omitted).

[40] *See supra*, note 17. The military judge may have alluded to one of the MIL. R. EVID. 403 factors in his ruling. *See* Record at 624 ("I'm going to permit the testimony. I mean I think it's a close call based on the foundational nature, and *I find it a little bit heightened* in that it's coming from a former Commanding Officer in this case.") (emphasis added). "It," may be a reference to the potential for unfair prejudice, but the reference is too equivocal to receive deference under *Manns*.

[41] *Manns, 54 M.J. at 166*; *see also* *Gov't of the V.I. v. Archibald, 987 F.2d 180, 186, 28 V.I. 228 (3rd Cir. 1993)* ("Where . . . the trial judge fails to perform the required balancing and to explain the grounds for denying a Rule 403 objection, we may undertake to examine the record ourselves[.]") (citation omitted).

[42] Appellant's Brief at 28. We note that ***HN9***[↑] evidence does not contravene MIL. R. EVID. 403 merely because it is *highly* prejudicial, it must be *unfairly* prejudicial. *See* *United States v. Abel, 469 U.S. 45, 54-55, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984)* (finding "no abuse of discretion under Rule 403 in admitting" testimony about Abel's gang affiliations under instructions which "did not prevent *all* prejudice" to him, as this "did not unduly prejudice" Abel).

version of events than ENS H, evidence regarding his character for truthfulness was both relevant and highly probative. *See* United States v. Stavely, 33 M.J. 92, 94 (C.M.A. 1991) (noting that **HN8**[↑] evidence directly probative of a witness's truthfulness is always relevant to the issue of credibility). On the other hand, we have no concerns that CDR W's opinion was "cumulative evidence."[43] Rather, as TC argued, the appellant's character for truthfulness and the "one specific lie" to NCIS, are "two different things" which are not cumulative.[44] Nor was CDR W's testimony "a waste of the members' time."[45] He testified briefly in rebuttal, solely on his opinion **[*17]** of the appellant's character for truthfulness. Finally, the appellant has cited no authority—and we have found none—to support his contention that CDR W's opinion testimony, by virtue of his position alone, was unfairly prejudicial. Consequently, we hold that the probative value of CDR W's opinion testimony was not substantially outweighed by the danger of unfair prejudice.

Even assuming *arguendo* that the probative value of CDR W's testimony was substantially outweighed by the danger of unfair prejudice, or a waste of time, or cumulative, we find the admission of his opinion testimony harmless. **HN10**[↑] Where evidence is erroneously admitted, we traditionally evaluate prejudice "by weighing (1) the strength of the [g]overnment's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Byrd, 60 M.J. 4, 10 (C.A.A.F. 2004) (citation and internal quotation marks omitted). "The burden of demonstrating harmlessness rests with the Government." *Id.* (citation omitted) (finding that the government "easily carrie[d] this burden" to show that the erroneous admission of lay opinion testimony on the **[*18]** meaning of past statements by the appellant was harmless); *see also* United States v. Baumann, 54 M.J. 100, 105 (C.A.A.F. 2000) (finding no material prejudice to the appellant's substantial rights from the admission of evidence contrary to MIL. R. EVID. 403 where "the prosecution presented an overwhelming case based on the unequivocal testimony of the victim, which was substantially corroborated by the appellant's pretrial statement acknowledging the occurrence of most of the charged acts").

Opinion evidence from CDR W was material; as noted *supra*, it was the only testimony he offered to the members and was admitted in the government's rebuttal case after the appellant testified.[46] However, CDR W's opinion testimony was not a focal point of the case. During the government's lengthy closing argument, TC devoted only a few sentences to CDR W's testimony.[47] In the larger context of the government's case, CDR W's opinion testimony concerning the appellant's character for truthfulness was far less significant than other evidence produced at trial. Moreover, the government's case was strong relative to the defense case. ENS H reported that the appellant had sexually assaulted her the same day as the sexual encounter, and she testified consistently and credibly to the **[*19]** appellant's actions of holding her wrists and having sexual intercourse with her after she said "no." The appellant's defense that the sex was consensual (and his credibility), was undermined by his denial to the NCIS agent that he had sex with ENS H, as well as by the recorded, pretext phone call with ENS H in which the appellant failed to deny most of the details later raised by ENS H at trial. As in Baumann, the appellant acceded to most of the complaining witness' testimony regarding the conduct at issue: the appellant acknowledged ENS H had resisted him, that she was "squir[ming]—you know, like messing around" while he had sex with her, notwithstanding his unreasonable assumption she was "playing."[48]

Finally, the military judge properly instructed the members on the purpose for which they could use the opinion evidence from CDR W.[49] *See* Baumann, 54 M.J. at 105 (C.A.A.F. 2000) (finding no prejudice from erroneous admission of testimony, where military judge

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[43] Record at 623.

[44] *Id.* at 622.

[45] *Id.* at 623.

[46] *Cf.* Byrd, 60 M.J. at 10 (noting that the witness' "inadmissible testimony" on the meaning of past statements by the appellant "was of limited materiality," as "[o]ther aspects of her testimony concerning Appellant's admissions and a request from Appellant to destroy evidence were, if believed, far more damaging to the defense").

[47] Record at 669-70. *See* Byrd, 60 M.J. at 10 (noting that the witness' inadmissible testimony was not "a focal point of the case," as "during his closing argument to the members, the trial counsel emphasized not [the witness'] interpretation" of the appellant's statements, but the statements "themselves" and the appellant's "testimony about the[m]").

[48] PE 7 at 9.

[49] Record at 660 ("Evidence has been received as to the accused's character for truthfulness. You may consider this evidence in determining the accused's believability.").

properly instructed the members). The appellant also had the opportunity to mitigate any prejudice from the admission of CDR W's opinion by cross-examining him to show "isolated or irrelevant" bases for any "personal hostility" towards the appellant. *Watson, 669 F.2d at 1382*.[50] In fact, the appellant **[*20]** did effectively cross-examine CDR W about his positive evaluation of the appellant's character in a fitness report. Thus, we are convinced that CDR W's opinion testimony, even if admitted in error, did not materially prejudice the appellant.

### III. CONCLUSION

The findings and sentence, as approved by the CA, are affirmed.

Senior Judge CAMPBELL and Judge JONES concur.

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[50] *See also United States v. Clark, 12 M.J. 978, 978-80 (A.F.C.M.R. 1982)* (finding no prejudice from the admission of a law enforcement officer's opinion evidence that the appellant was untruthful, as "it is seldom reversible error to admit opinion evidence . . . since its foundation is open to cross-examination"); *Woods v. Beavers, No. 90-3338, 1991 U.S. App. LEXIS 180, at *4*, unpublished op. (6th Cir. Jan. 3, 1991) (per curiam) ("The . . . objection ignores the fact that the [witness] could have been and was cross-examined concerning the basis of his opinion. Any risk of unfair prejudice was mitigated by this opportunity to cross-examine.").

**User Name:** Morgan CHRISTIE
**Date and Time:** Saturday, September 3, 2022 5:39:00 PM CDT
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1. *United States v. Gulley, 1995 CCA LEXIS 495*
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# United States v. Gulley

United States Navy-Marine Corps Court of Criminal Appeals

September 27, 1995, Decided

NMCM 94 00626

**Reporter**
1995 CCA LEXIS 495 *; 1995 WL 935043

UNITED STATES v. Kenny R. GULLEY, 430-47-0200 Mess Management Specialist Third Class (E-4), U.S. Navy

**Notice: [*1]** AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

**Prior History:** Sentence adjudged 13 July 1993. Military Judge: D.P. Holcombe. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan, FPO AP 96349-0051.

**Disposition:** Findings of guilty and the sentence approved on review below affirmed, except for the finding of guilty of Charge IV and its specification. Charge IV and its specification dismissed.

## Core Terms

sentence, military, instructions, messages, assigned error, waived, argument of counsel, defense counsel, send a message, plain error, German, sexual

## Case Summary

**Procedural Posture**
Appellant, a member of the United States Navy, challenged a judgment from a general court-martial, convened by the Commander, U.S. Naval Forces, Japan, that convicted him on a four-count indictment for having sexual relations with a 13-year old female and for indecent acts with a person under the age of 16.

**Overview**
The court rejected appellant's claim that the military judge erred by not giving a curative instruction to the court members regarding trial counsel's argument at sentencing that referred to the importance of "sending a clear message" to the civilian community that appellant's conduct was "wrong." The court ruled that, by not objecting at trial, appellant waived the issue on appeal and that, even if the error was not waived, when trial counsel's argument was considered in its entirety, the comment was minor and peripheral. The court then rejected appellant's claim that he was improperly denied the ability to present evidence of the victim's appearance and mature conduct, ruling that the record established that appellant had the opportunity to present such evidence. There was no error in not permitting appellant to introduce evidence that the girl dated sailors and regularly smoked and drank alcohol. The court agreed with the government that the military judge erred by not dismissing appellant's conviction of indecent acts with a person under 16 because such a charge was a lesser-included offense of carnal knowledge, under Part IV, Para. 45d(2)(a), Manual for Courts-Martial (1984).

**Outcome**
The court affirmed the findings of guilty and the sentence imposed on appellant's convictions, except for the finding of guilty of indecent acts with a person under 16 and its specification. The court dismissed that charge and its specification.

## LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > Objections

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

**HN1** **Standards of Review, Plain Error**

Failure to object to error in sentencing argument before the military judge begins to instruct the members on sentencing will waive the error unless it amounts to plain error.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Criminal Law & Procedure > Trials > Jury Instructions > Curative Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > Curative Instructions

Military & Veterans Law > ... > Trial Procedures > Instructions > Objections

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

**HN2** **Sentences, Deliberations, Instructions & Voting**

In the absence of plain error trial defense counsel's broadside oral request for "an instruction regarding the proper argument of messages being sent by a sentence," made after the military judge finished his instructions, is not the functional equivalent of an objection during or after the trial counsel's argument. Thus, where there was no timely objection to the trial counsel's argument, any error concerning the argument was waived and a curative instruction was not required.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Military & Veterans Law > ... > Courts Martial > Motions > Appropriate Relief

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

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

**HN3** **Standards of Review, Abuse of Discretion**

While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give. The test to determine if denial of a requested instruction constitutes error is whether: (1) the charge is correct; (2) it is not substantially covered in the main charge; and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation. The United States Nay-Marine Corps Court of Criminal Appeals reviews the military judge's refusal to give a defense-requested instruction under an abuse-of-discretion standard of review.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Military & Veterans Law > Military Justice > General Overview

Criminal Law & Procedure > Sentencing > Appeals > General Overview

**HN4** **Postconviction Proceedings, Clemency**

The distinction between a review of sentence appropriateness and consideration of clemency matters is significant: Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy -- treating an accused with less rigor than he deserves. Congress has assigned the United States Nay-Marine Corps Court of Criminal Appeals only the task of determining sentence appropriateness. It has placed the responsibility for clemency in other hands (e.g., the convening authority's). Generally, sentence appropriateness should be judged by individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Military & Veterans Law > Military Offenses > Lesser Included Offenses

Military & Veterans Law > Military Justice > General Overview

**HN5** **Harmless & Invited Error, Jury Instructions**

The crime of indecent acts with a person under 16 is a lesser-included offense of carnal knowledge. Part IV, Para. 45d(2)(a), Manual for Courts-Martial (1984).

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

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

Criminal Law & Procedure > Juries & Jurors > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

**HN6** **Plain Error, Definition of Plain Error**

The absence of one of the eight assigned members of the court-martial is error, but not plain error. The failure to raise an objection at trial waives the issue on appeal.

**Counsel:** LCDR ERIC C. PRICE, JAGC, USN, Appellate Defense Counsel.

LT JOHN R. LIVINGSTON Jr., JAGC, USN, Appellate Government Counsel.

**Judges:** BEFORE DAVID C. LARSON, EDWIN W. WELCH, J.E. DOMBROSKI. Chief Judge LARSON and Judge DOMBROSKI concur.

**Opinion by:** EDWIN W. WELCH

## Opinion

WELCH, Senior Judge:

Based on our examination of the record of trial, the appellant's assignments of error, [1] and the

[1] I. THE MILITARY JUDGE ERRED BY FAILING TO PROVIDE A CURATIVE INSTRUCTION TO THE COURT-MARTIAL MEMBERS ON THE PORTION OF TRIAL COUNSEL'S SENTENCING ARGUMENT REFERRING TO THE IMPORTANCE OF SENDING A CLEAR MESSAGE TO THE LOCAL CIVILIAN COMMUNITY. II. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY PROHIBITING THE INTRODUCTION OF EVIDENCE RELATED TO MISS [P]'S PUBLIC CONDUCT,

Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights was committed. We comment briefly on the assignments of error.

**[*2] Assignment of Error I**

We base our conclusion that this assignment of error is without merit on alternative grounds.

We conclude that the appellant waived any error relating to the trial counsel's argument by failing to make a timely objection. ***HN1***[⬆] "Failure to object to error in sentencing argument before the military judge begins to instruct the members on sentencing will waive the error unless it amounts to plain error." *United States v. Turner, 30 M.J. 1183, 1188 (A.F.C.M.R. 1990)*(citing *United States v. McPhaul, 22 M.J. 808* (A.C.M.R.), *pet. denied 23 M.J. 266 (C.M.A. 1986)*; Rule for Courts-Martial [R.C.M.] 1001(g)). *See also United States v. Commander, 39 M.J. 972, 978 (A.F.C.M.R. 1994)*. In the appellant's case, no objection was voiced by the trial defense counsel prior to instructions on sentencing. Indeed, prior to the instructions, the trial defense counsel chose to end his presentencing argument by focusing attention on the "send a message" theme by arguing that "there are a lot of messages you need to consider, but perhaps the most important is the message to Petty Officer Gulley, and how much a message is necessary?" Record at 177. Stated otherwise, **[*3]** ***HN2***[⬆] in the absence of plain error -- and there is no plain error in this case -- we do not consider the trial defense counsel's broadside oral request for "an instruction regarding the proper argument of messages being sent by a sentence," made after the military judge finished his instructions, Record at 182, to be the functional equivalent of an objection during or after the trial counsel's argument. Thus, because there was no timely objection to the trial counsel's argument, any error concerning the argument was waived and a curative instruction was not required.

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THUS DEPRIVING APPELLANT OF SIGNIFICANT EVIDENCE IN EXTENUATION AND MITIGATION. III. A SENTENCE INCLUDING ONE YEAR CONFINEMENT, TOTAL FORFEITURES AND AN UNSUSPENDED BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE IN LIGHT OF APPELLANT'S PLEAS OF GUILTY, THE CIRCUMSTANCES SURROUNDING APPELLANT'S OFFENSES, AND APPELLANT'S PRIOR SERVICE.IV. THE COURT-MARTIAL LACKED JURISDICTION TO TRY APPELLANT IN VIEW OF THE UNEXPLAINED ABSENCE OF A PANEL MEMBER.

Alternatively, assuming *arguendo* that the alleged error was not waived, we find that the military judge did not abuse his discretion when he denied the trial defense counsel's request for an instruction "regarding the proper argument of messages being sent by a sentence." Record at 182. *United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993)*, provides applicable guidance:

> ***HN3***[⬆] While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give. *United States v. Smith, 34 M.J. 200 (C.M.A. 1992)*; R.C.M. 920(c), Discussion. **[*4]** The test to determine if denial of a requested instruction constitutes error is whether (1) the charge is correct; (2) "it is not substantially covered in the main charge"; and (3) "it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation." *United States v. Winborn*, 14 [C.M.A.] 277, 282, *34 C.M.R. 57, 62 (1963)*. [In this case, we] review the military judge's refusal to give the defense-requested instruction on prior inconsistent statements under an abuse-of-discretion standard of review. *United States v. Dennis, 625 F.2d 782 (8th Cir.1980)*; *United States v. Rogers, 549 F.2d 490 (8th Cir.1976)*.

*37 M.J. at 478*. *See also United States v. Givens, 11 M.J. 694, 696 (N.M.C.M.R. 1981)*("We are satisfied that the judge's refusal to expand his instructions was no abuse of discretion.").

Before concluding that the military judge did not abuse his discretion, we evaluated the argument of each counsel, the military judge's instructions concerning sentencing, the trial defense counsel's request for an instruction, and the evidence considered by the court-martial members. We **[*5]** note below pertinent observations concerning each of these components of the record.

First, we have considered the totality of the trial counsel's lengthy argument, noting that it mainly hammers home the undisputed facts (i.e., that the appellant was a petty officer who engaged in sexual intercourse with a 13-year old girl and that the activity occurred in a BEQ which is also a temporary home for families) and the general deterrence theory of punishment. Only a brief part of the argument -- running 1 1/2 inches down the record -- asserts that the sentence adjudged should send a message "to our host

nationals, that sex with a 13-year old is [not] okay." Record at 175. Second, in response, rather than objecting to the "send a message" argument, the defense counsel echoed the "send a message" theme by arguing that the appropriate message was already conveyed by the fact that the appellant was already conveyed by the fact that the appellant was tried by a court-martial ("Look where he's sitting now."). Record at 176. Third, the military judge's instructions listed the five general reasons for sentencing, including "the deterrence of the wrongdoer and those who know of his crime and **[*6]** his sentence . . . ." Record at 180. Fourth, the evidence considered by the court-members was illuminating. They heard and observed the victim; they reviewed 1990 and 1991 reports of psychological evaluations of the victim, Defense Exs. A and B; they heard that the victim was "smoking, and . . . drinking," Record at 107; they learned from a physician that the victim was a 5 on the 1-to-5 Tanner Stages of sexual maturity; they heard the appellant testify under oath and they listened to his unsworn statement (e.g., "Maybe alcohol played a part in my misjudgment." Record at 172), and; they received considerable evidence indicating that the appellant had a relatively good record of performance.

Focusing on sections of the record mentioned above and the *Damatta-Olivera* test, we make three significant observations: (1) The appellant offered no specific curative instruction and failed to articulate with precision what he meant by "an instruction regarding the proper argument of messages being sent by a sentence," which means we *cannot conclude that he offered a correct instruction*; (2) The military judge's instructions were *exhaustive, thorough, and accurate*, and correctly stated **[*7]** the five principle reasons for sentencing offenders; in our opinion, his listing of the five reasons usually given for sentencing offenders -- and no more -- also conveyed *subsilentio* the message that other argued theories of punishment were not germane, and; (3) The trial defense counsel's request for instructions was clearly not a request for an instruction *vitally important to the appellant's defense* and the failure to instruct as requested *did not seriously impair an effective presentation by the appellant*.

In making the third observation stated above, we are cognizant of the patent factual differences between the appellant's case and *United States v. Sherman, 32 M.J. 449 (C.M.A. 1991)*. In *Sherman*, Germany was the situs of the robbery and aggravated assault trial, the thrice-stabbed victim was a German taxi driver, and the German newspapers devoted considerable attention to the incident involved. In the appellant's case, the record presents absolutely nothing indicating that even one Japanese national had the slightest interest in the case. Thus, factually, *Sherman* presents a more persuasive case for appellate relief than the appellant's. However, after **[*8]** concluding that the appellant in *Sherman* had waived his right to object to the trial counsel's argument urging the members to "send a message" to the German community, the Court stated:

> Even if trial defense counsel preserved this issue for review, it is doubtful that this legal error substantially affected appellant's sentence. . . . The appeal to appeasement of the German community *was a peripheral and minor portion of the prosecution's argument which defense counsel ably rebutted in his own closing argument*.

*32 M.J. at 452* (emphasis added). In our opinion, based on the entire record, the phrase "peripheral and minor portion of the prosecution's argument" aptly describes the portions of the trial counsel's argument that are the basis of the appellant's first assignment of error. Thus, the military judge did not abuse his discretion by failing to provide additional instruction "regarding the proper argument of messages being sent by a sentence."

Assignment of Error II

The appellant's assertion that he was deprived of significant evidence in extenuation and mitigation because he was "deprived of independent evidence of Ms. P's appearance and actions **[*9]** outside the courtroom which could mislead appellant into believing she was older than 16 years of age and of evidence of the lack of impact of the sexual activity upon Ms. P," simply turns a blind eye to considerable evidence in the record indicating that the appellant was in no way deprived of the opportunity to present evidence concerning Ms. P's appearance and actions during the relevant time period. For example, the record clearly demonstrates that Mess Management Specialist Seaman [MMSN] C was a witness who observed Ms. P on the night of 13 February 1993, that MMSN C was questioned about his discussion that night with Ms. P about her age and that he replied that he "seen her smoking, and . . . drinking, [and] thought she was in the Navy," Record at 107. Could MMSN C have been asked at that point to describe Mr. P's physical appearance? Her dress? Her height? Her weight? Could he have been asked for an opinion concerning her age? Obviously, such questions would not have been

prevented by the granting of the motion *in limine*. Thus, the appellant *had the opportunity* to ask such questions. Furthermore, the physician who testified said Ms. P was a "fully developed female," **[*10]** Record at 117, the appellant testified that Ms. P looked at least 17 or 18 years of age, Record at 128, Hospital Corpsman Second Class J and Hospitalman C testified by stipulation that on 14 February 1993 they observed that Ms. P was calm and had a matter of fact attitude while waiting to be examined by a physician, App. Exs. XIV and XV, and the members observed Ms. P's appearance at the court-martial. Stated otherwise, we find that the record does not support a claim that the appellant was prejudiced by the military judge's ruling on the motion in limine.

We also find that the military judge did not abuse his discretion by granting the motion in limine and thereby preventing the appellant from presenting at the sentencing stage of the trial evidence that Ms. P "has gone out with other sailors . . . [and] regularly smokes and drinks and holds herself out as somewhat older than she is." Appellate Ex. II. *See* United States v. Fox, 24 M.J. 110 (C.M.A. 1987)(holding in indecent assault case that the accused did not demonstrate how evidence of the victim's past sexual conduct would be relevant during the sentencing stage of the trial to an issue before the court); United States **[*11]** v. Vega, 27 M.J. 744 (A.C.M.R. 1988)(holding in carnal knowledge case that evidence of victim's prior sexual experience was not relevant under the circumstances presented and was properly excluded from the sentencing stage of the trial).

Assignment of Error III

***HN4***[↑] The distinction between a review of sentence appropriateness and consideration of clemency matters is significant: "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy -- treating an accused with less rigor than he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988).

Congress has assigned this Court only the task of determining sentence appropriateness. It has placed the responsibility for clemency in other hands (e.g., the convening authority's). Id. at 395-96.

"Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)(citation omitted).

Under the circumstances of **[*12]** this case, we conclude that the sentence approved below is not inappropriate.

Although not assigned as error, the Government invites our attention to the fact that the military judge erred by not dismissing the appellant's conviction ***HN5***[↑] of indecent acts with a person under 16 because such a charge is a lesser-included offense of carnal knowledge. Manual for Courts-Martial, United States, 1984, Part IV, P 45d(2)(a); United States v. Foster, 40 M.J. 140 (C.M.A. 1994). We agree with the Government that the error was harmless because the military judge instructed the members that the offenses were multiplicious for sentencing purposes. Record at 177. As suggested by the Government, we will correct the error by dismissing the indecent acts charge in our decretal paragraph.

**Supplemental Assignment of Error**

We hold that ***HN6***[↑] the absence of one of the eight assigned members of the court-martial was error, but not plain error. Thus, the failure to raise an objection at trial waived the issue. *See* United States v. Bouknight, 35 M.J. 671, 672 (A.C.M.R. 1992)(absence of three of eleven members was not plain error).

Accordingly, the findings of guilty and the sentence approved on review **[*13]** below are affirmed, except for the finding of guilty of Charge IV and its specification. Charge IV and its specification are dismissed for reasons stated above.

EDWIN W. WELCH

Chief Judge LARSON and Judge DOMBROSKI concur.

ABSENT FOR SIGNATURE

DAVID C. LARSON

ABSENT FOR SIGNATURE

J.E. DOMBROSKI

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**User Name:** Morgan CHRISTIE
**Date and Time:** Saturday, September 3, 2022 5:39:00 PM CDT
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## Document (1)

1. *United States v. Scamahorn, 2006 CCA LEXIS 71*

**Client/Matter:** -None-
**Search Terms:** 2006 CCA LEXIS 71
**Search Type:** Natural Language
**Narrowed by:**

| Content Type | Narrowed by |
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| Cases | -None- |

# *United States v. Scamahorn*

United States Navy-Marine Corps Court of Criminal Appeals

March 27, 2006, Decided

NMCCA 200201583

**Reporter**
2006 CCA LEXIS 71 *

UNITED STATES v. Ryan J. SCAMAHORN, Corporal (E-4), U. S. Marine Corps

**Notice: [*1]** AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

**Subsequent History:** Motion granted by *United States v. Scamahorn, 63 M.J. 322, 2006 CAAF LEXIS 825 (C.A.A.F., June 14, 2006)*

Review granted by *United States v. Scamahorn, 64 M.J. 236, 2006 CAAF LEXIS 1268 (C.A.A.F., Oct. 30, 2006)*

Affirmed by *United States v. Scamahorn, 64 M.J. 236, 2006 CAAF LEXIS 1761 (C.A.A.F., Oct. 30, 2006)*

**Prior History:** Sentence adjudged 21 August 2001. Military Judge: C.H. Wesely. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st MARDIV (Rein), Camp Pendleton, CA.

## Core Terms

military, nonjudicial, sentence, charges, specifications, false pretenses, larceny, defense team, civilian, assigned error, dishonorable, asserts, court-martial, withdraw, firearm, just debt, circumstances, caliber, ineffective assistance of counsel, failure to pay, car parts, confinement, clock, defense counsel, larceny charge, implied bias, speedy trial, subterfuge, withdrawn, mistrial

## Case Summary

**Procedural Posture**
After appellant was convicted at a general court martial convened by Commanding General, 1st MARDIV (Rein), Camp Pendleton, CA of violating a lawful order, four specifications of larceny, and obtaining services under false pretenses, which convictions were contrary to pleas, and after the convening authority approved the sentence as adjudged, review pursuant to Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)* was sought.

**Overview**
Appellant was charged with larceny involving handguns and involving his receipt of goods and services from an auto supply store. After he was convicted and sentenced, he appealed, claiming deprivation of effective assistance of counsel and speedy trial rights. The court affirmed. First, using a 3-part test to analyze the effective assistance claim, the court held that no error resulted from earlier dismissals of certain charges, that the dismissals were not subterfuges, and that no other alleged errors by counsel prejudiced appellant. Second, denial of appellant's challenge to a member of the court was not an abuse of discretion. Third, records of nonjudicial punishment were improperly admitted, but no prejudice resulted. Fourth, it rejected claims of error based on governmental sentencing argument and on the trial court's denial of a mistrial, noting that in neither case did prejudice result. After ruling that the evidence was both factually and legally sufficient to support the convictions and that the sentence was not inappropriately severe, the court applied a 4-factor test and concluded that appellant's due process rights were not compromised by post-trial appellate delay.

**Outcome**
The court concluded that the findings and sentence were correct in law and fact and that no error materially prejudicial to the substantial rights of appellant was committed. It thereupon approved of the disposition below.

## LexisNexis® Headnotes

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

Evidence > Inferences & Presumptions > Presumptions

Military & Veterans Law > Military Justice > Counsel

**HN1[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

All service members are guaranteed the right to effective assistance of counsel at courts-martial. The United States Navy-Marine Corps Court of Criminal Appeals applies a presumption that counsel provided effective assistance. This presumption is rebutted only by a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms. Second-guessing, sweeping generalizations, and hindsight will not suffice. Even if there is error, that error must be so prejudicial as to indicate a denial of a fair trial or a trial whose result is unreliable. An appellant alleging ineffective assistance of counsel thus must surmount a very high hurdle.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

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

**HN2[] De Novo Review, Ineffective Assistance of Counsel**

Whether a defendant has had ineffective assistance of counsel involves a mixed question of law and fact. The question of whether ineffective assistance of counsel resulted and whether the error was prejudicial are both determined by a de novo review.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Evidence > Inferences & Presumptions > Presumptions

Military & Veterans Law > Military Justice > Counsel

**HN3[] De Novo Review, Ineffective Assistance of Counsel**

The United States Navy-Marine Corps Court of Criminal Appeals applies a three-prong test to determine if the presumption of competence of counsel has been overcome: (1) are the allegations true? If so, is there a reasonable explanation for counsel's actions? (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? (3) If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? If the issue can be resolved by addressing the third prong, the court does not need to determine whether counsel's performance was deficient.

Military & Veterans Law > ... > Courts Martial > Sessions > Arraignments

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

**HN4[] Sessions, Arraignments**

R.C.M. 707(a)(1), Manual Courts-Martial allows the Government 120 days to bring an accused to trial from the date charges are preferred. When there are multiple charges preferred on different dates, each charge has a separate 120-day clock based on its date of preferral. R.C.M. 707(b)(2). Dismissal of the charges terminates the 120-day clock unless the dismissal is a subterfuge to allow the Government to proceed without exceeding the time allowed by R.C.M. 707. R.C.M. 707(b)(3)(A)(i) provides a new 120-day clock from the date charges are repreferred after a proper dismissal. The clock is tolled by the appellant's arraignment. R.C.M. 707(b)(1).

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

**HN5[] Judicial Review, Standards of Review**

The implied premise of the cumulative-error doctrine is the existence of errors, no one perhaps sufficient to merit reversal, yet in combination they all necessitate the disapproval of a finding or sentence. Assertions of

error that are without merit are not sufficient to invoke this doctrine.

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

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

**HN6** **Judges, Challenges to Judges**

A member of a court-martial must 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. R.C.M. 912(f)(1)(N), Manual Courts-Martial. Military judges are enjoined to be liberal in granting challenges for cause. This rule includes challenges for actual bias as well as implied bias.

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

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

**HN7** **Judges, Challenges to Judges**

Actual bias and implied bias are separate tests, but do not constitute separate grounds for a challenge to a member of a court-martial. There is implied bias when most people in the same position would be prejudiced. The focus for implied bias is on the perception or appearance of fairness of the military justice system. When there is no actual bias, implied bias should be invoked rarely.

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

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

**HN8** **Judges, Challenges to Judges**

The United States Navy-Marine Corps Court of Criminal Appeals reviews rulings on challenges to members of the court-martial for abuse of discretion. On questions of whether a member exhibits actual bias, the court gives the military judge great deference, because it recognizes that the military judge observed the demeanor of the participants in the voir dire and challenge process. This is because a challenge for cause for actual bias is essentially one of credibility. The appellate court, however, gives less deference to the military judge when reviewing a finding on implied bias because it is objectively viewed through the eyes of the public. It thus applies an objective standard when reviewing the judge's decision regarding implied bias.

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

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

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

**HN9** **Judicial Review, Courts of Criminal Appeals**

A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. The United States Navy-Marine Corps Court of Criminal Appeals will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Military & Veterans Law > Military Justice > Nonjudicial Punishments

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

**HN10** **Military Justice, Nonjudicial Punishments**

The guidelines governing admissibility of records of nonjudicial punishment are: 1. The admissibility of such records, including the procedural requirements for determining admissibility, is dependent on whether the document is regular or irregular on its face. 2. When an objection is based on an irregularity on the document's face, the Government must disprove that irregularity. 3. The burden to overcome the defense objection through additional evidence is on the Government, and must be accomplished without compelling the accused to provide that evidence. 4. If, however, the record of nonjudicial

punishment is regular on its face, that document is entitled to the presumption of regularity and the inferences that naturally flow from that presumption. In that case, the burden is on the accused to object and present credible evidence to overcome that presumption. For example, if the record of nonjudicial punishment contains entries that reflect the accused was informed of his right to consult counsel and to refuse nonjudicial punishment, and that the accused did not invoke those rights, the accused may present evidence that he did not make those entries prior to punishment being imposed. 5. The record would then be inadmissible unless the Government establishes, by independent evidence, that the accused had been advised of his rights and had not refused nonjudicial punishment.

Evidence > Inferences & Presumptions > Inferences

Military & Veterans Law > Military Justice > Nonjudicial Punishments

*HN11*[] **Inferences & Presumptions, Inferences**

It may be properly inferred that a service member's right to refuse nonjudicial punishment was waived when: (1) the record of nonjudicial punishment shows the accused was made aware of his right to refuse nonjudicial punishment; (2) the absence of any indication of the exercise of that right; and, (3) the imposition of nonjudicial punishment. However, no such inference can be made when there is an affirmative assertion of the right to refuse nonjudicial punishment followed by the imposition of that punishment. Where that occurs, the burden is on the Government to present evidence that the accused changed his mind and accepted the nonjudicial punishment.

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

Military & Veterans Law > Military Justice > Nonjudicial Punishments

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

*HN12*[] **Judicial Review, Courts of Criminal Appeals**

Where a reviewing court determines that a military judge erred in admitting evidence of nonjudicial punishment, the reviewing court must determine whether the error had a substantial influence on the sentence adjudged. If it did, the error is materially prejudicial to the substantial rights of an accused. Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*.

Military & Veterans Law > Military Justice > Judicial Review > Judge Advocate General

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

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

*HN13*[] **Judicial Review, Judge Advocate General**

Where the staff judge advocate's recommendation is served on defense counsel in accordance with R.C.M. 1106(f)(1), Manual Courts-Martial and defense counsel fails to comment on any matter included therein, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level of plain error.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibition Against Improper Statements

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

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

*HN14*[] **Prosecutorial Misconduct, Prohibition Against Improper Statements**

The lack of defense objection to an allegedly improper comment made by a prosecutor is relevant to a determination of prejudice because the lack of a defense objection is some measure of the minimal impact of that comment. Thus, absent an objection at trial, an appellant is not entitled to relief from such a comment unless there is plain error. Therefore, an appellant who charges that such an improper comment was made has the initial burden of persuasion under the

plain error analysis, and must make a showing that the error was plain or obvious and materially prejudicial to a substantial right.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Mistrial

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Criminal Law & Procedure > Trials > Motions for Mistrial

**HN15[] Abuse of Discretion, Mistrial**

The United States Navy-Marine Corps Court of Criminal Appeals will not grant relief for a military judge's failure to grant a mistrial unless there is clear evidence of abuse of discretion. A mistrial is a drastic remedy to be used sparingly to prevent manifest injustice only, and it is appropriate only when circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Withdrawal of Charges > General Overview

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

**HN16[] Commencement of Criminal Proceedings, Withdrawal of Charges**

The Government may, at any time and for any reason, withdraw charges prior to findings. R.C.M. 604, Manual Courts-Martial.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Trial Procedures > Instructions > General Overview

**HN17[] Courts Martial, Court-Martial Member Panel**

Absent evidence to the contrary, members of a general court-martial are presumed to comply with the military judge's instructions.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

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

**HN18[] Trial Procedures, Burdens of Proof**

The tests for legal and factual sufficiency of the evidence are well-known. For legal sufficiency, the United States Navy-Marine Corps Court of Criminal Appeals considers the evidence in the light most favorable to the Government, and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. For factual sufficiency, the court weighs all the evidence in the record of trial, recognizing that it did not see or hear the witnesses, and determine whether it is convinced of the appellant's guilt beyond a reasonable doubt. Reasonable doubt does not mean, however, that the evidence contained in the record must be free from any and all conflict.

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

**HN19[] Judicial Review, Courts of Criminal Appeals**

The United States Navy-Marine Corps Court of Criminal Appeals cannot affirm a finding of guilty on a theory not presented by the Government and not instructed upon by the military judge.

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

**HN20[] Military Offenses, Larceny & Wrongful Appropriation**

The Government is under no obligation to allege or even elect a specific theory of larceny to prosecute an offense

under Unif. Code Mil. Justice art. 121, *10 U.S.C.S. § 921*. Rather, the Government need only allege that an accused did "steal" the property of another.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Military & Veterans Law > Military Offenses > General Article > Deceit & Fraud

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

***HN21*** **Mens Rea, General Intent**

The criminal intent required for a violation of Unif. Code Mil. Justice art. 134, *10 U.S.C.S. § 934*, is similar to that required for larceny by false pretense per Unif. Code Mil. Justice art. 121, *10 U.S.C.S. § 921*. Manual Courts-Martial pt. IV, para. 78c. A false pretense with respect to larceny is a false representation of a past or existing fact by means of any act, word, symbol, or token, including a representation that a person presently intends to perform a certain act in the future. Manual Courts-Martial, pt. IV, para. 46c(1)(e). Thus, a false representation that a person presently intends to pay for an item (for *10 U.S.C.S. § 934*) and for related services (for *10 U.S.C.S. § 921*) is a false representation of an existing fact--the present intention--and thus a false pretense if there was no intent to pay. A false pretense may also exist by silence or failure to correct a known misrepresentation. A false pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth. Manual Courts-Martial, pt. IV, para. 46c(1)(e). Additionally, obtaining services under false pretenses requires the specific intent to permanently deprive or defraud another of the use and benefit of the service. Manual Courts-Martial, pt. IV, paras. 78b(4) and 49c(14).

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

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

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

***HN22*** **Posttrial Procedure, Actions by Convening Authority**

The mandate given to the United States Navy-Marine Corps Court of Criminal Appeals under Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)* requires that it affirm only such part or amount of the sentence as it determines, on the basis of the entire record, should be approved. The appeals court does not enter the realm of clemency, an area reserved for the convening authority. However, it is compelled to act when it finds inappropriate severity within an adjudged and approved sentence. R.C.M. 1107(b), Manual Courts-Martial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

***HN23*** **Criminal Process, Speedy Trial**

Where an appellant claims that he has been denied due process and suffered presumptive prejudice as a result of the time that has elapsed since his case was docketed with the United States Navy-Marine Corps Court of Criminal Appeals, the court analyzes the appellant's due process right to speedy appellate review under the same standards as his right to speedy post-trial review. Four factors are considered: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, the court concludes that the length of the delay is "facially unreasonable," it must balance the length of the delay with the other three factors. Moreover, in extreme cases, the delay itself may give rise to a strong presumption of evidentiary prejudice.

**Counsel:** CAPT JEFFREY STEPHENS, USMC, Appellate Defense Counsel.

LT JENNIE GOLDSMITH, JAGC, USNR, Appellate Defense Counsel.

LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel.

**Judges:** BEFORE J.W. ROLPH, J.F. FELTHAM, J.D. HARTY. Chief Judge ROLPH and Judge FELTHAM concur.

**Opinion by:** J.D. HARTY

## Opinion

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of violating a lawful order, four specifications of larceny, and obtaining services under false pretenses, in violation of Articles 92, 121, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 892*, *921*, and *934*. The members sentenced the appellant to a dishonorable discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence **[*2]** as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

We have considered the record of trial, the appellant's 10 assignments of error, [1] the appellant's sworn declaration, and the Government's Answer. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ*.

**[*3] Background**

The appellant frequented an indoor shooting range in Oceanside, California, where he rented handguns for use at that range. The range used Range Waiver forms to record the names of individuals who shot on a particular date, and lane tickets to record who rented a particular firearm and whether that person was military or civilian. Three firearms were discovered missing from the range: a Sig Sauer P220 .45 caliber on 14 August 1999; a Desert Eagle .50 caliber on 5 September 1999; and another Sig Sauer P220 .45 caliber on 20 November 1999. Based on Range Waiver forms and lane tickets, it was determined that the appellant was at the range on the above dates and on each occasion was in the group of shooters who rented the missing firearms.

The appellant gave separate statements to the Naval Criminal Investigative Service (NCIS) and the shooting range manager stating that he took the Sig Sauer in August 1999 by mistake, but later decided to keep the firearm after discovering it in his possession. He tried to return the Sig Sauer in November 1999 by renting another Sig Sauer, leaving the rented firearm in a gun case at the shooting lane, and returning the stolen Sig **[*4]** Sauer as if it was the rented firearm. This plan was interrupted by a range employee who asked the appellant about the gun case left at the shooting lane. The appellant then retrieved the gun case containing the second Sig Sauer.

The appellant admitted to NCIS that he took the Desert Eagle .50 caliber firearm, but told the range manager that he was only with the person who took that weapon. The second Sig Sauer firearm was retrieved from the

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[1] I. THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL. II. THE DENIAL OF APPELLANT'S CHALLENGE FOR CAUSE AGAINST MAJOR L CONSTITUTED AN ABUSE OF DISCRETION. III. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL WHEN HE WAS NOT BROUGHT TO TRIAL WITHIN 120 DAYS OF THE FIRST PREFERRAL OF CHARGES.

IV. THE MILITARY JUDGE ERRED TO THE PREJUDICE OF APPELLANT BY ALLOWING EVIDENCE TO BE ADMITTED OF HIS PRIOR NON-JUDICIAL [SIC] PUNISHMENT WITHOUT COMPLYING WITH *UNITED STATES v. BOOKER, 5 M.J. 238 ([C.M.A.] 1977)*. V. TRIAL COUNSEL IMPROPERLY ARGUED DURING PRESENTENCING THAT THE MEMBERS SHOULD AWARD SPECIFIC TERMS OF YEARS FOR INDIVIDUAL OFFENSES. VI. THE MILITARY JUDGE ABUSED HER DISCRETION BY DENYING APPELLANT'S MOTION FOR A MISTRIAL. VII. BASED ON THE CUMULATIVE EFFECT OF ASSIGNMENTS OF ERROR I-VI, APPELLANT WAS DENIED A FAIR TRIAL. VIII. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION OF LARCENY OF AUTO PARTS AT PEP BOYS OR OBTAINING SERVICES UNDER FALSE PRETENSES SINCE THERE WAS NO EVIDENCE OF CRIMINAL INTENT. IX. A DISHONORABLE DISCHARGE AND SENTENCE OF THREE YEARS CONFINEMENT IS AN INAPPROPRIATELY SEVERE PUNISHMENT FOR APPELLANT'S OFFENSES WHEN ALL THE ITEMS ALLEGEDLY TAKEN WERE RETURNED OR PAID FOR PRIOR TO PREFERRAL OF CHARGES. X. APPELLANT HAS BEEN DENIED SPEEDY POSTTRIAL REVIEW OF HIS COURT-MARTIAL IN THAT 1,030 DAYS HAVE PASSED FROM THE DOCKETING OF THIS CASE WITHOUT ALL PLEADINGS BEING FILED. (SUPPLEMENTAL ASSIGNMENT OF ERROR).

appellant's barracks room, and the Desert Eagle .50 caliber firearm was retrieved from an individual living at an off-base address provided by the appellant. Prior to NCIS investigating the firearm thefts, the agency was aware that the appellant was already under investigation by the Oceanside, California, Police Department for taking cars to a Pep Boys retail store for repairs, and then driving off without paying for parts and services.

On 24 February 2000, two specifications of larceny were preferred concerning the Sig Sauer .45 caliber handgun stolen in August 1999 and the Desert Eagle .50 caliber handgun stolen in September 1999. On 5 April 2000, a single specification of dishonorably failing to pay a just debt to a Pep Boys was preferred **[*5]** and referred to the same special court-martial to be tried with the larcenies. Without explanation, the larceny charge and both specifications were withdrawn from a special court-martial and dismissed on 25 April 2000. Appellate Exhibit I. The remaining charge of dishonorable failure to pay a just debt was withdrawn and dismissed, without explanation, on 13 July 2000. Appellate Exhibit I. As of 13 July 2000, there were no charges pending against the appellant.

On 24 July 2000, charges were preferred alleging the larceny of all three handguns, two larcenies of car parts from Pep Boys, and two specifications of obtaining services from Pep Boys by false pretense. [2] These charges were referred to a general court-martial on 20 October 2000, along with additional charges preferred on 11 August 2000 and second additional charges preferred on 11 October 2000. The appellant was arraigned on these charges on 1 November 2000. Additional facts will be included with our resolution of the appellant's assignments of error.

**[*6] Effective Assistance of Counsel**

In his first assignment of error, the appellant avers that he was denied effective assistance of counsel, because: (1) he requested his defense team to file a speedy trial motion and it did not; (2) the defense team failed to conduct an adequate investigation into the facts, causing the civilian counsel to withdraw from the case in the middle of the defense case in chief, resulting in a two-month delay in restarting the trial; (3) the defense team displayed a general failure to prepare as evidenced by unexplained absences of defense counsel at hearings, ignoring deadlines, not filing written motions, not requesting immunity for defense witnesses, and not challenging the denial of a witness request; and, (4) the defense team failed to present any evidence other than the appellant's unsworn statement during pre-sentencing. The Government contends that some of the appellant's assertions are not supported by the record, those that are supported by the record do not overcome the presumption of attorney competence, and, even if they did overcome the presumption, that there is no prejudice.

1. The law.

***HN1***[↑] All service members are guaranteed the **[*7]** right to effective assistance of counsel at courts-martial. *United States v. Gonzalez, 62 M.J. 303, 2006 CAAF LEXIS 113, at *13 (C.A.A.F. 2006)*(citing *United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005)*). We apply a presumption that counsel provided effective assistance. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*;*United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004)*. This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis, 60 M.J. at 473* (citing *United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001))*. "Second-guessing, sweeping generalizations, and hindsight will not suffice." *Id***.**

Even if there is error, that error must be so prejudicial "as to indicate a denial of a fair trial or a trial whose result is unreliable." *Id.* (citing *United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001))*. An appellant alleging ineffective assistance of counsel "'must surmount a very high hurdle.'" *United States v. Saintaude, 61 M.J. 175, 179 (C.A.A.F. 2005)* **[*8]** (quoting *United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997))*.

***HN2***[↑] Ineffective assistance of counsel involves a mixed question of law and fact. *Davis, 60 M.J. at 473* (citing *United States v. Anderson, 55 M.J. 198, 201 (C.A.A.F. 2001))*. Whether an appellant received ineffective assistance of counsel and whether the error was prejudicial are determined by a *de novo* review. *Id*. (citing *Anderson, 55 M.J. at 201; United States v. Cain, 59 M.J. 285, 294 (C.A.A.F. 2004)*; and *United States v. McClain, 50 M.J. 483, 487 (C.A.A.F. 1999))*.

***HN3***[↑] This court applies a three-prong test to determine if the presumption of competence has been

[2] The four specifications concerning Pep Boys were withdrawn at an unknown date and repreferred as part of the Second Additional Charges preferred on 11 October 2000. A single specification of disobeying a general order, by possessing a firearm in the barracks, was also preferred.

overcome:

(1) Are the allegations true; if so, "is there a reasonable explanation for counsel's actions?";

(2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and

(3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

*Garcia, 59 M.J. at 450* **[*9]** (quoting *United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002)*). If the issue can be resolved by addressing the third prong, we need not determine whether counsel's performance was deficient. *United States v. Quick, 59 M.J. 383, 386 (C.A.A.F. 2004)*(citing *Strickland, 466 U.S. at 697*).

2. Effectiveness in regard to speedy trial.

Relying on *United States v. Robinson, 47 M.J. 506 (N.M.Ct.Crim.App. 1997)*, the appellant alleges that the convening authority's dismissal of the charges on 25 April 2000 and 13 July 2000, and repreferral of the same or similar charges on 24 July 2000, was a subterfuge to avoid the running of the Rule for Courts-Martial 707, Manual for Courts-Martial, United States (2000 ed.) 120-day speedy trial clock. The appellant asserts that his speedy trial clock began on 24 February 2000, the date the first set of charges were preferred. Counsel for the appellant did not raise this issue at trial, giving rise to part of the appellant's ineffective assistance claim.

If the speedy trial issue was waived by not being raised at trial, the defense team may have provided ineffective assistance **[*10]** if that issue had merit. If the speedy trial issue is without merit, failing to raise it at trial would not result in prejudice, and, therefore, no relief would be warranted based on a claim of ineffective assistance of counsel. Our analysis of this speedy trial issue will partially resolve the issue of ineffective assistance of counsel and also resolve the appellant's third assignment of error, alleging a denial of his R.C.M. 707 speedy trial rights.

***HN4***[↑] R.C.M. 707(a)(1) allows the Government 120 days to bring an accused to trial from the date charges are preferred. [3] When there are multiple charges preferred on different dates, each charge has a separate 120-day clock based on its date of preferral. *Id*. at (b)(2). Dismissal of the charges terminates the 120-day clock unless the dismissal is a subterfuge to allow the Government to proceed without exceeding the time allowed by R.C.M. 707. *Robinson, 47 M.J. at 510*. R.C.M. 707(b)(3)(A)(i) provides a new 120-day clock from the date charges are repreferred after a proper dismissal. The clock is tolled by the appellant's arraignment. *Id*. at (b)(1). The original larceny charge and its two specifications of larceny **[*11]** were withdrawn and dismissed on the 60th chargeable day. The single specification of dishonorably failing to pay a just debt was withdrawn and dismissed on the 99th chargeable day. New charges were preferred on 24 July 2000, including the two original larceny charges, plus an orders violation, three additional larcenies, and two specifications of obtaining services under false pretenses, one of which was based on what was originally preferred on 5 April 2000 as a dishonorable failure to pay just debt.

Applying the R.C.M. 707 120-day clock, the Government had until 21 November 2000 to bring the appellant to trial on the charges preferred on 24 July 2000, and longer for the additional charges preferred on 11 August 2000 and 11 October 2000. The appellant was arraigned on the new charges on 1 November 2000, well within the **[*12]** 120 days allowed, unless the earlier dismissals were improper.

a. Subterfuge dismissals.

This court, in *Robinson*, although ultimately agreeing that a convening authority has unfettered discretion to dismiss charges, held that under the unique circumstances of that case, the dismissal of charges was a subterfuge and that the speedy trial clock was not reset. *Robinson, 47 M.J. at 510*. We noted that the conditions and constraints initially placed on the appellant in that case never changed during the period between the dismissal action and repreferral. Those conditions included being kept on legal hold, suspension of transfer orders, inability to work in his assigned area of expertise, and restrictions on his ability to take leave. *Id*. (citing *United States v. Britton, 26 M.J. 24, 26 (C.M.A. 1988)*. Specifically limiting our holding to the facts before us, we found subterfuge where: (1) dismissal on day 120 (115th chargeable day) of preferred, but unreferred, charges was for the sole purpose of avoiding the 120-day rule; (2) repreferral of

[3] The clock begins upon the earlier of preferral of charges or the institution of pretrial restraint. The appellant was not placed into pretrial restriction until 7 August 2000. Charge Sheet.

essentially identical specifications occurred 5 days later; (3) there was no practical interruption in **[*13]** the pending charge and specifications; and (4) there was no real change in the legal status of the appellant during that 5-day period. *Id. at 511*.

We find the facts of the appellant's case distinguishable from *Robinson*. First, the *Robinson* holding addressed the dismissal of preferred, but unreferred, charges on the 115th chargeable day. Here, the appellant's case was farther along in the military justice process, as evidenced by the referral of charges, indicating a more diligent attempt to proceed than was the case in *Robinson*. Second, dismissal of charges on the 60th and 99th chargeable days is far short of the time allowed to bring the appellant to trial. Third, although the three dismissed specifications carried over to the final charge sheet in the same or similar form, additional charges were also included in the final charges. Fourth, the two larcenies dismissed on 25 April 2000 were not preferred anew until three months later. There was, therefore, a practical interruption in the larceny charge and its two specifications.

The appellant's pretrial status did not change when the original larceny charges were dismissed, because a completely unrelated additional **[*14]** charge had been preferred and referred to the same special court-martial on 5 April 2000. There was, however, a significant and practical interruption in the appellant's pretrial status as to the dismissed larcenies. While a lack of change in pretrial status can be circumstantial evidence of a subterfuge dismissal involving same or similar charges, that evidentiary nexus is far less compelling when unrelated charges are involved. Here, the dishonorable failure to pay a just debt charge was unrelated to the dismissed larcenies. We find, therefore, absolutely no indication that the two larceny charges, originally preferred on 24 February 2000, were dismissed as a subterfuge to avoid the R.C.M. 707 speedy trial rule.

Eleven days after the charge alleging a dishonorable failure to pay a just debt to Pep Boys was withdrawn and dismissed, multiple charges were preferred, including two specifications of stealing car parts from Pep Boys and two specifications of obtaining services from Pep Boys under false pretenses. Those four specifications were then withdrawn and dismissed at an unknown date, leaving four referred specifications to proceed to trial by general court-martial. On 11 October 2000, five **[*15]** specifications of stealing auto parts from two Pep Boys locations in Oceanside, California, were preferred along with five specifications of obtaining services under false pretenses from the same Pep Boys locations at the same time as the larcenies of parts.

Applying a *Robinson* analysis to these facts we find the following:(1) the dishonorable failure to pay a just debt concerning Pep Boys was already referred to trial by special court-martial; (2) its withdrawal and dismissal occurred on the 99th chargeable day; (3) preferral of related but more specific charges occurred 11 days later showing in greater detail the scope and seriousness of the appellant's potential misconduct; [4] (4) there was a practical interruption in the dishonorable failure to pay a just debt charge during those 11 days; and, (5) there is no indication appellant suffered under the weight of charges during the 11-day period during which no charges were pending.

**[*16]** The appellant does not tell us what his pretrial status was. According to the Charge Sheet, he was in pretrial restriction beginning 7 August 2000; however, that was after the dismissal of the dishonorable failure to pay a just debt charge and the preferral of the related larceny and obtaining services under false pretenses charges. He does not assert that he was on legal hold, had transfer orders suspended, was unable to work in his assigned area of expertise, suffered restrictions on his ability to take leave, or was in any way treated differently than any other service member during the relevant period. This distinguishes the appellant from Robinson, who suffered all of these burdens.

The record does not suggest, and we do not find, that the charge of dishonorable failure to pay a just debt was dismissed on 13 July 2000 in order to avoid the speedy trial clock. Absent a subterfuge dismissal, the appellant was brought to trial within the time allowed for the charges preferred on 24 July 2000.

Because we find that the appellant was brought to trial on all charges within the time allowed, we also find that he was not prejudiced by his defense team not raising this issue at trial. **[*17]** Absent prejudice, the appellant has failed to establish that he received ineffective assistance of counsel based on this claimed deficiency.

3. Failure to conduct an adequate investigation.

The appellant asserts that his defense team's failure to conduct an adequate investigation into the facts resulted

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[4] See R.C.M. 401(c)(1), Discussion (dismissal and repreferral may be appropriate when the charge does not adequately reflect the nature or seriousness of the offense.).

in the defense team moving to withdraw from the case during the trial, which further resulted in a two-month delay when the civilian counsel's motion to withdraw was granted. The appellant speculates that the defense team's failure to interview Specialist (Spc) W, U.S. Army, and failure to review prior written statements of Mr. H, a potential Government rebuttal witness to Spc W's testimony, was the root cause of the withdrawal.

On 20 July 2001, the defense called Spc W as a witness in its case-in-chief. Spc W. testified that he, rather than the appellant, was the person who stole the Desert Eagle .50 caliber firearm referred to in Additional Charge II, Specification 2. Spc W testified that he had participated in a videotaped interview with civilian counsel in January 2001. After Spc W testified, the military judge put the court-martial in an overnight recess. On the morning **[*18]** of 21 July 2001, the parties reviewed proposed instructions and then recessed again. At 1335, 21 July 2001, the parties returned to court, and civilian counsel moved to withdraw from further representation of the appellant. The civilian counsel explained that there were irreconcilable differences between himself and the appellant that:

> prohibits my involvement in certain aspects that are still pending which will follow in this case . . . I am speaking about continued evidence which is to be presented and closing arguments made to the jury and conflicts resulting from that -- potential conflicts resulting from that . . . I have considered not commenting on evidence as the trial goes on; however, that was -- I believe that will prejudice my client given the attention that I believe has been drawn to that particular fact at this point. But further, there is also some evidence that my client and I cannot agree as to whether it should be called or not, and that is part of the conflict that is now on-going . . . If I'm ordered to stay on the case, and I am told to represent my client, then I will be making motions regarding certain testimony that I have come to find out that I **[*19]** do not believe it [sic] warrants this court's consideration . . . .

Record at 670-73. The trial defense counsel also requested to be removed from the case for the same reasons. *Id*. at 671. The military judge denied both motions, but agreed to a defense continuance request to determine how to proceed. *Id*. at 675.

On 6 August 2001, during an *Article 39(a)*, UCMJ, session, the appellant stated that he was retaining a different civilian counsel to replace his prior civilian counsel. The military judge scheduled the court-martial to resume on 20 August 2001. *Id*. at 685. The court-martial did resume on 20 August 2001, at which time the new civilian counsel presented the remaining defense witnesses. *Id*. at 687.

Following the defense case-in-chief, the Government requested to put on a rebuttal witness, Mr. H, to contradict the testimony of Spc W concerning who was with the appellant at the time the Desert Eagle .50 caliber handgun was stolen. The military judge denied the Government's request to call the rebuttal witness. *Id*. at 733.

The record contradicts the appellant's assertion regarding the issue of failure to investigate. First, the civilian counsel **[*20]** videotaped his interview of Spc W in January 2001, contradicting the appellant's claim that witness interviews did not occur. Second, the appellant's elongated theory asserts that: (1) if the defense team had interviewed all possible witnesses, they would have discovered that the Mr. H listed on the Range Waiver form for 5 September 1999, and not Spc W, was with the appellant when the Desert Eagle .50 caliber firearm was stolen; (2) had the defense team discovered Spc W was not with the appellant on 5 September 1999, they would not have called Spc W to testify that he was with the appellant that day; (3) had the defense team not called Spc W, it would not have had to withdraw from representing the appellant; and, (4) if the defense team had not withdrawn as counsel, there would not have been a two-month delay in the trial.

This reasoning is contradicted by the record. First, even if the defense had discovered that the Mr. H listed in the Range Waiver form for 5 September 1999 had given prior statements indicating he was with the appellant when one of the firearms was stolen, those statements are not necessarily inconsistent with SPC W's testimony that he was with the appellant at **[*21]** the same time. Second, the military judge did not grant the defense motions to withdraw. Rather, the appellant replaced civilian counsel by hiring a different counsel. Third, the continuance granted on 21 July 2001 delayed the trial for 30 days, not two months as alleged by the appellant.

Even if the appellant's factual assertions were correct, he has not shown any prejudice. We do not believe the outcome of this trial would have been any different even if the facts were as the appellant has submitted them. [5]

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[5] We encourage all appellate counsel to carefully review the

Absent prejudice, we do not find that the appellant received ineffective assistance of counsel based on a failure to investigate.

4. General failure to prepare.

The appellant asserts that his defense team was deficient based on a general failure to prepare, as evidenced by counsel not appearing for hearings, not meeting filing deadlines, not filing written **[*22]** motions, and not requesting immunity for defense witnesses.

The record reflects that appellant's first civilian counsel was not present at early *Article 39(a)*, UCMJ, sessions that dealt with administrative matters, such as setting trial milestones. Trial defense counsel, however, was present for each *Article 39(a)*, UCMJ, session, and represented civilian counsel's availability for each milestone. There is nothing unusual about a member of the defense team being absent from an *Article 39(a)*, UCMJ, session, particularly civilian counsel. We do not find this practice to constitute ineffective assistance of counsel. Again, the appellant does not assert what prejudice he suffered as a result of civilian counsel not being at these sessions.

Regarding the appellant's assertion that the defense team failed to meet deadlines, the record makes clear that the motion and witness request deadlines were abandoned by both parties due to pretrial agreement negotiations. The parties, in good faith, believed that a pretrial agreement would result from those negotiations. It is not deficient practice for the defense team to not file motions or witness requests by prescribed deadlines under these **[*23]** circumstances. [6] With regard to written motions, the appellant does not suggest what written motions should have been filed, except the speedy trial motion discussed previously, or how not filing motions has prejudiced him.

We are not aware of any witness that was denied as a result of not filing a written witness request. One defense witness testified by telephone as a result of his not being called when he was physically present. While the appellant is correct that the members were denied an opportunity to judge that witness' credibility in the courtroom, that is a two-edged sword, and, by itself, does not support a finding of prejudice. With regard to witness immunity, we note that all defense witnesses testified without grants of immunity. Therefore, we do not see how not requesting immunity under these circumstances could have prejudiced the appellant. **[*24]** Again, absent prejudice, there cannot be ineffective assistance of counsel.

5. Failing to present evidence during presentencing.

The appellant asserts that the defense team's failure to present character witnesses, documents concerning the appellant's military career, his awards, information about his family, and the fact that he was a cooperating informant for the NCIS was ineffective assistance. We disagree.

The appellant called Mr. S, who testified that the appellant was a good Marine who followed orders. Record at 715. Prosecution Exhibit 26, containing 13 pages from the appellant's service record, shows that the appellant's family consists of a mother and step-father, and a daughter who lives with someone other than the appellant. We can tell the appellant's history of assignments, that he participated in Operation Southern Watch, that he received a Meritorious Mast, and we are informed of his proficiency and conduct marks and composite scores. The appellant wore his awards in court, and the military judge reminded the members of those awards in her sentencing instructions. Record at 828. The appellant provided additional details about his military career and family **[*25]** during his unsworn statement, in which he asserted: "My defense team here did an excellent job. I want to thank them." *Id*. at 814.

Other than wanting his NCIS cooperation revealed, the appellant does not tell us what he would have submitted in extenuation and mitigation in addition to what was already presented. A great deal of information about the appellant was provided to the members. We will not speculate what else might have been presented. We do not find any prejudice resulting from the defense team's handling of the sentencing phase of this case. Without prejudice, we do not find ineffective assistance of counsel.

4. Cumulative effect of error.

***HN5***[↑] "The implied premise of the cumulative-error doctrine is the existence of errors, 'no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence. *United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992)*. Assertions of error without merit are not sufficient

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records of trial to ensure the facts counsel present are supported by that record.

[6] We do not hold that counsel are relieved from meeting these deadlines, only that not meeting them under these conditions was not ineffective assistance.

to invoke this doctrine." *United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999)*. We do not find merit in any of the individual allegations of deficient performance. **[*26]** We note that as a result of the legal representation the appellant received, the Government withdrew multiple specifications and the members found the appellant not guilty of five remaining specifications. Under these circumstances, we determine the appellant's first assignment of error is without merit.

**Member Challenge**

In his second assignment of error, the appellant claims that the military judge erred by denying his challenge for cause against Major (Maj) L, claiming the member demonstrated a rigid sentencing attitude and difficulty with the concept of reasonable doubt. The appellant preserved this issue for appellate review by using his peremptory challenge on Maj L, stating that he would otherwise have used the peremptory challenge on another identified member.

***HN6***[] A court member must 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." R.C.M. 912(f)(1)(N). Military judges are enjoined to be liberal in granting challenges for cause. *See United States v. Miles, 58 M.J. 192, 194 (C.A.A.F. 2003)*. This rule includes **[*27]** challenges for actual bias as well as implied bias. *United States v. Schlamer, 52 M.J. 80, 92 (C.A.A.F. 1999)*(citing *United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997)*.

***HN7***[] Actual bias and implied bias are separate tests, but not separate grounds for a challenge. *Miles, 58 M.J. at 194*. There is implied bias "'when most people in the same position would be prejudiced.'" *United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996)*(quoting *United States v. Smart, 21 M.J. 15, 20 (C.M.A. 1985)*. The focus for implied bias is on the perception or appearance of fairness of the military justice system. *See United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995)*. When there is no actual bias, implied bias should be invoked rarely. *United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998)*.

***HN8***[] We review rulings on challenges for abuse of discretion. *United States v. Lavender, 46 M.J. 485, 488 (C.A.A.F. 1997)*. On questions of actual bias, we give the military judge great deference, because we recognize that the military judge observed the demeanor of the participants **[*28]** in the *voir dire* and challenge process. *United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000)*(citing *United States v. Warden, 51 M.J. 78, 81 (C.A.A.F. 1999))*. This is because a challenge for cause for actual bias is essentially one of credibility. *Miles, 58 M.J. at 194-95*. This court, however, gives less deference to the military judge when reviewing a finding on implied bias because it is objectively viewed through the eyes of the public. *Napolitano, 53 M.J. at 166*. We, therefore, apply an objective standard when reviewing the judge's decision regarding implied bias. *Miles, 58 M.J. at 195*.

During general *voir dire*, the members were instructed that they could not have any "preconceived idea or formula as to either the type or amount of punishment that should be adjudged," and that they must first hear all the evidence and be in closed session deliberations on sentencing before they determine an appropriate sentence, and then only after "considering all the alternate punishments." Record at 68-69. During general *voir dire* by the military judge, Maj L, by way of negative responses, **[*29]** agreed that: (1) he would follow the law and the military judge's instructions in arriving at an appropriate sentence; (2) he would keep an open mind regarding sentence until all the evidence was presented and he had been instructed on the law; (3) his decision on an appropriate sentence would be based on the matters properly presented during the trial; (4) he would not have a set sentence in mind until the trial is over; (5) he would not have a fixed, preconceived, inelastic, or inflexible attitude concerning a particular type of punishment that he felt must or should be imposed simply because of the nature or number of the offenses; and (6) he had not formed an opinion as to the sentence that should be imposed. *Id.* at 76-77.

The civilian counsel conducted individual *voir dire* of Maj L, covering 16 pages of transcript. From the answers to those questions, we know the following: (1) Maj L recommended charges be brought against another Marine once in 13 years; (2) he was the Executive Officer of 1st Combat Engineer Battalion; (3) he believes that a Marine should be discharged if convicted of theft; (4) he does not draw any conclusions from someone being charged; (5) he believes **[*30]** it is important that people not be falsely accused; (6) he had no opinion on whether the charges in the instant case are legitimate, because he had not heard any evidence; (7) he would not draw any conclusions from the charges alone; (8) he had not drawn any conclusions; (9) he believes the burden is on the Government to prove its case in order to prevent an innocent person from being

convicted; (10) he does not believe the defense has to put on any evidence; (11) he would draw his own conclusions, and those conclusions would be drawn from the evidence only; and, (12) the Government does not have the burden to disprove other possible conclusions that may be drawn from the same evidence. Record at 132-46.

The appellant challenged Maj L for cause, claiming the member showed an inelastic sentencing attitude as evidenced by his stated belief that there is no room in the Marine Corps for a thief, and because the member would not require the Government to disprove all possible conclusions that can be drawn from the same facts. *Id*. at 252-53. The military judge denied the challenge, stating in part:

> I found [Maj L] to be rather philosophical in his answers. He was pretty thorough **[*31]** in his explanations of why he believed the things he believed. And he did have some opinions and he stated those opinions openly, but he did not demonstrate at any time an inflexibility. To me, he demonstrated an openness to new ideas to learning the standards and learning what the rules are.

*Id*. at 259.

We agree with the military judge. Although Maj L held the personal opinion that thieves, in general, should not be in the Marine Corps, he would not form an opinion *in this case* until all the evidence was presented and he was instructed on the law. The record does not show actual bias on Maj L's part. Nor, based on all the circumstances, does the record establish that Maj L's participation in the appellant's court-martial raises a significant question of legality, fairness, or impartiality, to the public observer. We, therefore, find no implied bias. The military judge did not abuse her discretion by denying the appellant's challenge of Maj L.

**Record of Nonjudicial Punishment**

In his fourth assignment of error, the appellant avers that the military judge erred by admitting over defense objection a record of nonjudicial punishment that was irregular on **[*32]** its face. The record of nonjudicial punishment indicated the appellant invoked his right to refuse nonjudicial punishment. However, nonjudicial punishment was imposed the same day. [7] The Government concedes it was error to admit the entry over defense objection, however, it asserts there was no prejudice.

***HN9***[↑] A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *United States v. McDonald, 59 M.J. 426, 430 (C.A.A.F. 2004)*(citing *United States v. Tanksley, 54 M.J. 169, 175 (C.A.A.F. 2000))*. We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997)*(citing *United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987))*.

Established precedent, when read together, convinces us that ***HN10***[↑] the following guidelines should be followed **[*33]** when dealing with the admissibility of records of nonjudicial punishment. [8]

1. The admissibility of records of nonjudicial punishment, including the procedural requirements for determining admissibility, is dependent on whether the document is regular or irregular on its face.

2. When an objection is based on an irregularity on the face of the document, the Government must disprove that irregularity. For example, if an accused objects to a record of nonjudicial punishment based on a failure to show the accused was afforded the opportunity to consult with counsel, the Government may prove, through other evidence, that the accused was afforded the opportunity to consult with counsel. [9] *United States v. Kahmann, 59 M.J. 309, 314 (C.A.A.F. 2004)*.

**[*34]** 3. The burden to overcome the defense objection through additional evidence is on the Government, and must be accomplished without compelling the accused to provide that evidence. *Id*.; *see United States v. Cowles, 16 M.J. 467, 468 (C.M.A. 1983)*.

4. If, however, the record of nonjudicial punishment is regular on its face, that document is entitled to the presumption of regularity and the inferences that

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[7] Prosecution Exhibit 26 at page 9.

[8] These guidelines are equally applicable to the admissibility of records of summary court-martial. *See United States v. Wheaton, 18 M.J. 159, 160 (C.M.A. 1984)*.

[9] If an accused objects to a record of summary court-martial based on a failure to show the review required under *Article 64*, UCMJ, was conducted, the Government may prove, through other evidence, that the required review was completed. *Kahmann, 59 M.J. at 314*.

naturally flow from that presumption. *See* United States v. Wheaton, 18 M.J. 159, 160 (C.M.A. 1984)(If the record of nonjudicial punishment shows that an accused has been notified of his right to counsel, it can be presumed either that he consulted counsel or waived his right to counsel.) In that case, the burden is on the accused to object and present credible evidence to overcome that presumption. For example, if the record of nonjudicial punishment contains entries that reflect the accused was informed of his right to consult counsel and to refuse nonjudicial punishment, and that the accused did not invoke those rights, the accused may present evidence that he did not make those entries prior to punishment being imposed. United States v. Mack, 9 M.J. 300, 324 (C.M.A. 1980). **[*35]**

5. The record would then be inadmissible unless the Government establishes, by independent evidence, that the accused had been advised of his rights and had not refused nonjudicial punishment. *Id*.

Here, the record of nonjudicial punishment, on its face, shows the appellant was informed of his right to consult counsel and his right to refuse nonjudicial punishment for a violation of Article 86, UCMJ. The record of nonjudicial punishment provided for the affirmative acceptance or refusal of nonjudicial punishment, and shows that an affirmative election was made refusing nonjudicial punishment. The next entry on that record, however, reflects the imposition of nonjudicial punishment for a violation of Article 86, UCMJ, on the same date the appellant refused nonjudicial punishment. This inconsistency makes the document irregular on its face, and, therefore, not entitled to the presumption of regularity. The appellant objected to the document's admissibility, thereby requiring the Government to produce other evidence to show that the appellant changed his mind and accepted nonjudicial punishment. [10] The appellant could not be compelled to provide that information for the Government. **[*36]**

The military judge overruled the appellant's objection stating:

> It seems on the face of the document that the accused was given his rights, and possibly even exercised his rights. What's missing is some documentation that he's changing his mind and accepting. I don't think that undermines the entry sufficiently to make it invalid for the members. Certainly we have a good faith basis for believing that NJP didn't happen or that it happened over his objection. [11] I imagine that would be in the paperwork that's back at the unit. You could certainly present that.

Record at 806. The military judge, by the above language, gave the exhibit the presumption of regularity, drew an inference based on that presumption, and placed the burden on the appellant to show that the inference she drew from the document was incorrect.

**[*37]** In Wheaton, 18 M.J. at 161, our superior court held that ***HN11***[↑] it may be properly inferred that the right to refuse nonjudicial punishment was waived when: (1) the record of nonjudicial punishment shows the accused was made aware of his right to refuse nonjudicial punishment; (2) *the absence of any indication of the exercise of that right*; and, (3) the imposition of nonjudicial punishment. No such inference can be made when there is an affirmative assertion of the right to refuse nonjudicial punishment, as we have here, followed by the imposition of that punishment. Here, the burden was properly on the Government to present evidence that the appellant changed his mind and accepted the nonjudicial punishment. The military judge's drawing an inference of nonjudicial punishment waiver, placing the burden on the appellant to rebut that inference, and admitting the record of nonjudicial punishment over defense objection, was clearly erroneous. *See* Miller, 46 M.J. at 65.

***HN12***[↑] Having determined that the military judge erred, we must determine whether the error had a substantial influence on the sentence adjudged. United States v. Sowell, 62 M.J. 150, 153 (C.A.A.F. 2005); **[*38]** United States v. Griggs, 61 M.J. 402, 410 (C.A.A.F. 2005)(citing United States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001)). If it did, the error is materially prejudicial to the appellant's substantial rights. Art. 59(a), UCMJ.

Prosecution Exhibit 26 consisted of 13 pages from the appellant's service record, including two records of nonjudicial punishment. The first nonjudicial punishment was imposed on the appellant on 30 December 1999 for absenting himself from his appointed place of duty so he could sleep, as both an orders violation and an

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[10] Absent objection by the defense, the prosecution is under no obligation to introduce such evidence. Kahmann, 59 M.J. at 313.

[11] We believe the military judge meant the court DID NOT have a good faith belief that the nonjudicial punishment did not occur or was imposed over the appellant's objection.

unauthorized absence. The nonjudicial punishment record, to which the appellant objected, was for an unauthorized absence from 2 April 2001 to 5 April 2001. This was after the acts for which the appellant was convicted, and three months before the members were selected. [12] The charge sheet in this case did not contain any offense charged under *Article 86*, UCMJ.

**[*39]** The trial counsel referred to both nonjudicial punishments in his sentencing argument stating:

> I ask you to take a look at the prosecution exhibit. This is not a Marine that has never been in trouble before. This is a Marine whose record shows that he's gone to NJP. And if you look at the nature of the offenses, they're not earth shattering. But what they do tell us on the *Article 92* and *86* is that this Marine does what he wants to do when he wants to do it.
>
> He takes himself off duty when he feels like and *goes UA for a couple of days*. If you notice, the first NJP was in front of a Captain.
>
> *The second one, he was in front of a Major.* I'm sure he had an excuse for why he left or why he did what he did just like today. Telling us he's trying to take the hit for his friends.

Record at 817-18 (emphasis added). The military judge, however, did not directly refer to either nonjudicial punishment in describing matters to be considered in selecting a sentence. *Id*. at 828.

The trial counsel devoted 17 words in his sentencing argument to this nonjudicial punishment. The point of his argument would have been the same if only referring to the first record **[*40]** of nonjudicial punishment, which was properly admitted. There was no similarity between the *Article 86*, UCMJ, offense for which the second nonjudicial punishment was imposed and the charges before the court-martial, and the nonjudicial punishment was not emphasized by the trial counsel or military judge. The appellant was sentenced to 36 months of confinement out of a possible 20 years and 6 months. Under these circumstances, we do not believe the erroneous admission of the nonjudicial punishment had any effect on the sentence imposed. Therefore, the military judge's error was not materially prejudicial to the appellant's substantial rights. *Article 59(a)*, UCMJ.

Although not raised as an error, we note that the nonjudicial punishment in question was listed in the staff judge advocate's recommendation (SJAR). The appellant submitted clemency matters pursuant to R.C.M. 1105, including the assertion of trial errors, prior to receiving the SJAR. The appellant did not list the admission of the record of nonjudicial punishment as one of those errors, and did not submit a response to the SJAR pursuant to R.C.M. 1106. ***HN13***[↑] Where, as in this case, the SJAR is served on the defense counsel in accordance **[*41]** with R.C.M. 1106(f)(1), and the defense fails to comment on any matter in the recommendation, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level of plain error. *United States v. Wellington, 58 M.J. 420, 427 (C.A.A.F. 2003)*. We do not find plain error.

**Sentence Argument**

In his fifth assignment of error, the appellant asserts that the trial counsel committed plain error by arguing for a specific term of confinement for each individual offense. We disagree.

We note that the appellant did not object to trial counsel's argument during trial. As our superior court has noted, ***HN14***[↑] "the lack of defense objection is relevant to a determination of prejudice because the lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment." *United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001)*(quoting *United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)*(internal quotation marks omitted)). Thus, absent an objection at trial, the appellant is not entitled to relief under this assignment of error unless there is plain error. *United States v. Barrazamartinez, 58 M.J. 173, 175 (C.A.A.F. 2003)*; **[*42]** *Carpenter, 51 M.J. at 396*.

The appellant has the initial burden of persuasion under the plain error analysis, and must make a showing that the error was plain or obvious and materially prejudicial to a substantial right. *Carpenter, 51 M.J. at 396* (citing *United States v. Powell, 49 M.J. 460, 464-65 (C.A.A.F. 1998))*; *United States v. Harvey, 60 M.J. 611, 615 (N.M.Ct.Crim.App. 2004)*, *rev. granted*, *61 M.J. 50 (C.A.A.F. 2005)*. Here, the appellant fails.

There is nothing in the record to indicate that the members were overly swayed to adjudge a harsh sentence because of the trial counsel's argument. The sentence appears to be more a function of the

[12] The appellant's charges covered the period May 1998 to September 1999, and the members were selected on 18 July 2001.

appellant's serious crimes than of the trial counsel's argument. The appellant's counsel was in the best position to determine the prejudicial effect of the argument, yet made no objection. Further, the military judge correctly instructed the members concerning the maximum authorized confinement, that the confinement must be stated in whole terms, and that a single sentence shall be adjudged for all offenses. Record at 824, 826. Even if it was error to argue **[*43]** for individual terms of confinement for each offense, doing so was not plain error, as we discern no prejudice to the appellant. We find this assignment of error to be without merit.

**Mistrial**

In his sixth assignment of error, the appellant claims the military judge abused her discretion by denying his motion for mistrial. The motion resulted from the Government's withdrawal of four specifications prior to resting its case-in-chief. We do not find error.

***HN15***[↑] We will not grant relief for a military judge's failure to grant a mistrial unless there is clear evidence of abuse of discretion. *United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000)*(citing *United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993))*. A mistrial is a drastic remedy to be used sparingly to prevent manifest injustice only. *United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003)*(citing *United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990))*. A mistrial is appropriate only when "circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Barron, 52 M.J. 1, 4 (C.A.A.F. 1999)* **[*44]** (quoting *United States v. Waldron, 15 C.M.A. 628, 36 C.M.R. 126, 129 (C.M.A. 1966))*(internal quotation marks omitted).

Here, the trial counsel moved to withdraw four specifications after the members received their cleansed charge sheet and before resting its case-in-chief. The appellant moved for a mistrial, claiming he had been prejudiced by having extra charges in front of the members that the Government knew it could not prove. The military judge denied the motion for mistrial, and instructed the members to cross out the withdrawn specifications on their cleansed charge sheets and told them they could not consider those specifications for any reason. Record at 548.

The Government's withdrawal of specifications did not create a manifest injustice. ***HN16***[↑] The Government may, at any time and for any reason, withdraw charges prior to findings. R.C.M. 604. We find that the military judge's instructions to the members secured the fairness and impartiality of the trial. ***HN17***[↑] Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions. *Thompkins, 58 M.J. at 47* (citing *Tennessee v. Street, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)*; **[*45]** *Lakeside v. Oregon, 435 U.S. 333, 340 n.11, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978)*; *United States v. Holt, 33 M.J. 400, 403 (C.M.A. 1991)*. "In the clear absence of manifest injustice," the military judge did not abuse her discretion by denying the appellant's motion for mistrial. *Id. at 47-48*. We do not see any practical difference between the Government withdrawing and dismissing specifications before resting and those same specifications being dismissed by the military judge in response to a defense motion for a finding of not guilty at the end of the Government's case. *See* R.C.M. 917. In either event, the specifications appear on the cleansed charge sheet, but are subsequently removed from the members' consideration. This issue is without merit.

**Factual and Legal Sufficiency**

In his eighth assignment of error, [13] the appellant asserts the evidence is factually and legally insufficient to establish the criminal intent required for the charges of larceny of car parts and obtaining car repair services to install those car parts under false pretenses.

**[*46]** ***HN18***[↑] The tests for legal and factual sufficiency are well-known. For legal sufficiency, we consider the evidence in the light most favorable to the Government, and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)*; *United States v. Reed, 51 M.J. 559, 561-62 (N.M.Ct. Crim.App. 1999)*, *aff'd*, *54 M.J. 37 (C.A.A.F. 2000)*; *see also Art. 66(c)*, UCMJ. For factual sufficiency, we weigh all the evidence in the record of trial, recognizing that we did not see or hear the witnesses, and determine whether we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325*; *see also Art. 66(c)*, UCMJ. Reasonable doubt does not

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[13] We have reviewed the appellant's seventh assignment of error alleging cumulative error based on assignments of error I through VI, and also find it without merit. *See* *Gray, 51 M.J. at 61* (Individual assertions of error without merit are not sufficient to invoke the doctrine of cumulative error).

mean, however, that the evidence contained in the record must be free from any and all conflict. Reed, 51 M.J. at 562.

The evidence shows that the appellant took his car to Pep Boys on 4 September 1999, at which time a work order was prepared for the sale and installation of **[*47]** two tires and a pinion seal on the appellant's car. Prosecution Exhibit 24. By signing the work order, the person who brought the car in expressly authorized Pep Boys to perform the contracted services and to provide the contracted materials, and granted an express mechanic's lien "to secure amount of repairs for work performed . . . ." *Id*. The work order contains the appellant's name (misspelled as "Scanran"), an incomplete base address, and the appellant's home phone number was the Camp Pendleton Base Locater phone number.

Pep Boys' procedure is to give the original work order to the service department. Once the work is done, the customer receives the original invoice in order to pay the customer service department for the parts and labor. If the customer drives off without paying, the original invoice will be missing from the company files and a duplicate invoice will have to be reprinted for the files. Pep Boys did not have the original invoice for the 4 September 1999 work performed on the appellant's car, indicating that his car had been driven off without anyone paying for the parts and service. Pep Boys reported the failure to pay to the police approximately three weeks **[*48]** later. When the appellant learned the police were involved, he returned to Pep Boys, acknowledged that he owed the debt, paid the debt, and apologized to the store owner.

The appellant asserts that this evidence is not factually or legally sufficient to show that he possessed the necessary criminal intent for the charge of larceny or for obtaining services under false pretenses, because he eventually paid for the parts and service. We disagree.

1. Larceny of car parts from Pep Boys.

The appellant was charged with larceny of the car parts installed on his car by Pep Boys. The specification itself does not state whether this was a wrongful taking, withholding or obtaining under false pretenses larceny. [14] ***HN19***[↑] This court, however, cannot affirm a finding of guilty on a theory not presented by the Government and not instructed upon by the military judge. *See* United States v. Pacheco, 56 M.J. 1, 11 (C.A.A.F. 2001) (citing United States v. Standifer, 40 M.J. 440, 445 (C.M.A. 1994); United States v. Riley, 50 M.J. 410, 415 (C.A.A.F. 1999); Dunn v. United States, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979); and Rewis v. United States, 401 U.S. 808, 814, 91 S. Ct. 1056, 28 L. Ed. 2d 493 (1991)). **[*49]** The military judge instructed the members on the larceny theories of wrongful taking and wrongful withholding, but not on wrongful obtaining under false pretenses. Record at 784. We cannot, therefore, affirm the finding of guilty as to Additional Charge II, Specification 3, under any theory other than a wrongful taking or wrongful withholding. Under the circumstances of this case, however, we find there was a wrongful taking larceny of the car parts. This requires a specific intent to permanently deprive Pep Boys of the use and benefit of the tires and pinion seal installed on the appellant's car. Manual for Courts-Martial, United States (1998 ed.), Part IV, P 46b(1)(d). The appellant's driving his car away from Pep Boys without paying for those parts is strong circumstantial evidence of his specific intent. *Id*., P 46c(1)(e).

**[*50]** We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the appellant committed a wrongful taking larceny of the car parts. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt of this offense. The evidence is, therefore, factually sufficient as well.

2. Obtain services under false pretenses from Pep Boys.

The appellant was also charged with obtaining, under false pretenses, the mechanical services provided to install the same car parts. ***HN21***[↑] The criminal intent required for an Article 134, UCMJ, violation (obtaining services under false pretenses) is similar to larceny by false pretense under Article 121, UCMJ. M.C.M., Part IV, P 78c; *see* United States v. Caver, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994); United States v. Flowerday, 28 M.J. 705, 707 (A.F.C.M.R. 1989). A false pretense with respect to larceny is a false representation of a past or existing fact by means of any act, word, symbol, or

[14] ***HN20***[↑] The Government is under no obligation to allege or even elect a specific theory of larceny to prosecute an offense under Article 121, UCMJ. Rather, the Government need only allege that an accused did "steal" the property of another. United States v. O'Hara, 14 C.M.A. 167, 33 C.M.R. 379, 381 (C.M.A. 1963).

token, including a **[*51]** representation that the person "presently intends to perform a certain act in the future." M.C.M., Part IV, P 46c(1)(e). Thus, a false representation that he or she presently intends to pay for parts (for *Article 121*, UCMJ) and services (for *Article 134*, UCMJ) is a false representation of an existing fact--the present intention--and thus a false pretense if there was no intent to pay. "A false pretense may also exist by silence or failure to correct a known misrepresentation." *United States v. Johnson, 39 M.J. 707, 710 (N.M.C.M.R. 1993)*, *aff'd*, *40 M.J. 318 (C.M.A. 1994)*; *see also United States v. Dean, 33 M.J. 505, 510 (A.F.C.M.R. 1991)*. A false pretense "must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth." M.C.M., P 46c(1)(e); *United States v. Hecker, 42 M.J. 640, 645 (A.F.Ct.Crim.App. 1995)*. Additionally, obtaining services under false pretenses requires the specific intent to permanently deprive or defraud another of the use and benefit of the service. M.C.M., Part IV, P 78b(4) and P 49c(14).

In this case, **[*52]** the services required to install the parts on the appellant's car were contracted for and obtained through the signing of the work order. Prosecution Exhibit 24. That document created a mechanic's lien on the appellant's car in an amount equal to the services provided. By entering into this contract, the appellant represented a present intent to pay for the services when they were complete. That is the false pretense upon which he obtained the services. The appellant's driving away without paying for the services is circumstantial evidence that he did not intend to pay for the services at the time he entered into the contract. The appellant's actions are also consistent with the specific intent to permanently deprive or defraud. The fact that he eventually did pay, after legal action had been instituted, does not convince us otherwise.

We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the appellant wrongfully obtained services from Pep Boys under false pretenses. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves **[*53]** are convinced beyond a reasonable doubt of the appellant's guilt of these offenses. The evidence is, therefore, factually sufficient as well.

**Sentence Severity**

In his ninth assignment of error, the appellant asserts that a sentence including a dishonorable discharge and 36 months of confinement is inappropriately severe for the offenses and the person. We disagree. Taking into account all the facts and circumstances, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy, 50 M.J. 286, 287-88 (C.A.A.F. 1999)*, we believe the sentence is appropriate.

***HN22***[↑] Our mandate under *Article 66(c)*, UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the convening authority. However, we are compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988)*; R.C.M. 1107(b). *See generally United States v. Spurlin, 33 M.J. 443, 444 (C.M.A. 1991).* **[*54]**

The appellant's crimes are certainly dishonorable and warrant a substantial period of confinement. We are mindful of the approved sentences of similar cases in the field as we discharge our statutory mandate. After careful review and consideration of the record, we find the imposition of 36 months of confinement and a dishonorable discharge to be appropriate for this offender and these offenses. Accordingly, we approve the sentence as adjudged and approved below.

**Post-Trial Appellate Delay**

In his tenth assignment of error, ***HN23***[↑] the appellant claims that he has been denied due process and suffered presumptive prejudice as a result of the time that has elapsed since his case was docketed with this court. Although the period of delay complained of begins with docketing with this court, we analyze the appellant's due process right to speedy appellate review under the same standards as his right to speedy post-trial review. *See United States v. Oestmann, 61 M.J. 103, 104 (C.A.A.F. 2005)*.

We analyze an appellant's due process right to speedy appellate review by looking to four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's **[*55]** assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)*(citing *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004))*.

If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude

that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id*. (quoting *Toohey, 60 M.J. at 102*).

The appellant's case was docketed with this court on 19 August 2002. The Government filed its Answer on 29 July 2005. Total delay from docketing to the last pleading filed is approximately one month short of three years. We do not find this facially unreasonable.

Even if this period of delay is facially unreasonable, we would not find a due process violation. Following 20 enlargements of time citing "other case-load commitments," the appellate defense counsel filed the appellant's Brief, asserting nine assignments of error, on 30 September 2004. [15] **[*56]** A different appellate defense counsel filed a supplemental assignment of error on 21 June 2005, asserting for the first time a denial of speedy appellate review. Following seven enlargements of time, the first four of which were uncontested, the Government filed its Answer. The record of trial consists of five volumes, including 835 pages of transcript plus exhibits.

We find no assertion of the right to a timely appeal until the appellant's counsel filed his supplemental assignment of error with this court. Moreover, the appellant has failed to demonstrate any prejudice from the delay. Finally, we find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. We conclude that the appellant's due process rights have not been violated as a result of the appellate processing of this case.

We are also aware **[*57]** of our authority to grant relief under *Article 66*, UCMJ, in the absence of any showing of actual prejudice. *Id*.; *Toohey, 60 M.J. at 100*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*. Applying the factors we recently enumerated in *United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)*(en banc), we do not believe that the period of appellate review alone, or the total period of post-trial review, affects the findings and sentence that should be approved in this case and therefore, decline to grant relief.

[15] We note the amount of time this case was in appellate defense counsel's hands for factual information only and not to insinuate the appellate review delay is invited error.

**Conclusion**

The findings and sentence, as approved by the convening authority, are affirmed.

Chief Judge ROLPH and Judge FELTHAM concur.

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## Document (1)

1. *United States v. Wilson, 2021 CCA LEXIS 284*
   **Client/Matter:** -None-
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| Cases | -None- |

# United States v. Wilson

United States Air Force Court of Criminal Appeals

June 10, 2021, Decided

No. ACM 39387

**Reporter**
2021 CCA LEXIS 284 *; 2021 WL 2390367

UNITED STATES, Appellee v. Charles A. WILSON, III, Airman First Class (E-3), U.S. Air Force, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Petition for review filed by *United States v. Wilson, 2021 CAAF LEXIS 835 (C.A.A.F., Sept. 10, 2021)*

Motion granted by *United States v. Wilson, 2021 CAAF LEXIS 826 (C.A.A.F., Sept. 15, 2021)*

Motion granted by *United States v. Wilson, 2021 CAAF LEXIS 970, 2021 WL 5774537 (C.A.A.F., Nov. 3, 2021)*

Review denied by *United States v. Wilson, 2021 CAAF LEXIS 1075 (C.A.A.F., Dec. 16, 2021)*

**Prior History: [*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Vance H. Spath. Approved sentence: Dishonorable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. Sentence adjudged 22 February 2017 by GCM convened at the Houston County Courthouse in Perry, Georgia.

*United States v. Wilson, 2015 CCA LEXIS 201 (A.F.C.C.A., May 7, 2015)*

## Core Terms

military, sentencing, contends, trial defense counsel, court-martial, trial counsel, rental car, murder, door, motive, confinement, killed, senior, defense counsel, cross-examination, circumstances, death penalty, swinging, soil, opened, post-trial, notice, convening, comments, opening statement, probable cause, suppress, rebut, alibi defense, factors

## Case Summary

**Overview**
HOLDINGS: [1]-Findings and sentence for premeditated murder and intentionally causing the death of an unborn child were affirmed because the evidence clearly indicated the victim, who was over eight months pregnant at the time, died in her bedroom as a result of being shot multiple times in the back of her head with a.22 caliber firearm and markings on the bullets recovered from the victim's body matched those on the test round recovered from the P-22 box seized from the servicemember's residence; [2]-There was no error with respect to the judge's alleged disqualification pursuant to R.C.M. 902(a), Manual Courts-Martial because the judge's application to the DOJ for employment as an immigration judge was not a disqualifying personal interest that could be substantially affected by the outcome of the trial.

**Outcome**
Findings and sentence affirmed.

## LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

*HN1*[] **Evidence, Weight & Sufficiency of Evidence**

An appellate court reviews issues of legal and factual sufficiency de novo. The assessment of legal and factual sufficiency is limited to the evidence produced at trial.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

**HN2[] Substantial Evidence, Sufficiency of Evidence**

The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In resolving questions of legal sufficiency, the appellate court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

**HN3[] Trial Procedures, Burdens of Proof**

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the appellate court is convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the appellate court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Offenses > Murder

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

Military & Veterans Law > Military Offenses > Manslaughter

**HN4[] Military Offenses, Assault**

In order to convict an Appellant of the specification of premeditated murder in violation of Unif. Code Mil. Justice art. 118, the Government is required to prove: (1) that the victim is dead; (2) that the death resulted from the act or omission of Appellant; (3) that the killing was unlawful; and (4) that, at the time of the killing, Appellant had a premeditated design to kill. Manual Courts-Martial pt. pt. IV, para. 43.b.(1). Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. Manual Courts-Martial pt. pt. IV, para. 43.c.(2)(a).

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Offenses > Murder

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

**HN5[] Military Offenses, Assault**

In order to convict an Appellant of the specification of killing an unborn child in violation of Unif. Code Mil. Justice art.119a, the Government was required to prove: (1) that Appellant engaged in the murder of the victim; (2) that the victim was then pregnant; and (3) that Appellant thereby caused the death of the victim's unborn child. Manual Courts-Martial pt. pt. IV, para. 44a.b.(2).

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

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

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

**HN6[] Pretrial Motions & Procedures, Disqualification & Recusal**

An accused has a constitutional right to an impartial judge. R.C.M. 902, Manual Courts-Martial governs disqualification of the military judge. R.C.M. 902(b) sets forth specific circumstances in which a military judge shall disqualify himself or herself, including when the military judge is known to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding. R.C.M. 902(b)(5)(B). In addition, R.C.M. 902(a) requires disqualification in any proceeding in which the military judge's impartiality might reasonably be questioned. Disqualification pursuant to R.C.M. 902(a) is determined by applying an objective standard of whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned. The test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions.

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

**HN7[] Judges, Challenges to Judges**

There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle. Although a military judge is to broadly construe the grounds for challenge, he should not leave the case unnecessarily. Of course, a judge has as much obligation not to disqualify himself when there is no reason to do so as he does to disqualify himself when the converse is true.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

**HN8[] Plain Error, Definition of Plain Error**

When the issue of disqualification is raised for the first time on appeal, an appellate court applies the plain error standard of review. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

**HN9[] Trial Procedures, Appeal by United States**

Whether an appellant is entitled to relief for a violation of Unif. Code Mil. Justice art. 13 is a mixed question of fact and law. The military judge's findings of fact will not be overturned unless they are clearly erroneous. Whether the facts amount to a violation of Unif. Code Mil. Justice art. 13 is a matter of law the court reviews de novo. The appellant bears the burden to demonstrate a violation of Unif. Code Mil. Justice art. 13.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Arrests

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military

Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > Military Offenses > Attempts

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

**HN10** **Apprehension & Restraint of Civilians & Military Personnel, Arrests**

Unif. Code Mil. Justice art. 13 prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial. The first prohibition involves a purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are reasonably related to a legitimate governmental objective. The second prohibition prevents imposing unduly rigorous circumstances during pretrial detention.

**HN11** Military appellate courts are reluctant to second-guess the security determinations of confinement officials. Where the conditions of an appellant's confinement relate to both ensuring his presence for trial and the security needs of the confinement facility, the appellant bears the burden of showing that the conditions were unreasonable or arbitrary in relation to both purposes.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

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

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

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

**HN12** **Bias & Impartiality, Actual & Implied Bias**

Courts generally recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias. Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial. An appellate court reviews a military judge's ruling on a claim of actual bias for an abuse of discretion. Implied bias, in contrast, is measured by an objective standard, whereby we determine whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high. The appellate court assesses implied bias based on the totality of the circumstances, assuming the hypothetical public is familiar with the military justice system. The appellate court reviews the military judge's ruling on a claim of implied bias pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review.

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

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

**HN13** **Judges, Challenges to Judges**

A court-martial 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. R.C.M. 912(f)(1)(N), Manual Courts-Martial. The two purposes of R.C.M. 912(f)(1)(N) are to protect the actual fairness of the court-martial and to bolster the appearance of fairness of the military justice system in the eyes of the public. The United States Court of Appeals for the Armed Forces has repeatedly emphasized the need for a military judge to follow a liberal grant mandate in ruling on challenges for cause. In other words, the military judge is mandated to err on

the side of granting a challenge. Appellate courts afford greater deference to a military judge's ruling on a challenge for implied bias where the military judge puts his analysis on the record and provides a clear signal he applied the correct law.

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

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

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

**HN14** **Judges, Challenges to Judges**

An accused enjoys the right to an impartial and unbiased panel. Holding an inelastic attitude toward the appropriate punishment to adjudge if the accused is convicted is grounds for an actual bias challenge under R.C.M. 912(f)(1)(N), Manual Courts-Martial. However, a mere predisposition to adjudge some punishment upon conviction is not, standing alone, sufficient to disqualify a member. Rather, the test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions.

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

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

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

**HN15** **Sentences, Capital Punishment**

A mere predisposition toward a particular punishment is not necessarily disqualifying, if the court-martial member is able to follow the military judge's instructions and give meaningful consideration to all the evidence and circumstances. Even in light of the liberal grant mandate, a military judge is not required to remove a member who is likely to favor a particular punishment, including the death penalty, because such an attitude is not in itself disqualifying. An inflexible member is disqualified; a tough member is not.

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

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

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

**HN16** **Evidence, Evidentiary Rulings**

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact. 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.

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

**HN17** **Compulsory Attendance of Witnesses, Interrogation & Presentation**

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Mil. R. Evid. 401. Relevant

evidence is generally admissible, unless another provision of law provides otherwise; irrelevant evidence is not admissible. Mil. R. Evid. 402.

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

***HN18*** **Relevance, Confusion, Prejudice & Waste of Time**

The military judge may exclude relevant evidence that is otherwise admissible if its probative value is substantially outweighed by a countervailing danger, including inter alia unfair prejudice, confusion of the issues, or waste of time. Mil. R. Evid. 403. A military judge enjoys wide discretion in applying Mil. R. Evid. 403. When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a clear abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Criminal Law & Procedure > Defenses > Right to Present

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

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

***HN19*** **Harmless & Invited Error, Constitutional Rights**

Where a military judge commits an error regarding the admissibility of evidence that is not of constitutional dimensions, we assess whether the error substantially influenced the verdict in light of (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. However, if the military judge commits a constitutional error by depriving the accused of his right to present a defense, the test for prejudice is whether the error was harmless beyond a reasonable doubt. A constitutional error is harmless beyond a reasonable doubt when the error did not contribute to the verdict.

***HN20*** Relevance is a low threshold, but even in the context of a capital prosecution the proffered evidence must have some tendency beyond speculation to make a consequential fact more or less probable.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

***HN21*** **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

The overriding concern of Mil. R. Evid. 403 is that evidence will be used in a way that distorts rather than aids accurate fact finding.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

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

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

***HN22*** **Abuse of Discretion, Evidence**

A military judge's decision to exclude or admit evidence is reviewed for an abuse of discretion.

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

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

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

**HN23** **Criminal Process, Assistance of Counsel**

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. In assessing the effectiveness of counsel, the appellate court applies the Strickland standard and begins with the presumption of competent representation. The appellate court will not second-guess reasonable strategic or tactical decisions by trial defense counsel. The appellate court reviews allegations of ineffective assistance de novo.

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

**HN24** **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

An appellate court utilizes the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel were ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? The burden is on the appellant to demonstrate both deficient performance and prejudice.

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

**HN25** **Judicial Review, Courts of Criminal Appeals**

The Courts of Criminal Appeals may not consider anything outside of the entire record when reviewing a sentence under Unif. Code Mil. Justice art. 66(c),10 U.S.C.S. § 866(c).

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

**HN26** **Effective Assistance of Counsel, Trials**

An appellate court evaluates trial defense counsel's decisions based upon their reasonableness at the time rather than their ultimate success.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

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

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

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

**HN27** **Pretrial Motions & Procedures, Suppression of Evidence**

An appellate court reviews a military judge's ruling on a motion to suppress for an abuse of discretion, viewing the evidence in the light most favorable to the prevailing party. A military judge abuses his discretion when: (1) his findings of fact are clearly erroneous; (2) he applies incorrect legal principles; or (3) his application of the correct legal principles to the facts is clearly unreasonable. 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.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good

Faith

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

Military & Veterans Law > Military Justice > Search & Seizure > Searches Not Requiring Probable Cause

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

**HN28[] Exceptions to Exclusionary Rule, Good Faith**

The Military Rules of Evidence effectuate the Fourth Amendment with respect to courts-martial. Under Mil. R. Evid. 315(f)(1), a search authorization must be based upon probable cause. Probable cause exists when there is a reasonable belief that the person, property, or evidence sought is located in the place to be searched. Mil. R. Evid. 315(f)(2). Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence. The burden of proof rests with the Government to demonstrate evidence was lawfully seized or that the good faith exception applies. Mil. R. Evid. 315(e)(1).

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Probable Cause Determinations

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

**HN29[] Deferential Review, Probable Cause Determinations**

Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and courts have concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination. Accordingly, searches conducted pursuant to a warrant or authorization based on probable cause are presumptively reasonable. An appellate court assesses whether the authorizing official had a substantial basis' for finding probable cause. A substantial basis exists when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location. Where a magistrate had a substantial basis to find probable cause, a military judge would not abuse his discretion in denying a motion to suppress. Close calls will be resolved in favor of sustaining the magistrate's decision.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

**HN30[] Search & Seizure, Warrants**

When the magistrate is presented with inaccurate information in support of a request for a warrant or search authorization, the appellate court will sever that information and determine whether the remaining information supports a finding of probable cause. Similarly, when information is omitted with an intent to mislead the magistrate or with reckless disregard for the truth, the appellate court assesses whether the hypothetical inclusion of the omitted material would prevent a finding of probable cause.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrants

Military & Veterans Law > Military Justice > Search & Seizure > Searches Not Requiring Probable Cause

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

Criminal Law & Procedure > ... > Exclusionary

Rule > Exceptions to Exclusionary Rule > Good Faith

HN31[] **Search Warrants, Execution of Warrants**

One exception to the ordinary rule of exclusion is the so-called good faith exception under which evidence obtained as a result of an unlawful search or seizure need not be suppressed if it was obtained pursuant to the good faith execution of a search authorization. Mil. R. Evid. 311(c)(3) sets forth three requirements for this exception: (1) the search or seizure executed was based on an authorization issued by a competent authority; (2) the individual issuing the authorization had a substantial basis for determining the existence of probable cause; and (3) the person seeking and executing the authorization reasonably and with good faith relied on the issuance of the authorization. The second requirement is met if the person executing the search had an objectively reasonable belief that the magistrate had a substantial basis' for determining the existence of probable cause.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN32[] **Search & Seizure, Probable Cause**

Where an affidavit contains errors, the appellate court severs that information and assess whether the remaining information supports a finding of probable cause.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN33[] **Search & Seizure, Probable Cause**

Although probable cause requires more than bare suspicion, it does not require proof by a preponderance of the evidence that the evidence will be present.

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

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

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN34[] **Evidence, Evidentiary Rulings**

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion.

HN35[] The mere lack of money, without more, as proof of motive, has little tendency to prove that a person committed a crime. However, where the moving party can demonstrate a specific relevant link to the offense in question, financial evidence may be relevant to establish motive.

HN36[] The context in which evidence is offered is often determinative of its admissibility. Where a party opens the door, principles of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and is predicated on a proper testimonial foundation. The legal function of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party. The scope of rebuttal is defined by evidence introduced by the other party.

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

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN37[] **Relevance, Confusion, Prejudice & Waste of Time**

Rebuttal evidence, like all other evidence, may be excluded pursuant to Mil. R. Evid. 403 if its probative value is substantially outweighed by the danger of unfair

prejudice. When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a clear abuse of discretion. However, we afford military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing.

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

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

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

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

**HN38** **Evidence, Evidentiary Rulings**

An appellate court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact. 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.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

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

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

**HN39** **Admissibility of Evidence, Character, Custom & Habit Evidence**

The relevance standard is a low threshold. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Mil. R. Evid. 401. Relevant evidence is generally admissible, unless otherwise provided by the Constitution, statute, Military Rules of Evidence, or the Manual for Courts-Martial. Mil. R. Evid. 402.

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

**HN40** **Relevance, Confusion, Prejudice & Waste of Time**

The military judge may exclude relevant evidence that is otherwise admissible if its probative value is substantially outweighed by a countervailing danger, including inter alia unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence. Mil. R. Evid. 403. A military judge enjoys wide discretion in applying Mil. R. Evid. 403. Where a military judge properly conducts the balancing test under Mil. R. Evid. 403, the appellate court will not overturn his decision unless there is a clear abuse of discretion.

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

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

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

**HN41** **Evidence, Evidentiary Rulings**

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion.

**HN42** The context in which evidence is offered is often determinative of its admissibility. Where a party opens the door, principles of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and is predicated on a proper testimonial foundation. The legal function of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party. The scope of rebuttal is defined by evidence introduced by the other party.

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

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

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

**HN43** **Relevance, Confusion, Prejudice & Waste of Time**

Rebuttal evidence, like all other evidence, may be excluded pursuant to Mil. R. Evid. 403 if its probative value is substantially outweighed by the danger of unfair prejudice. When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a clear abuse of discretion. However, the appellate court affords military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing.

Criminal Law & Procedure > Trials > Witnesses > Impeachment

Military & Veterans Law > Military Justice > Search & Seizure > Searches Not Requiring Probable Cause

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Impeachment at Trial

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

**HN44** **Witnesses, Impeachment**

Mil. R. Evid. 311(c) provides that evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused. The provision of such a specific exception for the use of illegally obtained evidence implies such evidence is not generally available to rebut or impeach defense evidence.

**HN45** The weight of the evidence supporting the convictions may so clearly favor the government that the appellant cannot demonstrate prejudice.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

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

**HN46** **De Novo Review, Jury Instructions**

Where an appellant properly preserves his objections, an appellate court reviews the adequacy of the military judge's instructions de novo. A military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law. The test for prejudice for a nonconstitutional error in findings instructions is whether the error had a substantial influence on the findings.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

***HN47*** **Courts Martial, Court-Martial Member Panel**

A military judge is required to tailor the instructions to the particular facts and issues in a case. Absent evidence to the contrary, we presume the court members followed the military judge's instructions.

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

***HN48*** **Instructions, Requests for Instructions**

The Benchbook instructions are not mandatory, and the military judge is required to tailor the instructions to the particular facts and issues in a case.

***HN49*** Rebuttal evidence serves to explain, repel, counteract or disprove evidence introduced by the opposing party.

***HN50*** Rebuttal evidence is evidence that explains, repels, counteracts or disproves the evidence introduced by the opposing party.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

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

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

***HN51*** **Plain Error, Definition of Plain Error**

Improper argument is a question of law that an appellate court reviews de novo. The test for improper argument is whether the argument was erroneous and whether the argument materially prejudiced the appellant's substantial rights. When there is no objection at trial, the appellate court reviews the propriety of trial counsel's argument for plain error. To prevail under a plain error analysis, the appellant must show (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.

Criminal Law & Procedure > Counsel > Prosecutors

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

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

***HN52*** **Counsel, Prosecutors**

Improper argument is one facet of prosecutorial misconduct. Prosecutorial misconduct occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Trial counsel may argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence. A prosecutorial comment must be examined in light of its context within the entire court-martial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

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

**HN53** **Trial Procedures, Arguments on Findings**

An appellate court need not determine whether a trial counsel's comments were in fact improper if it determines that the error, if any, did not materially prejudice the appellant's substantial rights. In the context of an allegedly improper sentencing argument, the appellate court considers whether trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone.

**HN54** Caution is particularly appropriate in the context of a capital sentencing proceeding, where the Government bears special burdens of proof.

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

**HN55** **Procedural Matters, Records on Appeal**

Appellate courts are permitted to consider matters from outside the record of trial when necessary to resolve issues raised by materials in the record of trial.

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

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

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

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

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

**HN56** **Posttrial Procedure, Actions by Convening Authority**

An appellate court reviews de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. There is a presumption of facially unreasonable delay where the convening authority does not take action within 120 days of sentencing, where the record of trial is not docketed with the Court of Criminal Appeals within 30 days of the convening authority's action, and where the court does not issue its decision within 18 months of docketing. Where there is such a facially unreasonable delay, the appellate court considers the four non-exclusive factors identified in to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: (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. No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.

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

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

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

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

**HN57** **Procedural Due Process, Scope of Protection**

There is a presumption of facially unreasonable delay where the convening authority does not take action within 120 days of sentencing, where the record of trial is not docketed with the Court of Criminal Appeals within 30 days of the convening authority's action, and where the court does not issue its decision within 18 months of docketing. Where there is no qualifying 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. There are three interests protected by an appellant's due process right to timely post-trial review: (1) preventing oppressive incarceration; (2) minimizing anxiety and concern; and (3) avoiding impairment of the appellant's grounds for appeal and ability to present a

defense at a rehearing.

Criminal Law & Procedure > Defenses > Right to Present

HN58 **Defenses, Right to Present**

Where the appellant has not prevailed on the substantive grounds of his appeal, there is no oppressive incarceration. Similarly, where Appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN59 **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

With respect to anxiety and concern, the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.

Criminal Law & Procedure > Counsel > Assignment of Counsel

HN60 **Counsel, Assignment of Counsel**

An appellant before a Court of Criminal Appeals does not have the right to select his detailed appellate counsel. 10 U.S.C.S. § 870.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Right to Counsel

HN61 **De Novo Review, Right to Counsel**

An appellate court reviews issues affecting the severance of an attorney-client relationship de novo.

Military & Veterans Law > Servicemembers > Active Duty

HN62 **Servicemembers, Active Duty**

The attorney-client relationship may be broken over defense objection when there is good cause to sever it. Such determinations are necessarily fact specific. Although separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case.

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

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

HN63 **Criminal Process, Assistance of Counsel**

Sixth Amendment rights to counsel are strictly trial rights; the Sixth Amendment does not include any right to appeal. The right to appeal in criminal cases is purely a creature of statute. An appellant before a Court of Criminal Appeals has the right to be represented by detailed counsel, but does not have the right to select his detailed appellate counsel. 10 U.S.C.S. § 870.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Counsel

Criminal Law & Procedure > Counsel > Assignment of Counsel

HN64 **Standards of Review, Abuse of Discretion**

An appellate court examines the denial of requested counsel and its review for an abuse of discretion.

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > Special Courts-Martial

Military & Veterans Law > ... > Courts Martial > Sentences > Impeachment & Reconsideration

Military & Veterans Law > ... > Evidence > Privileged Communications > Self-Incrimination Privilege

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

*HN65*[] **Military Justice, Counsel**

Unif. Code Mil. Justice art. 38(b) provides that an accused at a general or special court-martial has the right to be represented by civilian counsel provided by the accused, by detailed military counsel, or by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)). 10 U.S.C.S. §§ 838(b)(1), (2), (3)(A), (3)(B).

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

*HN66*[] **Military Justice, Counsel**

R.C.M. 506(b)(1), Manual Courts-Martial requires the Secretary concerned to define reasonably available for purposes of an accused's request to be represented by a particular military counsel. However, the rule goes on to state that certain categories of individuals are not reasonably available to serve as individual military counsel because of the nature of their duties or positions, to include appellate defense counsel and appellate government counsel. R.C.M. 506(b)(1), (b)(1)(D), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Discovery by Defense

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

*HN67*[] **Disclosure & Discovery, Discovery by Defense**

R.C.M. 506(b)(1), Manual Courts-Martial echoes the statutory requirement that the service Secretaries define the term reasonably available. The Secretary of the Air Force has done so in part by adopting the standards of the Manual for Courts-Martial, including the categorical exclusions set forth in R.C.M. 506.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

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

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

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

*HN68*[] **Standards of Review, Abuse of Discretion**

The military judge's decision to admit or exclude hearsay evidence is reviewed for an abuse of discretion.

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

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

*HN69*[] **Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

A statement against the declarant's interest is an exception to the general prohibition on the admissibility of hearsay evidence, where: a reasonable person in the declarant's position would have made the statement only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or

pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability. Mil. R. Evid. 804(b)(3)(A); Mil. R. Evid. 801, 802. This exception is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. The criterion is whether the declarant would himself have perceived at the time that his statement was against his penal interest. Whether a statement is self-inculpatory or not can only be determined by viewing it in context.

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

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

**HN70[] Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

Mil. R. Evid. 807 provides that a hearsay statement not otherwise admissible under Mil. R. Evid. 803 or Mil. R. Evid. 804 may nevertheless be admissible if the statement: (1) has equivalent circumstantial guarantees of trustworthiness; (2) is offered as evidence of a material fact; (3) is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admission will best serve the purposes of these rules and the interests of justice.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

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

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Right to Counsel

**HN71[] De Novo Review, Ineffective Assistance of Counsel**

An appellate court reviews allegations of ineffective assistance de novo. However, scrutiny of a trial defense counsel's performance is highly deferential, and the appellate court make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time. The appellate court utilizes the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? The burden is on the appellant to demonstrate both deficient performance and prejudice.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Mistrial

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Criminal Law & Procedure > Trials > Motions for Mistrial

**HN72[] Abuse of Discretion, Mistrial**

A military judge has discretion to declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. Mistrial is a drastic remedy which should be used only when necessary to prevent a miscarriage of justice. Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving

curative instructions. The appellate court will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion.

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

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

**HN73** **Procedural Due Process, Scope of Protection**

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The United States Supreme Court has extended Brady, clarifying that the duty to disclose such evidence is applicable even though there has been no request by the accused and that the duty encompasses impeachment evidence as well as exculpatory evidence.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery Misconduct

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

**HN74** **Disclosure & Discovery, Disclosure by Government**

A military accused has the right to obtain favorable evidence under Unif. Code Mil. Justice art. 46, as implemented by R.C.M. 701-703, Manual Courts-Martial. Unif. Code Mil. Justice art. 46 and these implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. With respect to discovery, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, inter alia, any documents within the possession, custody, or control of military authorities, and which are material to the preparation of the defense.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Prosecutorial Misconduct

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

Criminal Law & Procedure > ... > Reviewability > Waiver > Prosecutorial Misconduct

**HN75** **Prosecutorial Misconduct, Burdens of Proof**

An appellate court reviews prosecutorial misconduct and improper argument de novo and where no objection is made, the appellate court reviews for plain error. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. The burden of proof under a plain error review is on the appellant.

Criminal Law & Procedure > Counsel > Prosecutors

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

**HN76** **Counsel, Prosecutors**

Improper argument is one facet of prosecutorial misconduct. Prosecutorial misconduct occurs when trial

counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Such conduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, for example, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon. A prosecutorial comment must be examined in light of its context within the entire court-martial.

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

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

*HN77*[] **Procedural Due Process, Scope of Protection**

The Due Process Clause of the Fifth Amendment to the Constitution requires the Government to prove a defendant's guilt beyond a reasonable doubt. For trial counsel to suggest the accused has any burden to produce evidence demonstrating his innocence is an error of constitutional dimension.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Prosecutorial Misconduct

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

*HN78*[] **Prosecutorial Misconduct, Burdens of Proof**

Relief for improper argument will be granted only if the trial counsel's misconduct actually impacted on a substantial right of an accused (i.e., resulted in prejudice). Prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone. In assessing prejudice from improper argument, we balance three factors: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. In the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

*HN79*[] **Closing Arguments, Fair Comment & Fair Response**

The prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibition Against Improper Statements

*HN80*[] **Prosecutorial Misconduct, Prohibition Against Improper Statements**

The lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment.

Criminal Law & Procedure > Appeals > Reversible Error > Cumulative Errors

*HN81*[] **Reversible Error, Cumulative Errors**

The doctrine of cumulative error provides that a number of errors, no one perhaps sufficient to merit reversal, may in combination necessitate relief. However, assertions of error without merit are not sufficient to invoke this doctrine.

**Counsel:** For Appellant: Captain Brian L. Mizer, USN; Lieutenant Colonel Anthony D. Ortiz, USAF; Mark C. Bruegger, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major

Morgan R. Christie, USAF; Major Anne M. Delmare, USAF; Major Peter F. Kellett, USAF; Captain Allison R. Barbo, USAF; Mary Ellen Payne, Esquire.

**Judges:** Before JOHNSON, POSCH, and KEY, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge POSCH and Judge KEY joined. Senior Judge POSCH filed a separate concurring opinion.

**Opinion by:** JOHNSON

## Opinion

JOHNSON, Chief Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of premeditated murder in violation of *Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918*, and one specification of intentionally causing the death of **[*2]** an unborn child in violation of *Article 119a, UCMJ, 10 U.S.C. § 919a*.[1] The court-martial sentenced Appellant to a dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the adjudged sentence.

Appellant raises 26 issues for our consideration on appeal: (1) whether Appellant's convictions are legally and factually sufficient; (2) whether the military judge was disqualified by his undisclosed application for employment with the Executive Office of Immigration Review; (3) whether Appellant was subjected to illegal pretrial punishment in violation of *Article 13, UCMJ, 10 U.S.C. § 813*, when the Government placed him in maximum custody; (4) whether the military judge erred by denying a defense challenge for cause against a court member; (5) whether the military judge erred by excluding evidence of the victim's "swinging" lifestyle; (6) whether the military judge erred by failing to reconsider his ruling with respect to evidence of the victim's "swinging lifestyle;" (7) whether trial defense counsel were ineffective for failing to renew their **[*3]** request to admit evidence of the victim's "swinging lifestyle;" (8) whether the military judge erred by failing to suppress evidence from the search of Appellant's home; (9) whether the military judge erred by allowing the Government to introduce evidence of an Internal Revenue Service (IRS) deficiency against Appellant; (10) whether the military judge erred by admitting a post-mortem paternity test indicating Appellant was the probable father of the victim's unborn child; (11) whether the military judge erred by failing to suppress a letter allegedly sent by Appellant while he was in pretrial confinement; (12) whether the military judge's instructions on findings were erroneous; (13) whether the Government's sentencing argument was improper; (14) whether the confinement order erroneously omits Appellant's 1,271 days of confinement credit for his pretrial confinement; (15) whether Appellant is entitled to sentence relief for unreasonable post-trial delay; (16) whether the Government improperly interfered with Appellant's attorney-client relationships; (17) whether the Government improperly denied Appellant's individual military defense counsel (IMDC) request; (18) whether the military **[*4]** judge erred by allowing the Government to introduce improper evidence under Military Rule of Evidence 404(b); (19) whether the military judge erred by allowing a hearsay statement by the victim that she purchased a firearm for Appellant; (20) whether trial defense counsel were ineffective for failing to request an expert in geology; (21) whether the military judge erred by failing to grant a mistrial due to a government discovery violation; (22) whether the Government improperly shifted the burden of proof during findings argument; (23) whether the military judge erred by failing to rule on the Defense's motion to remove the mandatory minimum sentence of confinement for life for violation of the *Article 55, UCMJ, 10 U.S.C. § 855*, which prohibits cruel or unusual punishments; (24) whether the Government failed to provide Appellant the opportunity to respond to "new matter" in the addendum to the staff judge advocate's recommendation (SJAR) to the convening authority; (25) whether the convening authority failed to meaningfully consider Appellant's clemency submission; and (26) whether the cumulative effect of errors in Appellant's case denied him a fair trial.[2]

We have carefully considered issues (14), (18), (23),

[1] Unless otherwise indicated, all references to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2012 ed.), and all other references to the UCMJ and Rules for Courts-Martial and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] We have slightly reordered the assignments of error in Appellant's brief to this court. Appellant personally asserts issues (1) and (17) through (25) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

(24), and (25), and we find they warrant **[*5]** neither further discussion nor relief. *See* United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987). As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

## I. Background

### A. Appellant and TF

During the relevant periods of time, Appellant was stationed at Robins Air Force Base, Georgia. The off-base house in Byron, Georgia, where he lived alone was equipped with several security cameras that recorded the areas around his home. In addition to being an active duty Airman, Appellant was an active member and held a leadership position in the "Outcast" Motorcycle Club. Appellant was unmarried and had a son by a prior relationship.

Around the end of 2010 or beginning of 2011, Appellant met TF at a party held by motorcycle club members. TF attended the party with her cousin MB, who was a member of a female motorcycle club. TF, who was unmarried, lived with her single brother in a house in Dawson, Georgia, approximately 96 miles from Appellant's house. TF had recently completed nursing school and went to the party with MB to celebrate. After meeting at the party, Appellant and TF began a sexual relationship.

On 9 November 2012, at Appellant's request, TF bought a **[*6]** Walther P-22 .22 caliber handgun which she gave to Appellant.

TF became pregnant, and was expected to give birth in early September 2013. She was excited about the pregnancy and told various friends and relatives that Appellant was the father. TF's obstetrician testified at the trial that TF's pregnancy had no identified complications or risk factors.

On 23 April 2013, TF obtained an insurance policy from Metropolitan Life Insurance Company (MetLife) with a benefit amount of $1 million that listed Appellant as the sole beneficiary. In addition, TF made Appellant the beneficiary of a $42,000.00 life insurance policy through her employer that went into effect on 1 August 2013. Appellant falsely told TF that he had made her the beneficiary of his Servicemembers' Group Life Insurance (SGLI) provided through the Air Force.

On 10 August 2013, TF's friends and relatives held a baby shower for her in Dawson. TF expected Appellant to attend, but he did not. Nevertheless, TF continued plans to move into Appellant's house after the child was born. On 23 August 2013, TF drove to Appellant house to bring baby-related items in preparation for the move. She departed his house after approximately 30 **[*7]** minutes.

### B. IV

IV was a civilian who lived in Warner Robins, Georgia, and member of a female motorcycle club when she met Appellant in August 2010. IV and Appellant began dating within a couple of months. Appellant's motorcycle club, the Outcasts, was an all-male club, and women were not permitted to join. However, as IV explained at trial, a woman could be associated with the Outcasts through a male club member; such women "didn't have full rights" and were considered an "extension" of the male club member, and were referred to as "property." Being Outcast "property" involved a particular code of conduct, which included *inter alia* performing tasks and following instructions from the Outcast member without question, and not talking to outsiders about the club.

Being "property" of an Outcast member did not necessarily involve a romantic or sexual relationship, but IV was Appellant's "property" as well as his girlfriend. IV had Appellant's "riding name," or Outcast nickname, "BON3Z," tattooed on her body.

IV, who was unaware of Appellant's relationship with TF, dated Appellant "off and on" until approximately March 2013, when she began dating someone else who was not affiliated with the **[*8]** Outcasts. However, she remained Appellant's "property" and continued to meet him and "do stuff" for him. On 26 August 2013, Appellant asked IV in person to rent a car for him. He told her to put it on her credit card and he would pay her in cash. Appellant subsequently told her it was to be a one-day rental for in-state use. IV made a reservation and went to the rental agency on the afternoon of 28 August 2013. While she was there, Appellant called her to ask what was taking so long. IV rented a black Ford Focus and did not note any damage on the car when she and an employee inspected it.

In accordance with Appellant's instructions, IV drove the rental car to pick Appellant up on a street one block away from his residence. Appellant then drove her back to the car rental agency to pick up IV's car. IV got into her car and departed. IV did not ask why Appellant

wanted her to rent a car or why she was to pick him up on the street a block away from his house.

**C. TB**

TB, another civilian woman, met Appellant in April 2012 at a motorcycle club party. At that point she was already the "property" of another member of the Outcasts. At trial, TB testified that she and Appellant were dating in late **[*9]** August 2013, although they were having "complications." At approximately 1855 on 28 August 2013, TB arrived at Appellant's residence in her pickup truck. TB testified that after she arrived she did some cleaning, took a bath, prepared dinner, ate with Appellant, and then watched television with him in his bedroom until she fell asleep around 2230. TB testified that she fell asleep lying on Appellant's chest.

TB testified that when she awoke to an alarm at 0515 the following day, 29 August 2013, Appellant was in the bed. At approximately 0545 they left the house together. TB drove Appellant to where the rental car was parked, then followed him to the rental car agency. After Appellant dropped off the car there, TB and Appellant went to breakfast at a restaurant.

**D. Death of TF**

On the night of 28 August 2013, the night TB spent at Appellant's house, TF and her brother CF watched television at the home of their mother, AT, who lived in a house neighboring theirs in Dawson. TF said she was tired and returned to the house she shared with CF to go to bed. At approximately 2300, CF also returned to their house, locking the door behind him. He checked on TF, who was sleeping in her bedroom with **[*10]** the television on. CF then went to his own room, where he watched television for approximately another hour before going to sleep.

In the early morning hours of 29 August 2013, CF was awakened by a noise. CF "jump[ed]" up and opened the door to his bedroom. Appellant stood in the doorway of the bathroom across the hall approximately three feet away, facing CF and looking directly at him. Appellant was wearing black jeans and a black hooded sweatshirt. CF had never met Appellant before, but he immediately recognized Appellant from pictures TF had showed him. TF had not said anything to CF about Appellant coming to the house, and CF felt something was wrong. CF asked Appellant why he was there. Appellant responded by asking if CF was looking for TF, to which CF replied "yeah," and asked again why Appellant was there. Appellant went into the bathroom and closed the door without saying anything further.

Alarmed, CF returned to his bedroom to get his .38 caliber handgun. As CF reached for the weapon, he heard the bathroom door open and Appellant run out of the house through the side door. CF grabbed his handgun, returned to the hallway, and looked into TF's bedroom, where he saw "blood from **[*11]** [her] face." CF loaded the handgun and then pursued Appellant outside, where Appellant was driving away in a car. CF fired at the car until his handgun was empty, but the car drove off without stopping. A neighbor, DJ, happened to be awake at the time; she heard three gunshots and a car speeding away.

After reloading his pistol in case Appellant returned, CF went to TF's bedroom again. He found her lying in blood and not breathing. CF called the police and then went to the house of his mother, AT, who was also a nurse. AT later testified that when CF woke her up, he was "very frantic." CF told her that TF had "blood coming out of her nose" and would not "wake up," and that TF's boyfriend had been in the house and had done something to her. AT went to TF's house and found TF was bloody and not breathing.

Paramedics arrived at TF's residence at 0331 on 29 August 2013. They determined that TF was not breathing and had no pulse, and that nothing could be done to save her life or that of the unborn child. The Terrell County coroner pronounced TF dead at 0400 that morning. Later examination determined TF had five gunshot wounds in the back of her head and one gunshot wound in her back. TF's **[*12]** death directly led to the death of the unborn child shortly thereafter due to lack of oxygen.

**E. Investigation**

WS, a deputy with the Terrell County Sheriff's Office, was dispatched to TF's residence at 0318 and arrived shortly before the paramedics. He found CF standing by the road at the end of the driveway. According to WS, CF was "calm" as he told WS his sister was in a bedroom with "blood coming from her." WS called for paramedics and then went into the house, which he found "kind of dark" with visibility of "[p]robably 10 to 12 feet." After the paramedics found TF had no vital signs, WS had everyone leave the house in order to secure the scene. WS then spoke to CF, who disclosed that he had a handgun which he surrendered at WS's direction.

CF told WS what had happened and identified the intruder as his "sister's boyfriend from Robins, his name is Charlie Wilson."

The Sheriff's Office contacted the Georgia Bureau of Investigation (GBI), which assumed responsibility for the investigation. The first GBI agents arrived at the residence at approximately 0600 on 29 August 2013. As the agents processed the scene, they identified and gathered numerous items of evidence. This evidence included, **[*13]** *inter alia*, .38 caliber shell casings from CF's pistol both inside and outside the house; .22 caliber shell casings in TF's bedroom; a pillow in TF's bedroom that had multiple bullet holes in it; and TF's cell phone. The agents attempted to dust for fingerprints in TF's bedroom and the bathroom, but were not able to obtain any usable fingerprints inside the house.

Special Agent (SA) JS was present that morning and became the case agent for the GBI investigation. SA JS spoke with several witnesses in the vicinity of the residence, including the neighbor DJ, TF's mother AT, and TF's cousin MB. However, SA JS delayed speaking with CF until he could interview him in a "more controlled environment" at the local police department after gathering additional background information, because CF was initially considered a "person of interest" in relation to the homicide. When SA JS conducted the interview, CF appeared "[d]istraught, upset, [and] very sad." CF described what had happened, including identifying Appellant by name and describing his clothing.[3] CF acknowledged owning a .22 caliber firearm, but it was a single-shot rifle that the agents deemed unlikely to have fired the multiple gunshots **[*14]** that killed TF. Nevertheless, the agents seized the rifle.

With the evidence pointing toward Appellant as the likely suspect, SA JS coordinated with the Air Force Office of Special Investigations (AFOSI) to identify Appellant's residence and obtain a "no-knock" search warrant. The warrant was executed the same day by SA JS with three other GBI agents, several AFOSI agents, and the Houston County Sheriff's Office Special Response Team. The Special Response Team found Appellant with IV in an upstairs bedroom and removed them from the house.

GBI agents collected numerous significant items of evidence from Appellant's residence, including *inter alia*: a round of .22 caliber ammunition under a piece of furniture in the living room; the box for the Walther P-22 handgun that TF had purchased for Appellant in November 2012, which contained a sealed "test fire cartridge;"[4] two pairs of black pants, a black hooded sweatshirt, a black t-shirt, and a pair of black boots; multiple cell phones; a copy of TF's MetLife life insurance policy designating Appellant the sole beneficiary; a notice of deficiency from the IRS indicating Appellant owed the Government $10,802.17 (IRS notice); Appellant's surveillance **[*15]** cameras; and the baby items TF had brought a few days earlier.

After Appellant was removed from the house, the GBI agents initially detained him, but released him after a short interview.[5] SA JS also interviewed IV, who told him about renting a car for Appellant the previous day. In the early morning hours of 30 August 2013, SA JS went to the rental car agency where he found a black Ford Focus matching the description given by IV. Inspecting the exterior of the vehicle, SA JS noted there appeared to be a bullet ricochet mark on the driver's side window and damage to the molding of the driver's side door, the two marks in "like a horizontal line going from the rear to the front." SA JS remained with the car until the rental agency employees arrived later that morning, when SA JS was able to confirm this was the car IV had rented. SA JS was also able to obtain security camera video recordings from the rental agency that appeared to depict Appellant returning the black Ford Focus on the morning of 29 August 2013.

In the meantime, after Appellant was released, he met IV at her house. IV confronted Appellant regarding what she had learned from the police about the death of TF, a pregnant woman **[*16]** she did not know. Appellant told IV "[i]t was not [his] baby. F[**]k her." Appellant also told IV that he was about to get "kicked out" of the military, but he would be "straight" because "there was a policy."

On 30 August 2013, the GBI agents obtained an arrest warrant for Appellant. Appellant was arrested the following day, 31 August 2013, driving southbound on

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[3] CF later identified Appellant as the intruder from a photo lineup that included Appellant and five other individuals with a similar general appearance.

[4] At trial, SA JS gave the following explanation of a "test-fire cartridge": "When you buy a new handgun there will be, typically be a little sleeve like you see there, that contains a shell casing that has been fired from the gun that was purchased and it can be used for matching purposes."

[5] Appellant's statements during this interview were subsequently suppressed by the military judge and are not relevant to our analysis.

an interstate highway approximately 80 miles south of Warner Robins, Georgia. Appellant was placed in pretrial confinement where he remained until the conclusion of his court-martial.

As the investigation continued, the GBI agents learned that the day before TF purchased the Walther P-22 at Appellant's direction, Appellant bought a Walther P-22 thread adapter. At trial, an expert witness in the field of firearms explained that the Walther P-22 is designed to accept a thread adapter that allows a "suppressor," also known as a "silencer," to be attached to the barrel.

SA JS determined that the distance of one round trip from Appellant's residence to TF's house in Dawson, coupled with two round trips between the car rental agency and Appellant's residence, would have totaled approximately 215 miles. He further determined that the **[*17]** black Ford Focus IV rented had been driven approximately 217 miles from the time it was rented until its return.

SA JS tested how long it would take to drive between TF's home and Appellant's residence. One night, he departed TF's home at 0300 and arrived at Appellant's residence at 0418, indicating a travel time of one hour and 18 minutes.[6]

SA JS also reviewed the recordings from Appellant's security cameras. These depicted TB's arrival at Appellant's house on the evening of 28 August 2013, and Appellant and TB both departing the house at approximately 0545 on 29 August 2013. In the recordings, no one appeared to enter or exit the house between those two points in time. However, SA JS determined that there was a "blind spot" in the security cameras, whereby someone could enter or exit through a particular ground floor window without appearing in the recordings. Moreover, the window was not covered by a screen, and it appeared a table had been moved away from the interior of the window as if to provide access to it.

GBI agents obtained phone records of text messages between Appellant and TF. Notably, in the days leading up to TF's death, Appellant inquired about the daily routines of TF **[*18]** and her brother CF, including their sleeping habits. Investigators also obtained text messages between Appellant and IV, including the following exchange on 24 August 2013:

> [Appellant:] Man I can't let you go. I love you too f[**]king much
> [Appellant:] I am willing to do whatever it takes
> [IV:] You always say that and then you do it again. You told me you can't stop.
> [Appellant:] Everything is about to change. I told you what's about to go down. You couldn't stick around for that?
> . . . .
> [Appellant:] Why don't you move in wi[t]h me. Then we will be together always[7]

GBI ballistics analysis revealed the six .22 caliber bullets recovered from TF's body had been fired from the same weapon. Examination of the four .22 caliber shell casings recovered from TF's home revealed they matched the .22 caliber test-fire shell casing in the Walther P-22 box seized from Appellant's residence. In addition, investigators were able to positively eliminate CF's .22 caliber rifle as having fired the fatal rounds.

Examination of the ricochet mark on the window and damaged window molding from the rental car revealed traces "typical of a lead projectile."

The GBI agents performed gunshot residue (GSR) analysis on **[*19]** the items of clothing seized from Appellant's house. This analysis detected a small number of particles "associated" with GSR—specifically lead barium and lead antimony—on the sweatshirt, shirt, and both pairs of pants seized from Appellant's residence. However, no blood was found on the clothing. Particles "characteristic" of GSR were also found on a washcloth recovered from the floor of TF's bathroom.[8]

GBI analysis of clothing fibers identified the presence of fibers matching the sweatshirt, t-shirt, and both pairs of pants recovered from Appellant's residence both in the rental car and on the bedding in TF's bedroom. In addition, a single head hair matching Appellant was found on TF's bedding.

Analysis of soil found on the boots seized from Appellant's residence found that soil was similar to the

[6] On another occasion, "[i]n the middle of the day," SA JS drove from Appellant's residence to TF's home and back, with each leg taking approximately one hour and 45 or 50 minutes.

[7] Unless otherwise marked, texts quoted in the opinion are presented verbatim without correction.

[8] At trial, an expert in ballistics explained that particles "characteristic" of GSR contain three elements—lead, barium, and antimony—whereas particles "associated" with GSR contain some combination of two of those elements.

soil found in TF's front yard. However, the soil was also similar to the soil in a portion of Appellant's backyard, although it was dissimilar to the soil in Appellant's front yard and part of the backyard.

Analysis of TF's phone revealed that TF received calls at 0221 and 0222 on 29 August 2013, shortly before her death, and that both calls were answered. The calls lasted 10 seconds and 2 **[*20]** minutes and 36 seconds, respectively, and came from a number that had not been used to call TF's phone before.

DNA analysis performed by the GBI determined a 99.9999 percent probability that Appellant was the father of the deceased unborn child.

### F. Court-Martial Proceedings

The charges and specifications that are the subject of the instant appeal were referred for trial by a general court-martial on 9 October 2014. These charges and specifications were originally referred together with several other charges and specifications arising from other incidents in 2011, 2012, and 2013 which were unrelated to TF. The convening authority referred the case as capital. In the course of the extended pretrial motion practice, the Defense successfully moved to sever the alleged offenses which were not related to the killing of TF. Ultimately, Appellant was tried by three courts-martial; the court-martial presently under review was the last of the three, and the only capital proceeding.

Appellant's court-martial was conducted at the Houston County Courthouse in Perry, Georgia. The court-martial took place over an extended period of time, beginning with Appellant's arraignment on 22 October 2014 and concluding **[*21]** with the announcement of the sentence on 22 February 2017. Several factors contributed to the delays, including *inter alia* the replacement at one point of all Appellant's trial defense counsel, as well as the severance of the charges and specifications into three separate courts-martial.

## II. Discussion

### A. Legal and Factual Sufficiency

#### 1. Law

*HN1*[] We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

*HN2*[] "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)* (alteration in original) (citation omitted).

*HN3*[] The test for factual sufficiency is "whether, after weighing the evidence in the record of **[*22]** trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (alteration in original) (quoting *Washington, 57 M.J. at 399*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*).

*HN4*[] In order to convict Appellant of the specification of premeditated murder in violation of *Article 118, UCMJ*, as charged in this case, the Government was required to prove: (1) that TF is dead; (2) that the death resulted from the act or omission of Appellant; (3) that the killing was unlawful; and (4) that, at the time of the killing, Appellant had a premeditated design to kill. *See Manual for Courts-Martial, United States* (2012 ed.) (*MCM*), pt. IV, ¶ 43.b.(1). "Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended." *MCM*, pt. IV, ¶ 43.c.(2)(a).

*HN5*[] In order to convict Appellant of the specification of killing an **[*23]** unborn child in violation of *Article*

119a, UCMJ, as charged in this case, the Government was required to prove: (1) that Appellant engaged in the murder of TF; (2) that TF was then pregnant; and (3) that Appellant thereby caused the death of TF's unborn child. *MCM*, pt. IV, ¶ 44a.b.(2).

**2. Analysis**

The Government introduced compelling evidence of Appellant's guilt of both specifications. The evidence clearly indicated TF, who was over eight months pregnant at the time, died in her bedroom in the early morning hours of 29 August 2013, as a result of being shot multiple times in the back of her head with a .22 caliber firearm. There is no substantial question that her death was unlawful and premeditated. Additionally, there is no substantial question that TF's otherwise healthy unborn child died as a result of TF's killing.

The primary contested issue during the findings portion of the case was whether it was Appellant who committed the killing. The Government adduced a plethora of convincing evidence that it was. It is impractical and unnecessary to thoroughly recount the evidence from over eight days of trial on the merits and over 130 prosecution exhibits. However, below we summarize some of the most significant **[*24]** evidence supporting the Government's case.

***a. CF's Identification of Appellant***

CF testified that after he was awakened by a noise, he unexpectedly discovered Appellant in the hallway of the house he shared with TF, evidently shortly after she had been shot. CF had never met Appellant before, but he recognized Appellant from pictures TF had shown him. To be sure, CF's testimony was subject to challenge in certain respects. In addition to the fact CF had not met Appellant before, the lighting in the hallway was evidently relatively dim. Furthermore, CF had undergone brain surgery approximately a year and a half earlier, and there was conflicting evidence as to the extent to which this surgery would have affected CF's perception and memory. On the other hand, in the hours following the murder CF repeatedly stated that it was Appellant he saw in the house; he later picked Appellant's picture out of a six-photograph lineup identification; and he testified unambiguously that it was Appellant that he had seen.

***b. Ballistics Evidence***

Markings on the bullets recovered from TF's body matched those on the test round recovered from the Walther P-22 box seized from Appellant's residence, indicating **[*25]** they had been fired from the same weapon. This evidence clearly supported the inference that the handgun Appellant possessed was used to kill TF. The Government also introduced evidence that, close in time to when he had TF buy the handgun for him, Appellant purchased a thread adapter that would enable a silencer to be attached to a Walther P-22. CF's .22 rifle was excluded as the murder weapon.

***c. Rental Car***

Evidence linked Appellant to the rental car which had a similar general description to the one in which CF saw the intruder flee. CF fired at it multiple times. The car was undamaged when IV rented it at Appellant's direction on 28 August 2013. However, after Appellant returned it the following day, the driver's window had a bullet ricochet mark and the molding was damaged.

SA JS determined the distance the rental car had been driven from the time it was rented until it was returned was nearly the same and only slightly greater than the driving distance of a round trip from Appellant's house to TF's house added to two trips between Appellant's house and the rental agency. This evidence reinforced the inference that Appellant drove the rental car to TF's home in Dawson and back on **[*26]** the night of her murder.

***d. Other Forensic Evidence***

CF described the intruder as wearing black pants and a black hooded sweatshirt. Similar clothing was recovered from Appellant's residence. Forensic analysis matched fibers from Appellant's clothing with fibers recovered from the rental car and from TF's bedding following the murder. Additional testing identified particles associated with gunshot residue on the clothing recovered from Appellant's residence and from the washcloth recovered from the floor of the bathroom of TF's house, where the intruder had been.

***e. Opportunity***

SA JS determined it was possible to drive from TF's house to Appellant's house in one hour and 18 minutes.

In addition, there was a blind spot in the security cameras at Appellant's house, such that it was possible to exit and enter through a first-floor window without being recorded. Therefore, even taking at face value TB's testimony that Appellant was present at his residence when she fell asleep at approximately 2230 on 28 August 2013 and awoke at 0515 on 29 August 2013, Appellant had adequate time to exit the house through the window, drive to TF's house, commit the murder at approximately 0300, drive home, **[*27]** and reenter the house before TB awoke.

***f. Motive and Intent***

At Appellant's request, TF made him the sole beneficiary of the $1 million MetLife life insurance policy. Appellant was also the beneficiary of a smaller life insurance policy TF had through her employer. In contrast, Appellant lied to TF that he had made her the beneficiary of his SGLI. In addition, Appellant was in debt to the Government for $10,802.17.

TF drove to Appellant's home less than one week before the murder to deliver baby items and supplies, in anticipation of moving in with him after their daughter was born. However, the following day Appellant professed his love for IV and urged her to move in with him, which suggested he did not expect TF to be living with him.

The day before the murder, Appellant sent text messages to TF specifically asking about her sleeping habits and those of her brother, CF. This information would have been useful to make contact with TF on the night of the murder without CF's knowledge.

Rather than rent the car himself, Appellant directed his "property" IV to rent it for him, knowing she would ask no questions. Rather than parking the car at his residence, Appellant arranged to park it on **[*28]** the street where it would not be recorded on his security cameras.

When Appellant spoke with IV after the murder, he displayed a remarkably callous attitude toward the death of TF and her unborn child, saying "[i]t was not [his] baby. F[**]k her." He went on to indicate he was not concerned about being "kicked out" of the Air Force because "there was a policy," which could easily be understood to refer to his status as TF's life insurance beneficiary.

***g. Debunking the Alibi Defense***

The centerpiece of Appellant's defense was TB's testimony regarding his supposed alibi—that she was with him at his residence throughout the night of 28 August 2013 and early morning of 29 August 2013, and therefore he could not have committed the murder. As stated above, even if one accepts this testimony at face value, the Government proved it was possible for Appellant to have departed, committed the murder, and returned while TB was asleep.

Although TB opined that she believed she would have awoken if Appellant had left the bed, the Government effectively attacked TB's credibility on multiple fronts. To begin with, she was an ex-girlfriend of Appellant's who purported to be in a then-current dating relationship **[*29]** with him. TB was further affiliated with the Outcasts, of whom Appellant was a leader, by virtue of being the "property" of another Outcast member. On cross-examination, TB admitted that when she was interviewed by the GBI agents she did not initially disclose that she had helped Appellant return the rental car before going to breakfast with him. The Government also introduced texts between Appellant and TB in which TB agreed to help Appellant "handle" some unspecified "business" after she got off work on 28 August 2013. Afterwards, TB withdrew a total of $500.00 in three separate transactions from a bank account owned by Appellant. When questioned about these withdrawals at trial, TB claimed that this was a joint account they had together; however, the Government introduced documentary evidence indicating it was solely Appellant's account. Regardless of whether TB knew about Appellant's specific plan to murder TF, a reasonable factfinder could conclude Appellant paid TB to provide a false alibi for him.

***h. Appellant's Arguments***

On appeal, Appellant draws our attention to five areas. First, he suggests CF's brain surgery, the fact that CF never met Appellant before, and CF's possible **[*30]** resentment of Appellant's prior treatment of his sister made his identification of Appellant unreliable. We have considered these factors, but do not find them persuasive. In conjunction with the abundance of other inculpatory evidence, CF's identification of Appellant was powerfully incriminating.

Second, Appellant calls attention to the fact that the car rental agency employees did not note the damage to the window and molding when the car was initially returned

and then sent the vehicle to a vendor for maintenance for much of the day on 29 August 2013. Appellant further argues that, assuming the damage was caused by a bullet, expert testimony introduced by the Government could not "conclusively connect" the damage to a bullet from CF's gun. We have considered these points. However, that the car happened to be damaged by a bullet while in the custody of a vendor performing maintenance the same day Appellant returned it, rather than being damaged by a bullet fired by CF, would be a remarkable coincidence. We find the evidentiary implications of the damaged window to be significant.

Third, Appellant suggests the single hair matching his that was found on TF's bedding was insignificant **[*31]** because it "could have gotten there in any number of different manners." Although the hair somewhat corroborates the other evidence, we have not significantly relied on this evidence in our analysis.

Fourth, Appellant argues the fibers found at the crime scene and in the rental car that were consistent with his clothes were "fairly common" and could have come from other people. We have considered this. However, in conjunction with the rest of the evidence, we find the fiber evidence was significant.

Fifth, Appellant notes the murder weapon was never recovered, and Appellant's DNA was not found on the box recovered from his residence. We find these points to be of very limited significance. Disposing of the murder weapon in some location where it would not be found would have been an obvious move for any perpetrator, including Appellant. Testimony regarding TF's statements about buying the handgun for Appellant, coupled with documentation of the sale, Appellant's purchase of the thread adapter, and the presence of the box at his residence would lead a reasonable factfinder to believe he possessed the Walther P-22. Indeed, its unexplained absence is itself suspicious. Whether or not Appellant's **[*32]** DNA was recovered from the box, the ballistics evidence matching the fatal bullets to the test round in Appellant's possession was powerfully incriminating evidence.

***i. Conclusion as to Legal and Factual Sufficiency***

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's convictions. *See* *Robinson, 77 M.J. at 297-98*. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See* *Turner, 25 M.J. at 325*.

**B. Apparent and Actual Bias of the Military Judge**

**1. Additional Background**

Appellant was arraigned on 22 October 2014; the charges included capital premeditated murder. Judge Spath, who at the time was the Chief Trial Judge of the Air Force, presided at the arraignment and at every session of Appellant's court-martial. At the beginning of the arraignment, trial defense counsel conducted voir dire of Judge Spath and inquired, among other topics, how Judge Spath came to be detailed to Appellant's court-martial. Judge Spath explained that he detailed himself to the case based primarily on his **[*33]** level of experience, including experience with capital litigation, and the relative unavailability of the other most senior Air Force trial judges.

The next sessions of the court-martial consisted of motion hearings on 15-16 December 2014. On 15 January 2015, the Defense moved to disqualify Judge Spath, contending that his service as a judge in the Military Commissions Trial Judiciary made him unavailable to serve as the military judge in Appellant's court-martial. After hearing argument on the motion at the next court-martial session on 18 February 2015, Judge Spath orally denied the motion. Additional hearings in Appellant's court-martial took place on 9-10 March 2015, 19 May 2015, and 21 September 2015.

On 19 November 2015, Judge Spath applied for a position as an immigration judge with the Executive Office of Immigration Review (EOIR) within the Department of Justice (DOJ). Judge Spath's application referred to his five years of experience as a trial judge and 15 years of prosecution and defense litigation experience. Although he did not mention Appellant's case by name, he stated that his judicial experience included presiding over capital murder cases, and that he was "currently **[*34]** presiding" over two such cases. Elsewhere in the application he alluded to his role as the presiding judge in Appellant's case by reference to the current capital murder trial of an Air Force member.

Additional sessions of Appellant's court-martial occurred on 8-9 February 2016 and 14-15 September 2016. In

September 2016, Judge Spath accepted a conditional appointment as an immigration judge. The appointment was conditioned on, *inter alia*, satisfactory completion of a background investigation.

After a final motions hearing on 10 December 2016, Appellant's trial was held between 9 January 2017 and 22 February 2017, when Appellant was sentenced. At no time during the proceedings did Judge Spath bring his EOIR application or conditional appointment to the attention of the parties.

On 20 March 2017, Judge Spath received a temporary appointment as an immigration judge. Judge Spath negotiated his salary and start date in a series of emails between late March 2017 and early July 2017. His appointment was made permanent on 18 May 2018.

**2. Law**

*HN6*[] "An accused has a constitutional right to an impartial judge." *United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001)* (quoting *United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999)*). R.C.M. 902 governs disqualification of the military judge. R.C.M. 902(b) sets forth specific circumstances **[*35]** in which a "military judge shall [ ] disqualify himself or herself," including when the military judge "[i]s known . . . to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." R.C.M. 902(b)(5)(B). In addition, R.C.M. 902(a) requires disqualification "in any proceeding in which th[e] military judge's impartiality might reasonably be questioned." Disqualification pursuant to R.C.M. 902(a) is determined by applying an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *United States v. Sullivan, 74 M.J. 448, 453 (C.A.A.F. 2015)* (citing *Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)*). "'[T]he test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011)* (quoting *United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000)*).

*HN7*[] "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." *United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001)* (citation omitted). "Although a military judge is to 'broadly construe' the grounds for challenge, he should not leave the case 'unnecessarily.'" *Sullivan, 74 M.J. at 454* (quoting R.C.M. 902(d)(1), Discussion). "Of course, '[a] . . . judge has as much obligation not to . . . [disqualify] himself **[*36]** when there is no reason to do so as he does to . . . [disqualify] himself when the converse is true.'" *United States v. Kincheloe, 14 M.J. 40, 50 n.14 (C.M.A. 1982)* (alterations and omissions in original) (citations omitted).

*HN8*[] When the issue of disqualification is raised for the first time on appeal, we apply the plain error standard of review. *Martinez, 70 M.J. at 157* (citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.* (citation omitted).

**3. Analysis**

Appellant contends Judge Spath's pending application to the EOIR for a position as an immigration judge disqualified him as the military judge in Appellant's court-martial.[9] Appellant argues Judge Spath's application gave him a personal interest that could be substantially affected by the outcome of the trial. *See* R.C.M. 902(b)(5)(B). In addition, Appellant contends the application would cause a reasonable person to question Judge Spath's impartiality. Appellant cites Judge Spath's references to his experience in capital cases, including Appellant's case (albeit not by name), which he argues Judge Spath relied on to compensate for his lack of experience in immigration law. He further cites Judge Spath's denial of numerous defense motions aimed **[*37]** at dismissing the charges or preventing imposition of the death penalty. Appellant contends that because Judge Spath was disqualified, this court should set aside the findings and sentence.

This court considered a very similar argument related to Judge Spath in *United States v. Snyder, No. ACM 39470, 2020 CCA LEXIS 117, at *55-63 (A.F. Ct. Crim. App. 15 Apr. 2020)* (unpub. op.), *rev. den'd*, *80 M.J. 399 (C.A.A.F. 2020)*. In *Snyder*, the appellant had been convicted of sexual assault by a general court-martial composed of officers where Judge Spath presided over the trial. *Id. at *1, *4*. This court noted Judge Spath's DOJ application included the assertions that he had "tried over 100 sexual assault cases" and "presided over

[9] On appeal, Appellant does not renew the claim in his pretrial motion that Judge Spath's service in the Military Commissions Trial Judiciary disqualified him in Appellant's court-martial.

close to 100 sexual assault trials." *Id. at *56*. At the time of the appellant's trial, the terms of Judge Spath's job offer and employment by the DOJ were still pending. *Id. at *57*. As in the instant case, evidently Judge Spath did not disclose his pending employment with the DOJ to the parties. However, this court concluded that "[a]n objective observer knowing all of the facts would not question Judge Spath's impartiality, and there is no evidence in the trial or appellate record that Judge Spath had an interest that could be substantially affected by the outcome of the proceeding." *Id. at *62*. **[*38]** We reach a similar conclusion in Appellant's case.

Appellant relies heavily on the decision by the United States Court of Appeals for the District of Columbia Circuit in *In re Al-Nashiri, 921 F.3d 224, 440 U.S. App. D.C. 260 (D.C. Cir. 2019)*. In his capacity as a member of the Military Commissions Trial Judiciary, between July 2014 and February 2018, Judge Spath presided over Al-Nashiri's capital prosecution before a military commission. *Id. at 227-31*. In *Al-Nashiri*, the court found Judge Spath's application to the DOJ "cast an intolerable cloud of partiality over his subsequent judicial conduct," granted the petition for a writ of mandamus, and vacated all orders Judge Spath had issued after he submitted his employment application. *Id. at 226, 237*. However, Appellant's case, like *Snyder*, is fundamentally different from *Al-Nashiri* in a critical respect. The core problem in *Al-Nashiri* was that Judge Spath sought employment with the DOJ when the DOJ was directly involved in the ongoing *Al-Nashiri* prosecution—in other words, he was adjudicating a case involving his prospective employer. *See id. at 235*. The court explained that one of Al-Nashiri's prosecutors was a detailed DOJ attorney, and that the Attorney General himself "was a participant in Al-Nashiri's case from start to finish." *Id. at 236*. Therefore, **[*39]** "the average, informed observer would consider [Judge] Spath to have presided over a case in which his potential employer appeared." *Id.*

In contrast, the DOJ was not a party or participant in Appellant's court-martial, as it was not in Snyder's, and it had no discernible interest in the outcome. *See Snyder, unpub. op. at *60*. Therefore, Judge Spath was not "challenge[d] . . . to treat the [DOJ] with neutral disinterest in his courtroom while communicating significant personal interest in his job application," as had been the case with Al-Nashiri. *Al-Nashiri, 921 F.3d at 236*.

Having distinguished *Al-Nashiri*, we consider whether Judge Spath was disqualified in Appellant's case under the applicable plain error standard. We conclude Judge Spath's application to the DOJ for employment as an immigration judge was not a disqualifying personal interest that could be substantially affected by the outcome of the trial. The DOJ had no involvement or interest in Appellant's trial. It is true that Judge Spath cited his judicial experience, including his experience in capital cases, in his application; however, nothing he included in the application implied he would be biased with respect to the outcome of Appellant's trial. His application did not **[*40]** report the results of any trial over which he presided or imply any bias. Regardless of the outcome of Appellant's trial and regardless of whether the death penalty remained a potential sentence, it would remain true that he had presided over capital proceedings in Appellant's case. The insubstantial connection between Appellant's trial and Judge Spath's application was far too slight to overcome the "strong presumption" of judicial impartiality. *Quintanilla, 56 M.J. at 44*.

Similarly, we are convinced that no objective, reasonable, fully informed observer would believe Judge Spath's impartiality in Appellant's court-martial might reasonably be questioned. Judge Spath's application materials conveyed relevant judicial and prosecution and defense litigation experience to a prospective employer. Such an observer would not perceive any implied bias against Appellant in particular or defendants in general. Moreover, such an observer would recognize that the DOJ was not a participant in Appellant's court-martial and had no interest in the outcome.

Accordingly, we find no error, much less plain or obvious error, with respect to Judge Spath's alleged disqualification pursuant to R.C.M. 902(a) and R.C.M. 902(b)(5)(B).

**C. Pretrial Confinement**

**1. Additional [*41] Background**[10]

Appellant was ultimately charged with a total of 17

[10] The following additional background information is drawn primarily upon the military judge's findings of fact, which we find to be supported by the record and not clearly erroneous.

specifications.[11] In addition to the allegation of the premeditated murder of TF and of intentionally killing her unborn child, other alleged offenses included *inter alia* that Appellant had pointed a loaded firearm at a different woman, struck her with his hands and feet, dragged her by her hair, and threatened to kill her.

On 18 February 2014, after Appellant was placed in pretrial confinement but before he was arraigned, Appellant was transferred to the Naval Consolidated Brig (Brig) located at Joint Base Charleston, South Carolina.[12] The "Initial Custody Classification" form completed following Appellant's arrival recommended he be classified as a maximum security pretrial confinee due to "offense severity, multiple pending charges [and] possible length of sentence." The Brig periodically reviewed Appellant's classification status, but he remained a maximum security confinee throughout his pretrial confinement. Based on the point system the Brig used to determine security classifications and the number and nature of the offenses alleged against Appellant, there was essentially no chance that Appellant's status would be changed **[*42]** to medium custody.

Appellant was housed alone in a cell approximately 12 feet long and 6 feet wide. He was able to speak with other confinees housed nearby by speaking through a small opening in his door, as well as with confinement personnel. As a maximum security confinee, Appellant was afforded one hour per day outside his cell for recreation alone with access to a basketball court and television. Appellant also exited his cell to shower and for a daily inspection. Whenever Appellant was outside his cell, his hands were cuffed to his belt. Medium security confinees were afforded considerably more freedom, including *inter alia* being outside their cells between approximately 0530 and 2200 each day.

Appellant's behavior in confinement was generally good. He occasionally complained to confinement personnel about conditions in the Brig. In February 2015 confinement staff found an unauthorized razor blade in Appellant's cell, but this incident did not result in any disciplinary action.

Over time, at the direction of the Brig's commanding officer, in recognition of his "unique" status Appellant was afforded a number of additional privileges beyond those normally afforded a maximum security **[*43]** pretrial confinee. He was given an additional 30 minutes per day of recreation time. He was given a video game system to use in his cell. He was allowed to visit the Brig's library once per week. Although Appellant's request to attend religious services was denied, he was allowed to receive visits from clergy.

On 15 January 2016, the Defense submitted a motion alleging the conditions of Appellant's confinement at the Brig violated *Article 13, UCMJ*. The Defense asserted his custody level was "attributable entirely to the allegations against him," unsupported by any allegations of serious misconduct or escape attempts while in custody. Essentially, the Defense asserted the conditions of his confinement were more rigorous than necessary to ensure his presence at trial. The Defense requested the military judge "eliminate the conditions of [Appellant]'s custody beyond those necessary to meet the purposes of *Article 13[, UCMJ]*." The Government opposed the motion.

On 9 February 2016, the military judge received additional evidence and argument from counsel on the motion. The Defense called two witnesses, the noncommissioned officer in charge of the Brig's Special Quarters section and the Brig's commanding **[*44]** officer, Commander (CDR) JC.

The military judge denied the defense motion in a written ruling dated 25 February 2016. The military judge noted *Article 13, UCMJ*, prohibited two things: the intentional imposition of pretrial punishment and confinement conditions that are more rigorous than necessary to ensure Appellant's presence at trial. The military judge found no evidence of an intent to punish Appellant. With regard to the necessity of the conditions, the military judge explained:

> [T]he witnesses made clear that the nature of the charges were the main, if not by far the, leading factor in keeping this accused classified as a maximum security pretrial confinee. However, there were other reasons; including a history of violence, protection of the staff, protection of the other prisoners, etc., that were mentioned in the supporting documents and in the testimony. Again, the Brig is clearly balancing its' [sic] concern for security with a demonstrated and true desire to make accommodations for this accused.

The military judge further found the specific conditions of Appellant's confinement were not such that they

[11] The military judge dismissed three of the specifications in February 2016.

[12] Appellant was initially held in several civilian confinement facilities following his arrest on 31 August 2013.

would give rise to a presumption of an intent to punish, or that the Brig's security determinations **[*45]** were arbitrary or capricious.

After findings but before sentencing, the Defense sought additional confinement credit for the alleged violation of Article 13, UCMJ. The military judge declined to grant relief beyond the day-for-day credit for pretrial confinement required by United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984).

**2. Law**

HN9[] Whether an appellant is entitled to relief for a violation of Article 13, UCMJ, is a mixed question of fact and law. United States v. Crawford, 62 M.J. 411, 414 (C.A.A.F. 2006) (citations omitted). "[T]he military judge's findings of fact will not be overturned unless they are clearly erroneous." United States v. Fischer, 61 M.J. 415, 418 (C.A.A.F. 2005) (citation omitted). "Whether the facts amount to a violation of Article 13, UCMJ, is a matter of law the court reviews de novo." Crawford, 62 M.J. at 414 (citation omitted). The appellant bears the burden to demonstrate a violation of Article 13, UCMJ. *Id.* (citation omitted).

"Article 13, UCMJ, HN10[] prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005). "The first prohibition involves . . . a purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" **[*46]** *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)) (additional citation omitted). "The second prohibition . . . prevents imposing unduly rigorous circumstances during pretrial detention." *Id.*

HN11[] Military appellate courts "are reluctant to second-guess the security determinations of confinement officials." Crawford, 62 M.J. at 414 (citing Bell, 441 U.S. at 540 n.23 ("[M]aintaining security and order and operating the institution in a manageable fashion . . . 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of *substantial evidence* in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'") (quoting Pell v. Procunier, 417 U.S. 817, 827, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974))) (additional citations omitted). Where the conditions of an appellant's "confinement relate to both ensuring his presence for trial and the security needs of the confinement facility," the appellant "bears the burden of showing that the conditions were unreasonable or arbitrary in relation to both purposes." *Id.* (citations omitted).

**3. Analysis**

Appellant contends the Brig improperly based his security classification solely on the charged offenses rather than "a reasonable evaluation of all the facts and **[*47]** circumstances." *See* Crawford, 62 M.J. at 416. He asserts the military judge's finding that the Brig also based its determination on safety and security concerns to be "contradicted by the evidence" and erroneous. Appellant notes there was no evidence of threats or substantial misbehavior on his part during his confinement, and he discounts CDR JC's testimony regarding safety concerns by noting CDR JC acknowledged "the fundamental driving reason" for Appellant's classification was the severity of the charges.

In response, the Government acknowledges Appellant's security classification was "in large part" based on the severity of the charges; however, it contends Appellant has failed to demonstrate the Brig's classification was unreasonable or arbitrary in the circumstances of Appellant's case. The Government compares Appellant's case to the factors the United States Court of Appeals for the Armed Forces (CAAF) cited in *Crawford* as supporting a maximum security classification, including the seriousness of the charges, the potential for lengthy confinement, the appellant's prior threats and apparent ability to carry out his threats, his apparent access to weapons, and his professed willingness to resort to violent **[*48]** means. *See* id. at 416. The Government contends the "institutional objective" furthered by his classification was, in fact, safety and security. In addition, the Government emphasizes that the actual conditions of Appellant's confinement amounted to an "informal downgrade" from maximum custody in light of the special accommodations provided due to his unique circumstances.

We conclude Appellant has failed to meet his burden to demonstrate a violation of Article 13, UCMJ. As an initial

matter, we agree with the military judge the evidence does not support any finding of an intent to punish. To the contrary, as described above, the Brig provided Appellant several specific accommodations to lessen the rigor of his maximum security classification.

We further conclude Appellant has failed to demonstrate the conditions of his pretrial confinement were unreasonable or arbitrary in light of the Brig's legitimate interest in maintaining safety and security. Contrary to Appellant's argument, the military judge's finding that the reasons for his classification included a "history of violence" as well as "protection of the staff" and "protection of the other prisoners" was supported by CDR JC's testimony and was not clearly **[*49]** erroneous. The Brig was not obliged to ignore the logical inference that substantial evidence supported the specific charges against Appellant, which at the time of the Defense's motion included—among others—premeditated murder by firearm, intentionally killing an unborn child, other violent offenses, and communicating a threat to kill. Appellant focuses on his behavior in confinement, but we agree with the Government that his history of threats and violence prior to his confinement were relevant to his high-risk classification. *See id.*

In addition, the charged premeditated murder was eligible for the death penalty, and on 9 October 2014 the convening authority had referred the charges as a capital case. The Brig used the maximum imposable sentence as one of the factors to determine security classification. The dire nature of Appellant's legal peril was also a legitimate consideration in assessing the level of risk involved in his pretrial confinement.

Furthermore, we note the actual conditions of Appellant's confinement were evidently less onerous than those the appellant endured in *Crawford*, where the CAAF found no *Article 13, UCMJ*, violation. *See id. at 416* (noting the appellant "has not provided specific **[*50]** allegations he was treated differently from other maximum security prisoners"). As described above, the Brig intentionally provided Appellant more freedom and privileges than it normally afforded maximum security confinees.

Accordingly, in light of the deference we afford confinement officials to determine the security requirements of the facility, we conclude Appellant has failed to demonstrate the conditions of his confinement violated *Article 13, UCMJ*.

**D. Military Judge's Denial of Challenge for Cause**

**1. Additional Background**

The convening authority selected Colonel (Col) SM as a potential court member for Appellant's court-martial. Like the other selectees, Col SM completed a written questionnaire approved by the military judge to aid in the screening of prospective court members. With respect to the applicable burden of proof, Col SM indicated that he understood that the burden was on the Prosecution to "provide proof of wrongdoing;" that he agreed with the "beyond a reasonable doubt" standard; that the accused was presumed "innocent until proven guilty;" that the accused had the right to remain silent, which would "not be held against" him; and that he did not believe an accused's decision to remain **[*51]** silent was an indication of guilt. However, in response to the question, "do you believe a person accused of a crime should try to prove his or her innocence," Col SM indicated "yes," and explained, "[i]f there is information that could prove your innocence I would use it for that purpose."

With respect to the death penalty, Col SM indicated, *inter alia*, that he "somewhat supported" the death penalty, and that he was "ok with the death penalty if the crime warrants the punishment." In response to the question, "What is your opinion of the death penalty as the only appropriate punishment for a person who is found guilty of premeditated murder," Col SM responded "Probably the appropriate punishment, but maybe not the only punishment." Similarly, in response to the question, "Do you personally believe that death (and not confinement for life either with or without the possibility of parole) is the only appropriate punishment for a person who" intentionally killed another human, intentionally killed a pregnant woman and her unborn child, intentionally killed someone for monetary gain, or did "all of the above," Col SM indicated "no," and explained, "I believe that's probably the correct **[*52]** punishment, but it may not be the only punishment." (Underscore in original.)

Col SM was asked additional questions regarding the burden of proof and death penalty during voir dire. With regard to the burden of proof, during group voir dire Col SM agreed Appellant was innocent until proven guilty beyond a reasonable doubt, that the burden of proof rested solely on the Government, and that the Defense had no obligation to present evidence or disprove any element of the offenses. During individual voir dire, the

senior trial counsel asked Col SM about his questionnaire response that he would "use" infor-mation that "could prove [his] innocence." Col SM explained he thought he understood the burden of proof "completely" and could apply it, although he thought "if [he were] accused of something and [he had] evidence that could prove [his] innocence that [he] would want to do all [he] could to do that." However, Col SM affirmed that if the Defense did not present any evidence, he would not hold that against Appellant, and he would hold the Government to its burden of proof.

With regard to the death penalty, Col SM indicated that he would "consider all evidence presented by the defense in **[*53]** extenuation and mitigation if called upon to do so." When senior trial counsel asked Col SM about his responses on the questionnaire, Col SM stated that for premeditated murder he did "feel that [the death penalty] is probably the most appropriate punishment to give," but agreed "it's not the only punishment and [he] could be open to considering all of the options and the range of sentences in sentencing" and he had not "prejudged what sentence must be imposed if the accused is found guilty." When trial defense counsel asked Col SM to elaborate further on his questionnaire responses, Col SM explained:

> [W]hat I said earlier was invariably there are extenuating circumstances that usually would come up that would prevent [the death penalty] from happening. So, that's why I did not say it is the only punishment because there may be some reason why that that's not the case. But in general, I would say my feelings are for premeditated murder that that would be the appropriate punishment, is my view.

Trial defense counsel then asked, "It's fair to say that would be your starting point for an appropriate punishment?" Col SM responded, "For premeditated murder, yes." The military judge subsequently **[*54]** attempted to further clarify Col SM's thoughts with regard to the death penalty, resulting in the following exchanges:

> [Military Judge]: If what you are saying is, "I don't care about any of that other stuff, if you are convicted of premeditated murder, this is the sentence. That other stuff just will not enter my head. It's an automatic." That's not a wrong view. It's just that's an inelastic view of sentencing that makes it such that you are not going to be a good court member.
>
> However, if what you are saying is, "Look, that's a pretty serious offense, planning ahead of time to take somebody's life with premeditation. And so, as a general scenario, without knowing any of the background, without knowing anything, just in a vacuum, if I was sitting at home and someone said, [']What do you think the appropriate punishment is for premeditated murder?['] My answer likely would be, [']I think the death penalty would be the answer but I'm open to hearing more if I ever sat on a panel to go through this evidence.[']" Is that -
>
> [Col SM]: That is exactly, I think, what I'm trying to say.
>
> . . . .
>
> [Military Judge]: If I gave you an instruction that you had to provide consideration for somebody's **[*55]** upbringing and past as part of his extenuation and mitigation, I don't want to know where it would fall on your list, alls [sic] I need to know is, if I said you have to consider it, and then again, make a choice in your mind one way or the other as to whether or not that helps you in these decisions, are you going to follow my instruction and consider it?
>
> [Col SM]: Yes. As I mentioned, I think I could consider anything that was asked of me to consider.

The Defense challenged Col SM for cause on two bases. First, the Defense argued Col SM's questionnaire response that an accused should try to prove his innocence would lead to a presumption that, if the Defense did not present evidence, there was no exculpatory evidence, resulting in a shifting of the burden of proof. Second, the Defense argued Col SM should be removed because his "starting position" was that the death penalty would be the appropriate punishment for premeditated murder, which also effectively created an inappropriate burden for the Defense in sentencing. The Government opposed the challenge against Col SM.

The military judge denied the challenge and explained his reasoning on the record, relying on the CAAF's decision **[*56]** in *United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015)*. The military judge emphasized he watched Col SM carefully to determine whether Col SM would follow the instructions he was given. With respect to shifting the burden of proof, the military judge found Col SM's explanation that, if he were accused, he would want to put on evidence of his innocence was a "human, normal response to that question." However, the military judge found Col SM would follow the military judge's instruction "about what is beyond a reasonable doubt and what is the law." With regard to the death penalty,

the military judge found Col SM "very engaging" when asked "an open-ended question," and paraphrased Col SM's response as "I feel [the death penalty] is probably the most appropriate punishment . . . but I am open to considering an entire range. I believe I can give meaningful consideration for everything." With respect to public perception, the military judge commented on "the members of the audience who sat in and watched the entire exchange with him and watched his demeanor and watched his thoughtful answers to the questions and his ability to give true, meaningful consideration to what's presented to him." Taking into account the liberal grant mandate, **[*57]** the military judge concluded by finding no actual bias or implied bias.

The Defense exercised its peremptory challenge on another court member. Col SM served on the court-martial panel that convicted and sentenced Appellant.

**2. Law**

*HN12*[] "Courts generally recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias." *United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020)* (citation omitted), *cert. denied*, *141 S. Ct. 1052, 208 L. Ed. 2d 522 (2021)*. "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012)* (citation omitted). We review a military judge's ruling on a claim of actual bias for an abuse of discretion. *Hennis, 79 M.J. at 384* (citation omitted). Implied bias, in contrast, is measured by an objective standard, whereby we "determine[ ] 'whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.'" *United States v. Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010)* (citation omitted). We assess implied bias based on the totality of the circumstances, assuming the hypothetical "public" is familiar with the military justice system. *Id.* (citations omitted). We review the military judge's ruling on a claim of implied bias "pursuant to a standard that is 'less deferential than abuse **[*58]** of discretion, but more deferential than de novo review.'" *United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017)* (quoting *United States v. Peters, 74 M.J. 31, 33 (C.A.A.F. 2015)*).

*HN13*[] "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." R.C.M. 912(f)(1)(N). "The two purposes of R.C.M. 912(f)(1)(N) are to protect the actual fairness of the court-martial and to bolster the appearance of fairness of the military justice system in the eyes of the public." *United States v. Leonard, 63 M.J. 398, 402 (C.A.A.F. 2006)* (citation omitted). The CAAF "has repeatedly emphasized the need for a military judge to follow a 'liberal grant' mandate in ruling on challenges for cause." *Id.* (citation omitted). In other words, "[t]he military judge is . . . mandated to err on the side of granting a challenge." *Peters, 74 M.J. at 34*. Appellate courts afford greater deference to a military judge's ruling on a challenge for implied bias where the military judge puts his analysis on the record and provides a "clear signal" he applied the correct law. *United States v. Rogers, 75 M.J. 270, 273 (C.A.A.F. 2016)* (citations omitted).

*HN14*[] "An accused enjoys the right to an impartial and unbiased panel." *Nash, 71 M.J. at 88* (citation omitted). "Holding an inelastic attitude toward the appropriate punishment to adjudge if the accused is convicted is grounds **[*59]** for an actual bias challenge under R.C.M. 912(f)(1)(N)." *Hennis, 79 M.J. at 385* (citation omitted). "However, a mere predisposition to adjudge some punishment upon conviction is not, standing alone, sufficient to disqualify a member. Rather, the test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *Id.* (quoting *United States v. McGowan, 7 M.J. 205, 206 (C.M.A. 1979)*).

**3. Analysis**

Appellant contends that, in light of the liberal grant mandate, the military judge should have granted the Defense's challenge for cause because Col SM "articulated a disqualifying view regarding the burden of proof" and because "the death penalty was his starting position" as a punishment for premeditated murder. We address each contention in turn. However, as an initial matter, we note the military judge explained his reasoning for denying the challenge on the record and gave a clear signal he applied the correct law, to include referring to the CAAF's then-recent decision in *Akbar* and expressly acknowledging the liberal grant mandate. Accordingly, the military judge's decision is entitled to deference, albeit less deference than under the abuse of discretion standard.

Appellant's argument with respect to the burden of **[*60]**

proof is derived from Col SM answering "yes" to the questionnaire inquiry as to whether he believed an accused person "should try to prove his or her innocence," with the explanation, "[i]f there is information that could prove your innocence I would use it for that purpose." We agree with the military judge that this imagining of oneself in the position of an accused person was a "human" and "normal" response by a layperson to the question. Col SM also consistently explained that he understood the burden of proof beyond a reasonable doubt rested with the Government, and he would not hold it against Appellant if the Defense did not put on evidence. We are not persuaded by Appellant's efforts to portray Col SM's statements that he "thought" he could follow the military judge's instructions as equivocal. In light of Col SM's consistent indications that he understood and could apply the correct burden of proof, we do not find his initial reaction that he would want to prove his innocence to be disqualifying.

Col SM's statements regarding his views on the death penalty present a closer question. Appellant's characterization that Col SM's "starting position" was that death was the appropriate **[*61]** punishment for premeditated murder is a fair summary of Col SM's explanation of his views. ***HN15***[↑] However, the CAAF has recently reiterated that a mere predisposition toward a particular punishment is not necessarily disqualifying, if the member is able to follow the military judge's instructions and give meaningful consideration to all the evidence and circumstances. *See* *Hennis, 79 M.J. at 385*.[13] Even in light of the liberal grant mandate, a military judge is not required to remove a member who is likely to favor a particular punishment, including the death penalty, because such an attitude is not in itself disqualifying. "An inflexible member is disqualified; a tough member is not." *United States v. Schlamer, 52 M.J. 80, 93 (C.A.A.F. 1999)* (citation omitted).

Although in the abstract Col SM may have been predisposed to believe the death penalty was an appropriate punishment for the offense of premeditated murder, he also indicated he could follow the military judge's instructions to consider extenuating and mitigating circumstances and the full range of sentencing alternatives, and indicated the death penalty was not necessarily the only appropriate punishment. The military judge carefully assessed Col SM's responses and demeanor, and applied the correct law. Affording **[*62]** the military judge's determination the deference to which it is due, we conclude that his finding of fact that Col SM would follow instructions was not clearly erroneous; that the military judge did not abuse his discretion in denying the challenge for actual bias; and that Col SM's presence on the panel would not have caused members of the public familiar with the military justice system to perceive the court-martial as less than fair and impartial. *See* *Hennis, 79 M.J. at 387*.

### E. Exclusion of Evidence of TF's "Swinging Lifestyle"

#### 1. Additional Background

In the course of the GBI investigation of TF's death, SA JS spoke with TF's friend and co-worker, TS. Among other information, TS told SA JS that TF had described participating in a "swinging lifestyle" with Appellant after TF and Appellant began their relationship. Specifically, TF told TS that TF and Appellant would attend parties where they exchanged sexual partners with other couples. According to TF, the husband in one such couple was a military member. TF told TS that she stopped "swinging" after she learned she was pregnant. One of TF's cousins provided similar information to investigators.

Before trial, the Government moved to exclude evidence that **[*63]** TF engaged in "swinging" behavior. The Government contended this evidence had "no logical nexus to any fact of consequence in [the] court-martial," and was therefore irrelevant. The Government argued the "only purpose" of such evidence would be to distract the court members and tarnish the victim. The Defense opposed the Government's motion and proposed the evidence was relevant in three ways: to show "the existence of others with potential motives to harm" TF; to challenge the sufficiency of the investigation, because the GBI did not follow up on this information; and to provide context to evidence the Government sought to introduce of a conversation in which Appellant

[13] In *Hennis*, the United States Court of Appeals for the Armed Forces (CAAF) addressed denied challenges for cause against two members who agreed with the statement, "life in prison is not really punishment for premeditated murder of children," during general voir dire. *79 M.J. at 385*. In light of the members' responses during individual voir dire that they could consider other punishments besides death, as well as the military judge's determination that the members were not unalterably in favor of the death penalty and a member of the public would not conclude they were biased, the CAAF found no error. *Id. at 386-87*.

requested that TF abort the pregnancy.

After receiving argument from counsel, in an oral ruling later followed up in writing, the military judge granted the Government's motion. He noted the Defense's rationale of giving context to the conversation about abortion was moot because the military judge had excluded evidence of that conversation. With regard to the other rationales, the military judge noted the Defense, as the proponent of the evidence, had produced no information as to the identity of any other individual **[*64]** purportedly involved in the "swinging" activities, leaving "mere[ ] suppositions and assertions" as to who they might be. The military judge found "the swinging evidence, as currently demonstrated to the court [wa]s irrelevant." He further found that any minimal relevance was "substantially outweighed by the dangers of confusion of the issues and wasting time," and the evidence should therefore also be excluded under Mil. R. Evid. 403.

**2. Law**

HN16[↑] "A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion." *United States v. Eslinger, 70 M.J. 193, 197 (C.A.A.F. 2011)* (citation omitted). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003)* (citing *United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)*). "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)* (quoting *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)*).

HN17[↑] "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. Relevant evidence is generally admissible, unless another provision of law provides otherwise; **[*65]** irrelevant evidence is not admissible. Mil. R. Evid. 402.

HN18[↑] The military judge may exclude relevant evidence that is otherwise admissible if its probative value is substantially outweighed by a countervailing danger, including *inter alia* unfair prejudice, confusion of the issues, or waste of time. Mil. R. Evid. 403. "A military judge enjoys 'wide discretion' in applying Mil. R. Evid. 403." *United States v. Harris, 46 M.J. 221, 225 (C.A.A.F. 1997)* (quoting *United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995)*). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)* (quoting *United States v. Ruppel, 49 M.J. 247, 250 (C.A.A.F. 1998)*).

HN19[↑] Where a military judge commits an error regarding the admissibility of evidence that is not of constitutional dimensions, we assess whether the error substantially influenced the verdict in light of "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. McAllister, 64 M.J. 248, 250 (C.A.A.F. 2007)* (citations omitted). However, if the military judge commits a constitutional error by depriving the accused of his right to present a defense, the test for prejudice is whether the error was harmless beyond a reasonable doubt. *Id. at 251* (citations omitted). A constitutional error is harmless beyond a reasonable doubt **[*66]** when the error did not contribute to the verdict. *United States v. Chisum, 77 M.J. 176, 179 (C.A.A.F. 2018)* (quoting *Mitchell v. Esparza, 540 U.S. 12, 17-18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003)*).

**3. Analysis**

On appeal, Appellant contends the military judge abused his discretion by excluding evidence of TF's "swinging" activities for two reasons. First, he argues this evidence was relevant because it "refutes" the Government's contention that Appellant was the only person with a motive to kill TF. For example, Appellant suggests that the unnamed military member who TF reportedly told TS about would have a motive to kill her to keep his sexual activities a secret, or, having learned of TF's pregnancy, to eliminate an unwanted child. Second, Appellant contends the ruling prevented the Defense from fully confronting SA JS and challenging the thoroughness of the GBI investigation.

We conclude the military judge did not abuse his discretion under either theory. With respect to a motive to kill TF, we note again that no information identifying a particular individual was presented to the military judge. Moreover, according to TS, TF said she stopped "swinging" once she knew she was pregnant, months before TF was killed. In addition, there is no evidence

TF ever suggested that anyone other than Appellant was the father—which, **[*67]** as the post-mortem DNA test indicated, was in fact the case. ***HN20***[⬆] Relevance is a "low threshold," *United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010)*, but even in the context of a capital prosecution the proffered evidence must have some tendency beyond speculation to make a consequential fact more or less probable. *Cf*. *United States v. Hennis, 79 M.J. 370, 380-82 (C.A.A.F. 2020)* (finding military judge did not err by preventing defense from calling three witnesses in support of theory another individual committed charged offenses where that theory was "just [a]ppellant's speculation"). That TF participated in "swinging" behavior, months before she was killed, without more, in the absence of information that any of those unnamed partners were even aware of her pregnancy, creates no logical inference that any of them—whether military or civilian—would have a motive to murder TF. We find the military judge's conclusion that the evidence was irrelevant for this purpose was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *See* *McElhaney, 54 M.J. at 130* (citations omitted).

We find the military judge's conclusion that the evidence was not relevant to impeach SA JS or assail the investigation was similarly within the bounds of his sound discretion. In his written ruling, the military judge summarized some of **[*68]** the evidence that caused the GBI to quickly focus its investigation on Appellant. In light of this evidence, it was reasonable for the GBI to do so rather than devote time and resources to attempt to track down an unknown number of unidentified individuals who had no known credible motive to murder TF. In short, in light of the other evidence in the case, the "swinging" evidence would not have materially impeached SA JS as a witness or cast doubt upon the investigation as a whole.

Furthermore, assuming *arguendo* the "swinging" evidence had some minimal probative value, the military judge did not abuse his discretion by finding that value was substantially outweighed by the dangers of confusing the issues and wasting the court-martial's time, and therefore should be excluded under Mil. R. Evid. 403. The military judge's balancing of these considerations is articulated in his written ruling, albeit not extensively, and his determination is therefore entitled to deference. ***HN21***[⬆] "The overriding concern of [Mil. R. Evid.] 403 'is that evidence will be used in a way that distorts rather than aids accurate fact finding.'" *United States v. Stephens, 67 M.J. 233, 236 (C.A.A.F. 2009)* (quoting 1 Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* § 403.02[4], at 4-27 (6th ed. 2006)). **[*69]** In this case, the military judge had a legitimate concern that whatever minimal probative value the evidence had was substantially overshadowed by the danger that "inject[ing] salacious conduct" of the victim would, in addition to wasting time, diminish the court members' sympathy and distort their perception of her.

Finally, even if we assume for purposes of argument that the military judge erred in excluding this evidence, the error did not prejudice Appellant. The parties disagree as to whether such an error would be of constitutional dimension, i.e., whether it would amount to interference with Appellant's right to present a defense. *Cf*. *United States v. Stever, 603 F.3d 747, 756-57 (9th Cir. 2010)* (identifying factors to evaluate whether erroneous exclusion of evidence amounts to constitutional violation). However, even if we assume without deciding the exclusion was a constitutional error, we find the error was harmless beyond a reasonable doubt. The significance of Appellant's speculations about past "swinging" activities with unidentified partners is vanishingly small compared to the weight of evidence incriminating Appellant that the Government introduced at trial, discussed at greater length above in relation to the legal and factual **[*70]** sufficiency of the evidence. For similar reasons, Appellant's efforts to impeach the adequacy of the investigation with this information would not have affected the outcome of his court-martial.

### F. Military Judge's Failure to Reconsider Evidence of TF's "Swinging Lifestyle"

#### 1. Additional Background

Assistant trial counsel's opening statement to the court members included the following:

> Throughout the course of the investigation, the [GBI] interviewed many people including Ms. [IV], the woman who rented the car for the accused. After she was interviewed by the [GBI], the accused came over to her house. She confronted him. She asked, "What's going on? Who is this woman that was murdered?" The accused said it wasn't his baby and she had a policy. Members, during the search of the accused's home on August 29th, 2013, authorities found [TF's] one million dollar life insurance policy in the desk drawer in his bedroom.

The Government's opening statement was followed by the Defense's opening statement and the testimony of the Government's first witness. After the first witness's testimony, the military judge noted that he and the counsel had an R.C.M. 802 session at which the Defense indicated they believed **[*71]** the Government's opening statement opened the door "to some evidence that I had kept out, for lack of a better word, lifestyle choices that somebody might have made." Senior defense counsel identified assistant trial counsel's statement that Appellant "went over to [IV's] house and said words to the effect of, 'It wasn't my baby,' . . . ." as having opened the door. The military judge responded:

> Yeah. Appreciate it. Here's -- I know you know the issue. Opening statements are statements. They're not evidence. And so, if the evidence doesn't come out during the trial, you're welcome to comment on it in closing. If the evidence comes out during the trial, you're welcome to readdress but I am not going to rule on the admissibility any different than I already have on evidence at this point because I told the members that opening statements are just that, what counsel think is going to come out during the course of the testimony.

Senior defense counsel then raised a different issue, and there was no further discussion of whether the Government's opening statement had opened the door to previously excluded evidence.

**2. Law and Analysis**

***HN22***[] A military judge's decision to exclude or admit evidence **[*72]** is reviewed for an abuse of discretion. *Eslinger, 70 M.J. at 197* (citation omitted).

Appellant contends the military judge abused his discretion by ruling the Government's opening statement did not open the door to evidence the military judge previously excluded regarding TF's participation in "swinging" activities, as discussed above. Specifically, Appellant contends the military judge erroneously believed an opening statement cannot open the door because it is not evidence. He cites several decisions by federal circuit courts holding that the defense's assertions in its opening may open the door to evidence related to the accused's intent or evidence that bolsters the testimony of a prosecution witness, *see United States v. Chavez, 229 F.3d 946, 952-53 (10th Cir. 2000)*; *United States v. Croft, 124 F.3d 1109, 1120 (9th Cir. 1997)*; *United States v. Moore, 98 F.3d 347, 350 (8th Cir. 1996)*; *United States v. Knowles, 66 F.3d 1146, 1161 (11th Cir. 1995)*; *United States v. Smith, 778 F.2d 925, 928 (2d Cir. 1985)*; as well as two decisions of the United States Court of Military Appeals implying similar reasoning. *See United States v. Houser, 36 M.J. 392, 400 (C.M.A. 1993)*; *United States v. Franklin, 35 M.J. 311, 317 (C.M.A. 1992)*.

In response, the Government contends the military judge did not "foreclose" reconsideration of this issue, but merely deferred it until after presentation of evidence. The Government contends this deferment was a reasonable exercise of the military judge's discretion because the issue was not yet ripe, and it did not prejudice Appellant because the Defense could have requested reconsideration **[*73]** again after the evidence of Appellant's statement denying paternity came out in the course of the trial, as it did through IV's testimony.

Our superior court's position on this point is difficult to discern precisely. As Appellant notes, the general rule among the federal circuits appears to be that opening statement may open the door to responsive evidence, at least in some circumstances. *See United States v. Turner, 39 M.J. 259, 266 (C.M.A. 1994)* (Crawford, J., concurring) (citations omitted) ("All the circuits agree that the opening statement opens the door."). *Houser* and *Franklin* suggest the same, although in each case the court noted the evidence the appellant complained of on appeal was also admissible for another reason. *See Houser, 36 M.J. at 400* (explaining the defense's aggressive cross-examination of the victim as well as its opening raised questions of counterintuitive victim behavior); *Franklin, 35 M.J. at 317* (explaining premeditation was an element of the offense as well as being raised as an issue in the defense's opening statement). However, the majority opinion in *Turner*, decided after *Houser* and *Franklin*, pointedly noted that an opening statement is not evidence, and suggested the proper way for counsel to address assertions in the opposition's opening statement **[*74]** that are not borne out by the evidence is to comment on them in closing argument. *Turner, 39 M.J. at 262-63*. The *Turner* majority declined to hold that a "passing comment" in the defense's opening statement opened the door to evidence regarding the accused's invocation of his *Fourth Amendment*[14] and *Fifth Amendment*[15] rights,

[14] *U.S. Const. amend. IV*.

[15] *U.S. Const. amend. V*.

instead finding any error was harmless. *Id. at 262-64*.[16]

Similar to the majority in *Turner*, we find we need not decide whether assistant trial counsel's passing reference to Appellant's denial of paternity opened the door to the previously excluded evidence. Assuming *arguendo* the door was opened, we find any error by the military judge was harmless beyond a reasonable doubt[17] for two reasons. The first reason is the one the Government alludes to: the military judge's decision did not prevent the Defense from seeking reconsideration of the "swinging" evidence after IV testified to Appellant's denial of paternity, which she did. The military judge clearly indicated the Defense could raise the issue at such a time. The second reason is one we explained above in relation to the preceding issue: whatever slight relevance the "swinging" evidence had, either in raising a possible motive for other perpetrators, impugning the thoroughness **[*75]** of the investigation, or in providing context to Appellant's denial of paternity, was insignificant compared to the weight of the evidence of Appellant's guilt. Any error by the military judge in this respect did not contribute to the verdict. *See Chisum, 77 M.J. at 179* (citation omitted).

**G. Ineffective Assistance of Counsel: Failure to Request Reconsideration of Ruling on "Swinging" Evidence**

**1. Law**

***HN23***[↑] The *Sixth Amendment*[18] guarantees an accused the right to effective assistance of counsel. *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*. In assessing the effectiveness of counsel, we apply the standard in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and begin with the presumption of competent representation. *See Gilley, 56 M.J. at 124* (citations omitted). We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. *United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)* (citation omitted). We review allegations of ineffective assistance de novo. *Akbar, 74 M.J. at 379* (citation omitted).

***HN24***[↑] We utilize the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers;" and (3) if defense **[*76]** counsel were ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result? *United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)* (alteration and omission in original) (quoting *United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)*). The burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012)* (citation omitted).

**2. Additional Background and Analysis**

After the military judge ruled the Government's opening statement had not opened the door to the previously excluded evidence of TF's "swinging" behavior as described above, the Defense did not again request reconsideration after the Government introduced evidence. Appellant now contends his trial defense counsel were ineffective for failing to do so. Appellant argues the Government opened the door during its case-in-chief in at least two ways: by eliciting IV's testimony regarding Appellant's statement denying paternity of TF's unborn child, and by introducing evidence that human hairs were found in TF's bed that were not attributable to TF or Appellant. Appellant avers trial defense counsel's failure deprived the Defense of evidence someone other than Appellant may have had a motive to murder TF.

At the Government's request, this court ordered and

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[16] We also note that in every case cited by Appellant, the issue raised is whether the *defense's* opening statement opened the door to additional *prosecution* evidence. The situation in the instant case appears to be anomalous in federal appellate case law. There are several logical reasons why this would be so, including the order of presentation of evidence and the burden of proof, among others. However, we discern no persuasive reason why different rules regarding the effect of opening statements should apply to the prosecution and defense.

[17] As in our analysis of the preceding issue, we assume without deciding that the constitutional test of harmlessness beyond a reasonable doubt is the appropriate standard. *See McAllister, 64 M.J. at 250* (citations omitted); *Stever, 603 F.3d at 756-57*.

[18] *U.S. Const. amend. VI*.

received sworn **[*77]** declarations from Appellant's three trial defense counsel responsive to Appellant's claims of ineffective assistance.[19] The three declarations were generally consistent as to why the Defense did not again seek reconsideration of the "swinging" evidence, and offered multiple explanations. First, trial defense counsel believed they had adequately preserved the issue of the "swinging" evidence for appellate review through their initial motion in limine. Second, they did not believe any of the evidence adduced would have caused the military judge to change his ruling.

Third, while the Defense initially sought to preserve the ability to introduce the "swinging" evidence, trial defense counsel had always viewed the evidence as a dangerous double-edged sword and were skeptical the evidence would ultimately be helpful. Although it might have reinforced the idea that someone else with an intimate relationship with TF might have had a motive to commit the murder, it also posed significant risks for the Defense. By challenging the sufficiency of the investigation, the Defense risked SA JS recounting all of the evidence that caused the GBI to focus its **[*78]** investigation on Appellant. This included the risk that the Defense would itself open the door to otherwise inadmissible evidence, including SA JS's knowledge of other offenses Appellant had allegedly previously committed which were initially charged together with the murder of TF and killing of her unborn child, as well as evidence Appellant had requested TF have an abortion.[20] In addition, evidence that Appellant had involved TF in "swinging" activities—"pressured" her to do so, according to some potential witnesses—tended to reinforce the Government's portrayal that Appellant cynically manipulated TF "for his own gain and amusement," and would hurt rather than help his case by making the life insurance scheme appear more plausible. Similarly, trial defense counsel were concerned that the "swinging" evidence would further tarnish Appellant in the eyes of the court members and hurt the Defense during sentencing. Finally, trial defense counsel were concerned that at least some of the court members would react to the evidence in a similar manner to the military judge—"believing it was an underhanded attempt to smear the murder victim."

We conclude Appellant has failed to demonstrate either **[*79]** deficient performance or prejudice. Although not all of trial defense counsel's specific rationales for not re-requesting reconsideration are equally convincing, in general we agree the concern that the "swinging" evidence would do more harm than good for the Defense was reasonable. We recognize that securing the ability to present "swinging" evidence through reconsideration of the initial exclusion would not obligate the Defense to actually introduce such evidence. However, the lack of practical value to the Defense reasonably explains the decision not to seek further reconsideration. Relatedly, from the perspective of trial defense counsel at the time, the value of the exclusion of the evidence as an appellate issue may have outweighed the net value of introducing such evidence at trial. ***HN26***[] As explained above, Appellant has not prevailed on that issue at this court; but we evaluate trial defense counsel's decisions based upon their reasonableness at the time rather than their ultimate success. *See* *Akbar, 74 M.J. at 379* (citation omitted).

We emphasize again how tenuous the logical link is between an unidentified "swinging" partner from several months before TF's death to a credible motive to commit the murder. **[*80]** Our analysis of trial defense counsel's performance must take into consideration the feebleness of the inference upon which Appellant's argument relies.

Finally, for the reasons stated in our analysis of the preceding issues, even if trial defense counsel's performance had fallen measurably below the standard of performance, Appellant was not prejudiced by the

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[19] ***HN25***[] In *United States v. Jessie*, the CAAF explained the general rule that the Courts of Criminal Appeals (CCAs) "may not consider anything outside of the 'entire record' when reviewing a sentence under *Article 66(c), UCMJ*[, *10 U.S.C. § 866(c)*]." *79 M.J. 437, 441 (C.A.A.F. 2020)* (quoting *United States v. Fagnan, 12 C.M.A. 192, 30 C.M.R. 192 (C.M.A. 1961)*) (additional citation omitted). However, the CAAF recognized that "some [of its] precedents have allowed the CCAs to supplement the record when deciding issues that are raised by materials in the record," specifically with affidavits or hearings ordered pursuant to *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)* (per curiam). *Jessie, 79 M.J. at 442*. In *Jessie*, the CAAF declined to disturb this line of precedent. *Id. at 444*. Accordingly, we understand *Jessie* to permit our review of the trial defense counsel declarations. *See* *id. at 442* (citation omitted) (noting the CAAF has allowed the CCAs "to accept affidavits or order a *DuBay* hearing when necessary for resolving claims of ineffective assistance of trial defense counsel").

[20] In separate trials held prior to the instant court-martial, Appellant had been acquitted of most of these alleged offenses.

failure to again request reconsideration. Whatever minimal value the "swinging" evidence had for the Defense's case would not have affected the outcome in light of the overpowering weight of the evidence of Appellant's guilt presented by the Government. Accordingly, Appellant cannot prevail on this ineffective assistance claim.

**H. Motion to Suppress Search of Appellant's Home**

**1. Additional Background**

At 1840 on 29 August 2013, the lead GBI investigator, SA JS, signed an affidavit requesting a "no-knock" search warrant for Appellant's residence. The affidavit described the investigative steps SA JS had taken since he arrived at the crime scene at approximately 0630 that morning, including *inter alia* interviewing CF and several other witnesses. Among other information, SA JS related that TF had been shot and killed on her bed in the **[*81]** residence she shared with CF; that CF had seen Appellant dressed in dark clothing in the house around the time of TF's death, recognizing him from the many digital photos TF had shown CF; that the neighbor, DJ, had heard three gunshots and a car speeding away; that TF's friend and cousin, MC, said Appellant did not want the baby; and that SA JS had learned from Special Agent AA of the AFOSI that the Air Force was aware of two prior alleged criminal incidents involving Appellant, including an incident in which Appellant allegedly fired a weapon at an ex-girlfriend. SA JS requested authorization to search Appellant's residence for: firearms; computers, cellular telephones, and related electronic devices and equipment and the data within them; receipts and other "documents of evidentiary value;" portable "Global Positioning Satellite devices;" dark clothing; and a car and two motorcycles believed to belong to Appellant.

At 1915 on 29 August 2013, a Superior Court of Houston County judge issued a "no-knock" search warrant for the described property. SA JS and other law enforcement agents executed the warrant at 2115 on 29 August 2013. As a result of the search, the GBI seized numerous items **[*82]** of apparent evidentiary value.

The Defense moved to suppress the evidence seized pursuant to the 29 August 2013 search warrant. The Defense alleged numerous omissions, inaccuracies, and misleading statements in SA JS's affidavit. It contended the only actual evidence tending to indicate Appellant committed the crime was CF's identification, which was insufficient to support probable cause because CF had never met Appellant before, because of the "well-established unreliability of eyewitness identifications," and because of the particular circumstances under which this identification was made. The Defense further argued that "virtually nothing" in the affidavit tended to establish evidence of the crime would actually be found in Appellant's home, and that the warrant was overbroad. Finally, the Defense argued that the good faith exception would not apply because SA JS knew his affidavit was "bare bones" and "filled with irrelevancies and misleading and incomplete assertions." The Government opposed the motion to suppress, contending there was probable cause for the warrant and that, in the alternative, the good faith exception would apply.

The military judge received evidence and heard **[*83]** argument on the suppression motion. Notably, the Government called SA JS to testify. On cross-examination, SA JS admitted he unintentionally included two inaccurate statements in his affidavit. First, the affidavit stated Appellant "may have in his possession a shotgun, AR-15 [rifle], and a 9 mm Berretta [pistol]." However, when SA JS later reviewed his notes he realized Special Agent AA had actually informed him those weapons had previously been confiscated. Second, the affidavit stated Appellant had pleaded guilty to a misdemeanor for the prior shooting incident and received a year of probation. SA JS testified it was later clarified to him that Appellant had not pleaded guilty, but had entered a pretrial diversion program.

The military judge denied the motion to suppress in a written ruling. The military judge found SA JS's testimony was credible, and that the two errors SA JS acknowledged in the affidavit were unintentional. The military judge found the judge had probable cause to issue the search warrant. He cited, *inter alia*, CF's identification of Appellant and description of the clothes Appellant was wearing; CF's description of the car Appellant drove; evidence of electronic **[*84]** communications between Appellant and the victim, TF; witness descriptions of the romantic relationship between Appellant and TF; and SA JS's identification of "at least a partial motive," specifically evidence that Appellant did not want the unborn child of which he was the identified father. The military judge further explained the evidence indicated Appellant had the opportunity to return to his residence after the crime to change clothes before reporting for duty later in the day. Viewing the evidence "in a commonsense manner" and giving the

issuing judge appropriate deference, the military judge found the judge's decision to issue the warrant "was well within reason." Finally, the military judge indicated that had he found probable cause lacking, he nevertheless would have denied the motion based on the good faith exception.

**2. Law**

*HN27*[↑] We review a military judge's ruling on a motion to suppress for an abuse of discretion, viewing the evidence in the light most favorable to the prevailing party. *United States v. Eppes, 77 M.J. 339, 344 (C.A.A.F. 2018)* (citations omitted). A military judge abuses his discretion when: (1) his findings of fact are clearly erroneous; (2) he applies incorrect legal principles; or (3) his "application of the correct **[*85]** 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)*). "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. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)* (citation omitted).

The *Fourth Amendment* provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

*U.S. Const. amend. IV*. *HN28*[↑] The Military Rules of Evidence effectuate the *Fourth Amendment* with respect to courts-martial. Under Mil. R. Evid. 315(f)(1), a search authorization "must be based upon probable cause." Probable cause exists "when there is a reasonable belief that the person, property, or evidence sought is located in the place . . . to be searched." Mil. R. Evid. 315(f)(2). "Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence." *United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007)*. The burden of proof rests with the Government to demonstrate evidence was lawfully seized or that the good faith exception applies. Mil. R. Evid. 315(e)(1).

*HN29*[↑] "Reasonable minds frequently **[*86]** may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination." *United States v. Leon, 468 U.S. 897, 914, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)* (internal quotation marks and citation omitted). Accordingly, searches conducted pursuant to a warrant or authorization based on probable cause are presumptively reasonable. *United States v. Hoffmann, 75 M.J. 120, 123-24 (C.A.A.F. 2016)* (citation omitted). We assess whether "the authorizing official had a 'substantial basis' for finding probable cause." *Id. at 125* (citation omitted). "A substantial basis exists 'when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location.'" *United States v. Nieto, 76 M.J. 101, 105 (C.A.A.F. 2017)* (quoting *United States v. Rogers, 67 M.J. 162, 165 (C.A.A.F. 2009)*). "[W]here a magistrate had a substantial basis to find probable cause, a military judge would not abuse his discretion in denying a motion to suppress." *Leedy, 65 M.J. at 213*. "Close calls will be resolved in favor of sustaining the magistrate's decision." *United States v. Monroe, 52 M.J. 326, 331 (C.A.A.F. 2000)* (citation omitted).

*HN30*[↑] When the magistrate is presented with inaccurate information in support of a request for a warrant or search authorization, we will sever that **[*87]** information and determine whether the remaining information supports a finding of probable cause. *United States v. Cowgill, 68 M.J. 388, 391 (C.A.A.F. 2010)* (citing *United States v. Gallo, 55 M.J. 418, 421 (C.A.A.F. 2001)*) (additional citation omitted). Similarly, when information is omitted with an intent to mislead the magistrate or with reckless disregard for the truth, we assess whether the hypothetical inclusion of the omitted material would prevent a finding of probable cause. *United States v. Mason, 59 M.J. 416, 422 (C.A.A.F. 2004)* (citation omitted).

*HN31*[↑] One exception to the ordinary rule of exclusion is the so-called "good faith" exception under which evidence obtained as a result of an unlawful search or seizure need not be suppressed if it was obtained pursuant to the good faith execution of a search authorization. Mil. R. Evid. 311(c)(3) sets forth three requirements for this exception:

> (1) the search or seizure executed was based on an authorization issued by a competent authority;
> (2) "the individual issuing the authorization . . . had a substantial basis for determining the existence of

probable cause;" and
(3) the person seeking and executing the authorization "reasonably and with good faith relied on the issuance of the authorization."

The second requirement is met if the person executing the search "had an objectively reasonable belief that the magistrate had a **[*88]** 'substantial basis' for determining the existence of probable cause." *United States v. Perkins, 78 M.J. 381, 387 (C.A.A.F. 2019)* (quoting *United States v. Carter, 54 M.J. 414, 422 (C.A.A.F. 2001)*).

**3. Analysis**

On appeal, Appellant essentially reiterates two general arguments the Defense made in its motion. First, he asserts SA JS's affidavit was "riddled with misrepresentations" and did not support a finding of probable cause. Second, he asserts the affidavit failed to establish a nexus between TF's murder and the presence of evidence at Appellant's residence. We find neither argument persuasive and briefly address each.

***a. Alleged "Deliberate or Reckless Falsehoods and Omissions"***

Appellant asserts SA JS omitted evidence that diminished the reliability of CF's identification of Appellant. He cites SA JS's motion testimony that the first deputy on the scene, WS, briefed him that CF had provided "differing stories" regarding the identity of who killed TF. However, after this abbreviated initial transfer of information, SA JS interviewed CF himself later in the day after gathering additional information, and CF unequivocally identified Appellant. We are not persuaded SA JS's failure to include his initial, possibly garbled, exchange with WS in the affidavit as evincing an intent to mislead or reckless **[*89]** disregard for the truth. Appellant also criticizes SA JS for not "sufficiently detail[ing]" the fact that CF had not previously met Appellant in person. However, the affidavit described how CF recognized Appellant from photos and that to CF's knowledge Appellant had never been to CF's and TF's residence before, which implied CF had not seen Appellant before and was not misleading. Appellant further notes SA JS did not mention brain surgery that CF had undergone approximately a year and a half earlier, but we are not persuaded that omission was reckless given CF's evident ability to see and recognize Appellant, to communicate, and to answer questions when interviewed.

Appellant also contends SA JS's affidavit misrepresented the nature of Appellant's relationship with TF by exaggerating its apparent volatility, with references to demands that she abort the pregnancy, alleged threats Appellant made to TF, and Appellant's alleged history of violence toward an ex-girlfriend. Appellant contends SA JS had uncovered no evidence Appellant had previously been violent toward TF and failed to include that TF was planning to move in with Appellant. We find these omissions only marginally relevant **[*90]** to the question of probable cause, and their omission was neither reckless nor misleading.

Appellant asserts the affidavit's erroneous statement that Appellant may have access to a shotgun, rifle, and 9 mm pistol was indisputably significant in light of TF's death by shooting and the prior allegation that Appellant had shot at an ex-girlfriend, and was "a major factor in the issuance of the warrant." The military judge found this error was unintentional, and that conclusion is not clearly erroneous. ***HN32***[⬆] Where an affidavit contains errors, we sever that information and assess whether the remaining information supports a finding of probable cause. In this case, excising SA JS's error with respect to Appellant's potential access to specific firearms, as well as his admitted error regarding Appellant's pretrial diversion as opposed to a misdemeanor conviction, we find the remaining information amply supports a finding of probable cause. Even if we also assume *arguendo* that the omitted information Appellant complains of as described above was included, regardless of our finding the omissions were neither intentionally nor recklessly misleading, the issuing judge would still have had a substantial **[*91]** basis to find probable cause.

***b. Allegedly Deficient Nexus***

Appellant contends SA JS's affidavit contained no indication that Appellant either came from or returned to his residence on the night of the murder. Appellant asserts the affidavit relied only on a "generalized profile" of how a person might behave and a "hope" that evidence would be discovered at Appellant's residence. We are not persuaded. In general, a common sense approach to reviewing the affidavit would provide a substantial basis to believe evidence relevant to the crime would be discovered at Appellant's residence, given not only CF's identification but also Appellant's long-term romantic involvement with TF, as well as Appellant's presumed need to prepare to carry out the

crime, to return home to change clothes, to park his vehicle, and to generally carry on with his life, among other considerations.

Appellant contends there was no probable cause, at that point, to believe Appellant owned or had access to a .22 caliber firearm such as the one used to kill TF. However, there *was* probable cause to believe that TF was killed with a .22 caliber firearm and that Appellant was the assailant. Appellant contends there was no **[*92]** evidence Appellant still possessed the murder weapon or that it was at his residence. ***HN33***[↑] Although probable cause requires more than bare suspicion, it does not require proof by a preponderance of the evidence that the evidence will be present. The possibility that Appellant hid or disposed of the murder weapon in some unknown location did not render his residence an unreasonable place to look for it. Again, we find the issuing judge had a substantial basis to find probable cause.

With respect to Appellant's vehicles, he contends CF's failure to identify the color of the car Appellant fled in "fatally undercut[ ] any nexus between [Appellant]'s vehicle and the crime scene." We disagree. CF described Appellant driving away in a four-door sedan, possibly a Chevrolet Cruze. Appellant was believed to own a vehicle of the same general type—a compact four-door sedan. Given Appellant's presumed need to return to his residence, and the fact that he was seen fleeing the murder scene in a vehicle of the same general type as the one he owned, the affidavit provided a more than sufficient nexus to search for Appellant's vehicle.

The link between Appellant's two motorcycles and the crime is less obvious. **[*93]** However, the inclusion of the motorcycles in the warrant did not materially advance the investigation or impact Appellant's trial. Accordingly, there was no evidence from the motorcycles to suppress, and assuming *arguendo* the military judge abused his discretion by finding probable cause existed with respect to the motorcycles, the error was harmless beyond a reasonable doubt. *See* United States v. Mott, 72 M.J. 319, 332 (C.A.A.F. 2013) (citation omitted) ("Constitutional errors are reviewed for harmlessness beyond a reasonable doubt.").

Appellant's remaining nexus arguments with regard to digital devices, receipts, clothing, and other evidence included in the warrant are unconvincing and require no specific analysis.

***c. Conclusion with Regard to Denial of the Motion to Suppress***

As described above, we find the issuing judge generally had a substantial basis to find probable cause existed for the warrant; assuming *arguendo* the absence of a nexus to the motorcycles, their inclusion was harmless. Accordingly, the military judge did not abuse his discretion in denying the motion. Assuming *arguendo* the military judge erred with respect to the existence of probable cause, we further find SA JS relied in good faith on a facially valid warrant issued **[*94]** by a competent authority, and that suppression would not be warranted. *See* Perkins, 78 M.J. at 387.

**I. Admission of IRS Deficiency Notice**

**1. Additional Background**

During the 29 August 2013 search of Appellant's residence, agents found the IRS notice of deficiency dated 10 June 2013 that Appellant owed the Government $10,802.17 in the same room where they found Appellant's copy of TF's MetLife insurance policy designating Appellant the sole beneficiary.

On 25 January 2016, the Defense filed a pretrial motion in limine to preclude the Government from offering evidence of the IRS notice. The Defense argued the IRS deficiency was a "routine affair" that did not represent the kind of dire or exigent circumstance that would overcome the general inadmissibility of evidence of impecuniosity as proof of motive. *See generally* United States v. Johnson, 62 M.J. 31 (C.A.A.F. 2005). The Government opposed the motion, arguing that the IRS deficiency was admissible as proof of motive, and to support the specific aggravating factor of monetary gain with regard to the death penalty. After receiving oral argument on the motion, the military judge granted the Defense's motion in limine "[a]t this point."

On 18 November 2016, the Government submitted a motion for reconsideration, **[*95]** which the Defense opposed. The military judge heard additional oral argument on 10 December 2016; on 2 January 2017 he advised the parties that he declined to reconsider his initial ruling.

At trial, the Government called SA JC, a GBI agent who took numerous photographs during the search of

Appellant's residence. The Government offered a number of photographs through SA JC, but it did not offer any photographs of the IRS notice during its direct examination. During cross-examination, the Defense offered through SA JC four photographs comprising Defense Exhibit C, which depicted a desk in Appellant's bedroom. Trial defense counsel cross-examined SA JC regarding the photographs to the effect that the MetLife insurance policy was found in a bottom file drawer, potentially underneath a number of other documents, in a location marked by a GBI evidence marker labeled "V."

When trial defense counsel completed her cross-examination, trial counsel requested a hearing pursuant to *Article 39(a), UCMJ*, *10 U.S.C. § 839(a)*. Trial counsel argued the Defense had opened the door to admitting evidence of the IRS notice. Trial counsel explained that the photograph depicting an evidence marker labeled "V" also depicted evidence marker "W," **[*96]** which marked the location where the IRS notice was found, opened and uncovered, on top of the desk. Trial counsel explained:

> [T]he concern here is that defense is making the suggestion that the life insurance policy was in the bottom of the drawer and wasn't important to [Appellant]. And then they put in a photo that has both the life insurance policy and the IRS deficiency, that's clearly laying on the top of his desk drawer, in the amount of $10,000.00 -- approximately $10,000.00 which I would assume it is important to [Appellant]. So, we believe this opens the door to the IRS deficiency if they're insinuating that the life insurance is not important to him and that they put in the photograph of.

Senior trial defense counsel objected that the same rationales for excluding the IRS notice still existed, that the situation remained analogous to *Johnson*, and the door had not been opened.

After a short recess, the military judge overruled the Defense's objection and advised he would let the Government "put on information about where the IRS debt notice was found." Senior trial defense counsel further argued it appeared the IRS notice might have been moved from its original location before **[*97]** the photograph with evidence marker "W" was taken. In response, the military judge asked SA JC if she remembered where the IRS notice was found. SA JC responded that she "could not say with 100 percent certainty" where it was originally found, but "for the most part when [she] took the pictures, it was where they found it." The military judge maintained his ruling, agreeing with trial counsel that evidence regarding the original location of the IRS notice went to its weight rather than admissibility.

On redirect examination, SA JC testified that evidence marker "W" in Defense Exhibit C marked the location of a treasury deficiency in the amount of approximately $10,000.00.

The military judge instructed the court members on the use of evidence of the IRS deficiency in findings as follows: "You may consider evidence the accused may have been in debt to the IRS for the limited purpose of its tendency, if any, to demonstrate motive of the accused to commit the alleged offenses and to rebut the issue of alibi raised by the accused."

The Government referred to the IRS deficiency multiple times during its closing argument on findings and twice during its sentencing argument.

**2. Law**

*HN34*[↑] "A military **[*98]** judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion." *Eslinger, 70 M.J. at 197* (citation omitted).

*HN35*[↑] "The mere lack of money, without more, as proof of motive, has little tendency to prove that a person committed a crime." *Johnson, 62 M.J. at 34*. "However, where the moving party can demonstrate a specific relevant link to the offense in question, financial evidence may be relevant to establish motive." *Id. at 35*.

*HN36*[↑] "The context in which evidence is offered is often determinative of its admissibility." *United States v. Saferite, 59 M.J. 270, 274 (C.A.A.F. 2004)*. "[W]here a party opens the door, principles of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and is predicated on a proper testimonial foundation." *Eslinger, 70 M.J. at 198* (citation omitted). "[T]he legal function of rebuttal evidence . . . 'is . . . to explain, repel, counteract or disprove the evidence introduced by the opposing party.'" *Saferite, 59 M.J. at 274* (quoting *United States v. Banks, 36 M.J. 150, 166 (C.M.A. 1992)*). "The scope of rebuttal is defined by evidence introduced by the other party." *Banks, 36 M.J. at 166* (citations omitted).

*HN37*[↑] "Rebuttal evidence, like all other evidence, may be excluded pursuant to [Mil. R. Evid.] 403 if its probative value is substantially outweighed by the

danger of unfair prejudice." *Saferite, 59 M.J. at 274* (citation omitted). "When a military judge conducts a proper balancing test **[*99]** under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Manns, 54 M.J. at 166* (quoting *Ruppel, 49 M.J. at 250*). However, we afford "military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing." *Id.* (citation omitted).

**3. Analysis**

Appellant identifies three "significant problems" with the military judge's decision to permit the Government to introduce testimony regarding the IRS notice in response to the Defense's introduction of Defense Exhibit C. First, Appellant contends the Defense did not open any doors, but was responding to potentially misleading evidence offered by the Government. Second, Appellant contends evidence of the IRS notice did not actually rebut the Defense's evidence regarding the location of the insurance policy. Third, Appellant asserts the military judge's weight-versus-admissibility analysis was flawed because the Government could not offer "definitive evidence" the notice was actually found on top of the desk, where it was photographed.

Before we address Appellant's arguments, we address the Government's initial argument in response: that we should uphold the admission of the IRS **[*100]** notice because the military judge should have admitted it in the first instance as evidence of Appellant's motive. The Government cites the CAAF's decision in *United States v. Perkins* for the principle that an appellate court may uphold a trial judge's ruling based upon a theory not relied upon at trial. *78 M.J. 381, 386 n.8 (C.A.A.F. 2019)*. We do not question the validity of the principle; however, the Government's reliance on it here is inapt. The military judge twice rejected this very theory advanced by the Government in response to the Defense's motion in limine. Essentially, the Government invites us to find the military judge abused his discretion in his initial ruling; we decline to do so. *See United States v. Parker, 62 M.J. 459, 464 (C.A.A.F. 2006)* (citation omitted) ("When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case.").

However, we are not persuaded by Appellant's arguments either, and we find the military judge did not abuse his discretion. Appellant's first argument is that the Defense was merely responding to the Government's "potentially misleading evidence" that the MetLife insurance policy was found in Appellant's desk drawer, which might imply it was an important document to him. Appellant contends the **[*101]** Defense was counteracting this implication through evidence that the policy may have been "buried" underneath a pile of other documents, implying it was *not* important to him. However, this argument tends to confirm the Government's argument, and the military judge's understanding, that the purpose of Defense Exhibit C and related cross-examination of SA JC was in fact to downplay Appellant's financial motive to commit the offenses. In addition, the relevant question is not whether the Defense was responding to the Government's evidence, but whether the evidence introduced by the Defense invited a fair response from the Government. The Defense's own exhibit, offered to show the insurance policy had been buried and was presumably unimportant, also depicted where the IRS notice was found, open and in a prominent spot atop the desk, implying through similar reasoning that the notice was significant to Appellant. This purpose elevated the relevance of the IRS notice beyond mere impecuniosity.

Appellant's second argument is that the IRS notice was not proper rebuttal, because whether he thought the notice was important does not rebut the point the Defense sought to make—challenging the Government's **[*102]** implication that finding the insurance policy in Appellant's desk drawer meant the policy was important to him. We find the military judge did not plainly err in finding it was rebuttal. The Defense had attacked the significance of Appellant's monetary motive to commit the offenses. The Government responded with evidence tending to indicate Appellant did have a significant monetary motive. Moreover, the Government's rebuttal employed a logical corollary of the Defense's own rationale: if being buried under other papers in a desk drawer suggested a document was not important or of current significance, being prominently displayed atop the desk suggested the document was important or of current significance. Furthermore, there was a logical connection between the IRS notice and the insurance policy that served to rebut the Defense's implication that the insurance policy was not significant; evidence that Appellant was presently concerned about his sizeable IRS debt made his potential access to the proceeds of a $1 million life insurance policy more significant.

With regard to Appellant's third argument, we are not persuaded the military judge erred in concluding the

possibility the IRS **[*103]** notice had been moved went to its weight rather than its admissibility. First, the Government was not required to "definitively" prove the notice had not been moved. Second, we do not agree "the Government was unable to provide *any* evidence" Appellant placed the IRS notice in the location where it was photographed. As SA JC told the military judge and testified, although she could not be "100 percent" certain, in general items were marked and photographed where they were found during the search.

Finally, we note the military judge did not state that he had performed a balancing test pursuant to Mil. R. Evid. 403 before deciding to permit the Government to introduce evidence of the IRS notice. Accordingly, we perform our own balancing de novo. *See* Manns, 54 M.J. at 166. We conclude the evidence was properly admitted in light of Mil. R. Evid. 403. The evidence was relevant to counteract the Defense's attack on Appellant's monetary motive to commit the offenses. Its introduction required only a few simple questions to SA JC during her redirect examination, with the aid of Defense Exhibit C. The evidence addressed theories and themes—specifically Appellant's motives—that were already directly in issue in the case. Accordingly, we find the dangers **[*104]** of unfair prejudice, confusing the issues, misleading the members, undue delay, and cumulativeness were minimal, and did not substantially outweigh the probative value. *See* Mil. R. Evid. 403.

**J. Admission of Post-Mortem Paternity Test**

**1. Additional Background**

Before trial, the Defense moved to exclude evidence of the post-mortem DNA analysis that indicated Appellant was the father of the unborn child to a 99.9999 percent degree of certainty. The Defense argued the evidence was irrelevant, and therefore inadmissible under Mil. R. Evid. 401 and Mil. R. Evid. 402. The Defense anticipated the Government might propose one of Appellant's motives in killing TF was to eliminate an unwanted child; however, the Defense reasoned that a *post-mortem* test indicated nothing as to whether Appellant knew *at the time of death* that he was the father. In other words, "[Appellant's] knowledge or belief in the paternity of the baby is not made more or less probable by any result of the test." Alternatively, the Defense contended the evidence should be excluded under Mil. R. Evid. 403 because any probative value was substantially outweighed by the danger of confusion and unfair prejudice, because the DNA evidence: (1) would mislead the members into thinking Appellant knew he **[*105]** was the father, and thereby confuse the issue of motive; and (2) would cause the members to punish Appellant more severely "for killing his own biological child rather than focusing on the actual evidence of his awareness of paternity."

The Government opposed the defense motion. The Government's written response largely focused on the scientific reliability of the DNA testing, but suggested there were "several reasons" why the evidence could be relevant, including *inter alia* "the theory that [Appellant] committed the crime because he did not want to father the child."

After receiving argument on the motion, the military judge held the evidence was admissible. He explained, "[t]he fact that the accused is the father of the child is relevant in a criminal case involving the murder of the mother and unborn child." The military judge opined the Defense's position that the DNA test "had no relation to the crime" because it was "post-crime," "simply makes no sense." He found the DNA test was relevant to corroborate other evidence Appellant knew TF was pregnant and that the child was his. With regard to Mil. R. Evid. 403, the military judge found the evidence was not confusing or needlessly cumulative; rather, **[*106]** it was "directly related to the named victim, evidence of intent in the case, and evidence of motive in the case." Accordingly, at trial the Government introduced testimony regarding the results of the DNA testing and the likelihood of Appellant's paternity.

**2. Law**

HN38[↑] We review a military judge's decision to admit or exclude evidence for an abuse of discretion. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017) (citation omitted). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." Donaldson, 58 M.J. at 482 (citing Humpherys, 57 M.J. at 90). "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.'" McElhaney, 54 M.J. at 130 (quoting Miller, 46 M.J. at 65; Travers, 25 M.J. at 62).

HN39[↑] "The relevance standard is a low threshold."

*United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)* (citation omitted). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. Relevant evidence is generally admissible, unless otherwise provided by the Constitution, statute, Military Rules of Evidence, or the *Manual for Courts-Martial*. Mil. R. Evid. 402.

*HN40*[↑] The military judge may exclude **[*107]** relevant evidence that is otherwise admissible if its probative value is substantially outweighed by a countervailing danger, including *inter alia* unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence. Mil. R. Evid. 403. "A military judge enjoys 'wide discretion' in applying Mil. R. Evid. 403." *Harris, 46 M.J. at 225* (quoting *Rust, 41 M.J. at 478*). "Where a military judge properly conducts the balancing test under Mil. R. Evid. 403, we will not overturn his decision unless there is a clear abuse of discretion." *Ruppel, 49 M.J. at 251* (citation omitted).

**3. Analysis**

We conclude the military judge did not abuse his discretion in admitting the DNA evidence of Appellant's paternity. We agree with the military judge that the test results were relevant regardless of the fact that the test was performed after the offenses. The relevance does not hinge on Appellant's knowledge of the test results; rather, the relevance is that confirmation Appellant was actually the father corroborated other evidence indicating Appellant believed he was the father, and that TF held him out to be the father, before TF was killed. Evidence of Appellant's belief that he was the father in turn supported the Government's theories regarding Appellant's intent and motives—for example, "to dispose **[*108]** of the daughter he did not want," as trial counsel subsequently argued. Accordingly, we find the probative value of the test results with respect to Appellant's intent and motives was sufficient to meet the low threshold for relevancy.

We further find the military judge did not abuse his wide discretion in applying Mil. R. Evid. 403. The evidence, which the Defense did not contest on scientific grounds, was concise and clear in its implications. The Defense remained free to argue Appellant did not have scientific proof of his paternity before the deaths occurred. We are not persuaded the risks of confusion, unfair prejudice, or any other countervailing concern substantially outweighed the probative value of the evidence.

**K. Admission of Appellant's Letter from Jail to TB**

**1. Additional Background**

***a. The Letter and its Suppression***

After his arrest on 31 August 2013, Appellant was confined in the Tift County Jail. While confined in isolation there, between 31 August 2013 and 14 September 2014 Appellant wrote a number of letters to his friends and family members which he mailed through the prison mail system. The jail's inmate handbook advised inmates that "[m]ail correspondence of a general nature" was subject **[*109]** to being opened, inspected, and read for material that might be threatening to the safety or security of the facility. However, during his time in the isolation section of the jail, Appellant did not have access to the paper or electronic copy of the handbook.

Beginning on or about 5 September 2013, a jail employee made and retained copies of Appellant's letters before resealing the letters and mailing them. This was not the jail's typical procedure. One such letter that was copied was from Appellant to TB, Appellant's alibi witness who testified she slept at Appellant's house the night TF was killed. The letter stated in part:

> Last thing before I respond to your letters. I need to know something about what you told the police, but they read my letters. So when answering just say, "to answer your question, Yes I did" or "No I didn't." Did you tell the police where the rental car was parked?? (And if they question you again don't talk to them at all) (Tear the last paragraph off this letter and burn or flush it)

The record is unclear as to whether TB received the original letter.

Before trial, the Defense moved to suppress all letters seized by jail officials when Appellant was in pretrial **[*110]** confinement. On 29 October 2015, the military judge granted the motion to suppress. He explained the Government had failed to meet its burden of proof, and that the "wholesale photocopying of an inmate's mail in contravention of the jail's written policy, in reliance on a single individual . . . implementing the wide-ranging search, without demonstrated authority, or

a regulation or rule allowing him to do so, [wa]s arbitrary," and therefore an illegal search and seizure in violation of the *Fourth Amendment*.

***b. The Letter's Introduction as Rebuttal Evidence***

At trial, the Defense's cross-examination of several Government witnesses led the military judge to admit the portion of Appellant's suppressed letter to TB as rebuttal evidence. Trial defense counsel's questions tended to suggest a possible innocent use for the rental car; that Appellant was not concerned about being associated with the car; that the car might have been damaged after it was returned; and that TB had not attempted to conceal from investigators her knowledge of Appellant returning the car. The cross-examinations are summarized below.

The Government called IV who testified, *inter alia*, about renting a car at Appellant's request on 28 **[*111]** August 2013. On cross-examination, IV testified that she knew the Outcast Motorcycle Club had a clubhouse in Atlanta, Georgia, which was two hours away from Warner Robins.

The Government also called AW, the branch manager for the rental agency where IV rented the car. On cross-examination, AW acknowledged that the rental agency employees did not initially notice the ricochet mark on the window or damage to the molding when the car was returned the morning of 29 August 2013. She also acknowledged the agency had security cameras that were in plain view and not hidden; the apparent implication was that Appellant would have seen them and known he was being recorded when he returned the car, yet did so anyway.

The Government also called TB, who testified Appellant was with her when she fell asleep at his residence on the night of 28 August 2013, and he was there when she awoke the following morning at 0515. TB testified that she got out of bed at approximately 0540 and departed with Appellant, who she dropped off at the rental car which was parked down a side street. TB testified she did not know what the rental car was for. After Appellant returned the rental car, TB picked him up and they **[*112]** went to breakfast together. In response to questioning by trial defense counsel on cross-examination, TB testified to her belief that Appellant did not leave the bed after TB fell asleep on the night of 28 August 2013, based on her usual sleeping habits with him. In addition, TB testified that she told a GBI agent about helping Appellant return the rental car during her initial GBI interview. On re-direct, senior trial counsel had TB clarify that she did not initially mention the rental car when she was questioned about what she did that morning. On further cross-examination, TB clarified that she told the agent about returning the rental car when he specifically asked her whether she took Appellant anywhere before they went to breakfast.

After TB, the Government called JM, Appellant's neighbor. JM testified that in the early morning of the day that the police searched Appellant's house, he remembered seeing a small, four-door sedan parked on the street close to JM's driveway. On cross-examination, senior trial defense counsel attacked an asserted discrepancy between JM's testimony as to where he saw the car, and where he had previously told investigators he saw the car. The apparent **[*113]** implication was that JM's testimony—suggesting Appellant wanted to keep the rental car away from his house—was unreliable.

After JM's testimony, the Government asserted to the military judge that the Defense had opened the door to the portion of Appellant's letter to TB quoted above. Senior trial counsel cited the cross-examinations of IV, AW, TB, and JM as, in varying ways, raising the inference that Appellant was not trying to conceal the rental car and it might have been used for an innocent purpose. Quoting *United States v. Haney*, senior trial counsel argued Appellant "may not use his constitutional rights as a 'shield' to 'prevent the Government from contradicting the untruths and reasonable inferences that the fact finders could logically draw from the defense cross-examination.'" *64 M.J. 101, 116 (C.A.A.F. 2006)* (quoting *Gilley, 56 M.J. at 125* (Crawford, C.J., concurring in part)). In response, trial defense counsel argued the Defense had not opened the door, that the Government had raised these matters, and that the timing of the letter—approximately one month after TB was interviewed by the GBI—made it irrelevant.

The military judge allowed the Government to introduce the portion of the letter. He agreed with the Government that **[*114]** the letter "shows something nefarious about the rental car." The military judge explained:

> [H]ere I have a paragraph from a letter that absolutely provides some light as to what's going on with that rental car. And you can't benefit from it. And the cross-examination of [TB] that you did, the cross-examination of [AW], and the discussion of this Atlanta clubhouse, I think we all know what that's for. Maybe it's 98 miles to the Atlanta

> clubhouse and back as well. I have no idea. I assume we're going to see some evidence on it. I don't know. But I know those inferences are out there and the government gets to rebut them.

The relevant portion of the letter was admitted as Prosecution Exhibit 121, which senior trial counsel additionally read to the court members. The military judge later instructed the court members: "You may consider evidence found in Prosecution Exhibit 121 for the limited purpose of its tendency, if any, to show consciousness of guilt on behalf of the accused, and to rebut the issue of alibi raised by the accused."

**2. Law**

***HN41***[] "A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion." *Eslinger, 70 M.J. at 197* (citation omitted).

***HN42***[] "The context in which evidence **[*115]** is offered is often determinative of its admissibility." *Saferite, 59 M.J. at 274*. "[W]here a party opens the door, principles of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and is predicated on a proper testimonial foundation." *Eslinger, 70 M.J. at 198* (citation omitted). "[T]he legal function of rebuttal evidence . . . 'is . . . to explain, repel, counteract or disprove the evidence introduced by the opposing party.'" *Saferite, 59 M.J. at 274* (quoting *Banks, 36 M.J. at 166*). "The scope of rebuttal is defined by evidence introduced by the other party." *Banks, 36 M.J. at 166* (citations omitted).

***HN43***[] "Rebuttal evidence, like all other evidence, may be excluded pursuant to [Mil. R. Evid.] 403 if its probative value is substantially outweighed by the danger of unfair prejudice." *Saferite, 59 M.J. at 274* (citation omitted). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Manns, 54 M.J. at 166* (quoting *Ruppel, 49 M.J. at 250*). However, we afford "military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing." *Id.* (citation omitted).

**3. Analysis**

On appeal, Appellant essentially reiterates trial defense counsel's argument that the Defense did not open **[*116]** the door because the Government "already put into play" the matters it asserted the Defense introduced. In response, the Government argues the Defense's cross-examination did open the door to previously inadmissible evidence. The Government cites several precedents from our superior court to the effect that the defense may open the door to otherwise inadmissible evidence, and that an accused may not use his constitutional rights to prevent the Government from contradicting untruths. *See Eslinger, 70 M.J. at 198*; *Gilley, 56 M.J. at 120*; *United States v. Trimper, 28 M.J. 460, 466-67 (C.M.A. 1989)*.

However, the parties have not specifically addressed the application of the exclusionary rule to evidence suppressed for violation of the *Fourth Amendment* where such evidence subsequently becomes relevant to rebut evidence adduced through defense cross-examination of prosecution witnesses. Similarly, neither the parties nor the military judge addressed this aspect at trial. The military judge appears to have assumed that evidence suppressed for violation of the accused's constitutional rights is on an equal footing with other previously excluded evidence in terms of its availability for rebuttal. We are not so sure.

None of the cases the Government relies on involved the use of evidence initially suppressed for **[*117]** violation of the *Fourth Amendment* to rebut general cross-examination of prosecution witnesses. *See Eslinger, 70 M.J. at 196-98* (involving opinion testimony in sentencing); *Gilley, 56 M.J. at 120-22* (involving references to appellant's request for counsel); *Trimper, 28 M.J. at 466-67* (involving use of privately obtained urinalysis result to impeach accused's testimony that he had never used cocaine). Our review of the pertinent law has not disclosed such precedent either.

Other authority suggests that evidence derived from constitutionally infirm search and seizure is not available for such purposes. For example, similar to the holding in *Trimper*, Mil. R. Evid. 311(c) provides that "[e]vidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused." ***HN44***[] The provision of such a specific exception for the use of illegally obtained evidence implies such evidence is not *generally* available to rebut or impeach defense evidence. Furthermore, in *James v. Illinois* the United States Supreme Court explained that its precedents permitted the use of evidence obtained in violation of a defendant's *Fourth* and *Fifth Amendment* rights to impeach the defendant's own testimony, but declined to

extend the exception to the impeachment of other defense witnesses. **[*118]** *493 U.S. 307, 311-14, 110 S. Ct. 648, 107 L. Ed. 2d 676 (1990)* (citing *United States v. Havens, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980)*; *Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)*; *Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975)*; *Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954)*). In this case, the military judge did not admit the excerpt of Appellant's suppressed letter to TB to impeach the testimony of Appellant or any other defense witness, but merely to rebut the inferences created by trial defense counsel's cross-examination of the Government's own witnesses. Accordingly, for purposes of our analysis we assume without deciding the military judge erred.

However, we find Appellant is not entitled to relief because any error was harmless beyond a reasonable doubt. *See Mott, 72 M.J. at 332* (citation omitted). It is true that the excerpt of the letter was relevant to counteract the cross-examination testimony related to the rental car that the Defense elicited, and that trial counsel referred to this evidence in one portion of his argument on findings. However, the letter merely reinforced the significance of the rental car which was already apparent from other evidence, notwithstanding the cross-examination. Appellant rented the car through IV, for no apparent reason other than to avoid association with it. He parked it away from his house, where it would not be seen by witnesses or on his security cameras. The Defense's primary theory was alibi based on TB's **[*119]** testimony that Appellant spent the night of the murder at his own house, but this left no innocent explanation for how the car was driven 217 miles before it was returned—the passing reference to the Atlanta clubhouse was the feeblest of gestures in that direction. Moreover, after the car was returned the GBI found a ricochet mark on the window consistent with a .38 caliber round, as fired from CF's pistol.

Furthermore, the rental car was not even the most compelling evidence of Appellant's guilt. CF saw Appellant flee the scene of the murder. Ballistics evidence indicated the fatal bullets were fired from the Walther P-22 Appellant possessed. Coupled with all of the other incriminating forensic and other evidence, and the thorough undermining of TB's alibi testimony, the evidence of Appellant's guilt was overwhelming. "'***HN45***[] [T]he weight of the evidence supporting the conviction[s][ ]'. . . may so clearly favor the government that the appellant cannot demonstrate prejudice." *United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)* (second alteration in original) (quoting *United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)*) (additional citation omitted). This is such a case. Accordingly, we find Appellant is not entitled to relief.

## L. Findings Instructions

### 1. Law

***HN46***[] Where an appellant properly preserves **[*120]** his objections, we review the adequacy of the military judge's instructions de novo. *United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006)* (citations omitted). "[A] military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." *United States v. Behenna, 71 M.J. 228, 232 (C.A.A.F. 2012)* (citations omitted). The test for prejudice for a nonconstitutional error in findings instructions is whether the error had a "substantial influence" on the findings. *United States v. Gibson, 58 M.J. 1, 7 (C.A.A.F. 2003)*.

***HN47***[] "[T]he military judge . . . is required to tailor the instructions to the particular facts and issues in a case." *United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002)* (citations omitted). Absent evidence to the contrary, we presume the court members followed the military judge's instructions. *United States v. Stewart, 71 M.J. 38, 42 (C.A.A.F. 2012)* (citation omitted).

### 2. Additional Background and Analysis

Appellant contends the military judge's instructions to the court members were erroneous in five respects. The Defense preserved its objections to these instructions by raising them to the military judge at trial. We address each contention in turn.

#### *a. Instruction Regarding Alibi Defense*

The military judge instructed the court members as follows with regard to Appellant's alibi defense:

> The evidence *may have raised* the defense of alibi in relation to the offenses **[*121]** of premeditated murder and the intentional killing of an unborn child and the lesser included offense.

> "Alibi" means the accused could not have committed the offenses charged or any lesser included offense because the accused was at another place when the offenses occurred. Alibi is a complete defense to the offenses that are charged. You should consider all evidence that you believe is relevant on the issue of alibi.
>
> The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt the accused was present at the time and place of the alleged offense, the defense of alibi does not exist.

(Emphasis added.)

The military judge deviated slightly from the standard alibi instruction from the *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1018 (10 Sep. 2014) (*Benchbook*), which begins: "The evidence *has raised* the defense of alibi . . . ." (Emphasis added). Appellant contends this modification was erroneous because it tacitly indicated the military judge doubted the testimony of TB, Appellant's alibi witness. Appellant further contends this was an error of constitutional magnitude because it "diluted" his right to have the court **[*122]** members fully consider his alibi defense, and the error was not harmless beyond a reasonable doubt. *See* United States v. Brooks, 25 M.J. 175, 180 (C.M.A. 1987) (finding failure to give alibi instruction was an error of constitutional magnitude).

We disagree. As an initial matter, the instant case is not comparable to *Brooks*, where the military judge erroneously failed to give an alibi instruction where that defense was raised by the evidence. *Id. at 179-80*. In Appellant's case, the military judge did explain the alibi defense and instructed the members to consider whether it applied in light of the evidence before them. This was not interference with Appellant's right to present a defense equivalent to the constitutional error that occurred in *Brooks*.

Turning to Appellant's specific objection, we find no error in the military judge's instruction that the evidence "may have raised" the defense of alibi. ***HN48***[↑] The *Benchbook* instructions are not mandatory, and "the military judge . . . is required to tailor the instructions to the particular facts and issues in a case." *Baker, 57 M.J. at 333* (citations omitted). As given, the instruction accurately characterized the evidence. There was no direct evidence that Appellant was at his residence at the time of the murder. Even if one takes **[*123]** TB's testimony as to when she fell asleep and when she awoke at face value, the evidence indicated Appellant would have had time to travel from his home to TF's residence, kill TF, and return all while TB was asleep, notwithstanding TB's opinion that she would have awoken if Appellant had left the bed. Moreover, the court members did not have the standard *Benchbook* instruction with which to compare the military judge's instruction, and from which to infer the military judge's opinion of TB's credibility.

Appellant does not assert the military judge's explanation of the alibi defense was substantively erroneous. The military judge appropriately oriented the court members to the possible existence of an alibi defense and directed the court members to consider the evidence in that light. He thereby discharged his responsibility to provide an accurate, complete, and intelligible explanation of the applicable law. *Behenna, 71 M.J. at 232* (citation omitted). Furthermore, even if we assume *arguendo* the military judge should have instructed the members that the evidence "has raised" rather than "may have raised" the alibi defense, the deviation had no substantial influence on the findings. Court members are presumed **[*124]** to follow the military judge's instructions, and the alibi instructions given would have led the court members to consider whether the evidence indicated Appellant was not present when TF was killed.

***b. Instruction Regarding Accomplice Testimony***

The military judge instructed the court members as follows with regard to the testimony of accomplices:

> A witness is an accomplice if he or she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention to a factor specifically affecting [TB]'s testimony, that is, a motive to falsify her testimony in whole or in part, because of an obvious self-interest under the circumstances.
>
> For example, an accomplice may be motivated to falsify testimony in whole or in part because of his own self-interest in avoiding future prosecution. In deciding the believability of [TB], you should consider all the evidence you believe is relevant on this issue.
>
> Whether [TB], who testified as a witness in this case, was an accomplice is a question for you to decide. If [TB] shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or **[*125]** involved herself with the offense with which the

> accused is charged, she would be an accomplice.
> As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness. Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony was not self-contradictory, uncertain, or improbable.

Appellant notes the military judge provided the standard accomplice instruction from the *Benchbook* without significant modification. *See Benchbook* at 1096. However, Appellant contends the standard instruction was confusing and inadequate under the circumstances of this case. Appellant contends the instruction that an accused may be convicted based solely on the testimony of an accomplice, where TB—although called by the Government—was actually Appellant's alibi witness, implied either that TB provided incriminating evidence, or that the members should convict Appellant if they disbelieved TB, or both. According to Appellant, under any of these scenarios the military judge's instruction was erroneous and substantially **[*126]** prejudicial.

Although we agree the final paragraph of the instruction was somewhat awkward under the circumstances of this case, we find no error. Appellant does not allege, and we do not find, that anything in the instruction was an inaccurate statement of law. Additionally, in light of the military judge's unchallenged instructions on the elements of the offenses and repeated admonitions that the burden of proof rested with the Government, we find no cause for concern that the accomplice instruction would cause the members to weigh the evidence erroneously. To the extent the final portion of the instruction was not particularly applicable in Appellant's case, we presume the court members would have simply not applied it, rather than applied it erroneously and contrary to the military judge's other instructions. *See* *Stewart, 71 M.J. at 42* (citation omitted).

***c. Instruction Regarding Evidence of IRS Deficiency***

As explained above in our analysis of Appellant's specific assignment of error, the military judge admitted evidence of Appellant's notice of deficiency from the IRS in the amount of $10,802.17 as rebuttal to the photographs in Defense Exhibit C. The military judge provided the following instruction **[*127]** with regard to the IRS deficiency notice:

> You may consider evidence the accused may have been in debt to the IRS for the limited purpose of its tendency, if any, to demonstrate motive of the accused to commit the alleged offenses and to rebut the issue of alibi raised by the accused.

Appellant contends this instruction was erroneous because the deficiency evidence was not admitted to rebut the issue of alibi. Because court members are presumed to follow the military judge's instructions, Appellant contends he was prejudiced because the instruction led the court members to consider the evidence for an improper purpose. In response, the Government argues the instruction was not erroneous because the conditional language "may consider" and "if any" did not require the members to use the evidence to rebut the alibi defense. The Government further argues that the deficiency was evidence of Appellant's financial motive to commit the murder, and therefore relevant under the low standard of Mil. R. Evid. 401 to rebut the alibi defense because of its tendency to indicate Appellant did commit the offense.

It is difficult to assess whether the military judge's instruction was erroneous because the military judge **[*128]** did not clearly explain at the time for what purpose he was admitting the IRS deficiency evidence. ***HN49***[↑] Rebuttal evidence serves to "explain, repel, counteract or disprove" evidence introduced by the opposing party. *Saferite, 59 M.J. at 274* (citation omitted). As the Government argues, the IRS deficiency has some very general tendency to counteract or disprove the alibi defense by demonstrating a motive for Appellant to commit the murder, and thereby making it more likely Appellant did so. However, this is arguably true of every piece of relevant and material inculpatory evidence. Trial counsel's argument that Defense Exhibit C had opened the door did not mention the alibi defense and instead focused on the Defense's effort to minimize the evidence of Appellant's financial motive. If the military judge admitted the deficiency evidence solely as rebuttal evidence related to motive, then Appellant's argument has some force. However, the military judge, having found the Defense opened the door to the deficiency evidence by putting in visual evidence of the deficiency notice itself, might have concluded the deficiency was relevant and useable for other purposes as well. His decision to instruct the court members that **[*129]** they could consider the evidence for its tendency, if any, to rebut the alibi defense—over the Defense's objection—suggests that he did so.

Accordingly, for the purpose of analysis, we assume without holding that the military judge erred and resolve the issue on the question of prejudice. Assuming the instruction was erroneous, it had no substantial effect on the findings. Evidence of the IRS deficiency notice was properly before the members in any event as evidence of Appellant's financial motive. In light of the abundance of incriminating evidence placing Appellant at the scene of TF's murder, coupled with the significant flaws in TB's credibility and other weaknesses in Appellant's alibi defense, addressed in more detail above in relation to legal and factual sufficiency, the incremental effect of the military judge permitting the court members to consider the IRS deficiency for its tendency to rebut Appellant's alibi, if any, was negligible.

***d. Instruction Regarding Appellant's Letter from Jail to TB***

As described above, the military judge initially excluded the letter Appellant wrote to TB from confinement in September 2013, but subsequently found the Defense had opened the door to **[*130]** admission of a portion of it. The military judge provided the following instruction with regard to the letter:

> You may consider evidence found in Prosecution Exhibit 121, that's the letter from September of 2013. You may consider evidence found in Prosecution Exhibit 121 for the limited purpose of its tendency, if any, to show consciousness of guilt on behalf of the accused, and to rebut the issue of alibi raised by the accused.

Appellant contends the portion of the instruction that invites the members to consider how the letter rebuts Appellant's alibi defense is erroneous. He asserts that even if one assumes the letter amounts to evidence of his consciousness of guilt, without more, it does not impeach TB's credibility or, by extension, Appellant's alibi defense. However, in our consideration of the admission of the letter as rebuttal evidence, *supra*, we explained that any error in its admission was harmless beyond a reasonable doubt. For similar reasons, we find the military judge's instruction regarding the letter was also harmless beyond a reasonable doubt. *See* Mott, 72 M.J. at 332 (citation omitted).

***e. Instruction Regarding the Motorcycle Club and "Property"***

The military judge provided the following **[*131]** instruction with regard to evidence of the Outcast Motorcycle Club:

> You may consider evidence related to the issue of the Outcast Motorcycle Club to include the description of and definition of property for the limited purpose of its tendency, if any, to show the accused's opportunity, the accused's plan and to rebut the issue of alibi raised by the accused and to rebut the testimony of [TB].

Although Appellant concedes that TB's credibility in general was "certainly a factor" for the court members to consider, he contends this instruction was erroneous because "it did not actually rebut any of [TB's] testimony." Again, we disagree.

HN50[↑] Rebuttal evidence is evidence that "explain[s], repel[s], counteract[s] or disprove[s] the evidence introduced by the opposing party." Saferite, 59 M.J. at 274 (citation omitted). The evidence was not required to literally contradict TB's testimony in order to rebut it. Evidence of Appellant's and TB's mutual affiliation with Outcast, and of TB's status as "property" of an Outcast member, were relevant to illustrate her potential bias and thereby counteract and rebut her alibi testimony.

**M. Trial Counsel's Sentencing Argument**

**1. Additional Background**

After the members returned a verdict **[*132]** of guilty, including a unanimous verdict as to premeditated murder, the military judge permitted counsel for each side to give an opening statement with respect to sentencing. During the Government's opening statement, senior trial counsel explained the four "decisional points" or "gates" the Government must pass in order for the court members to impose the death penalty: a unanimous vote that Appellant was guilty of premeditated murder; a unanimous vote that the Government had demonstrated a qualifying aggravating factor beyond a reasonable doubt; a unanimous vote that the extenuating and mitigating factors are substantially outweighed by the aggravating circumstances; and a unanimous vote to impose the death penalty.

The Defense's sentencing case was short. Trial defense counsel introduced approximately 30 documents related to Appellant's duty performance and military and civilian educational achievements, three letters to Appellant

from his son, ten pages of photographs, a one-page unsworn "Personal Statement" signed by Appellant, and an approximately 20-minute Defense-produced video containing portions of interviews with Appellant, members of Appellant's immediate family including **[*133]** his son, and former educators of Appellant, as well as portions of several recorded phone conversations between Appellant and his son during Appellant's pretrial confinement. The Defense did not call any witnesses or introduce any character letters. Appellant's personal statement primarily focused on his relationship with his son. Appellant's written personal statement and video-recorded interview did not acknowledge his guilt of the offenses, express any remorse, apologize to TF's family or friends, or mention TF or her unborn child.

After the presentation of evidence and other sentencing matters, counsel for both parties delivered sentencing arguments. Senior trial counsel's argument included the following statements:

> We talked yesterday about the four gates. Gate One has already been met in the unanimous verdict for premeditated murder. Gate Two, unanimous vote for the existence of the aggravating factor beyond a reasonable doubt. Members, I submit to you again that this should be easy for you. The aggravating factor in this case is that the murder was committed for the purpose of getting money or a thing of value. And ask yourselves this, has any other reason for this murder been **[*134]** presented to you? Was there any other purpose to that act that morning?

Senior trial counsel then discussed the $1 million MetLife insurance policy, the notice of deficiency from the IRS, and Appellant's statement to IV on the day of the murder that there was "a policy."

Senior trial counsel then proceeded to address the "third gate." He addressed potential mitigating and extenuating factors identified in the military judge's instructions and argued why they should not sway the members' decision. With regard to the duration of Appellant's pretrial confinement, senior trial counsel argued:

> And what is it you've not been presented with? Any evidence that that 1,264 days has had any impact on him. No evidence that he's been rehabilitated during that time. That he's entered into any programs there. That he's done anything while in confinement to change his behavior or change his outlook and mindset on the world. Nothing.

Senior trial counsel then addressed the Defense's sentencing evidence:

> And you do have before you, the military judge will instruct you to consider the Defense Exhibits in this case. . . . The defense presented to you yesterday a 20 minute mitigation case. And you're allowed **[*135]** to consider that to ultimately determine how much weight to give that. And really, does that provide much mitigation? I would submit to you that that case is more aggravating than it is mitigating. It's more aggravating than it is mitigating. Because it shows you that there is no excuse for these actions. There is nothing. There is nothing in his background. There is nothing in his life that would explain this. That would give you some reason to say, "Okay, we can latch on to that. This is why he committed this evil act. This is why he strayed." But he grew up in a loving family.
>
> That [sic] also didn't present in that mitigation package any letters, any sentencing letters from anyone. Now, [Appellant], in his video, talked about being part of an All Star team. These were the best individuals on this team. Where are the letters from anyone on that team that talks about that performance? You were presented with nothing.

The Defense did not object to any of these statements at the time they were made. However, the military judge sustained a defense objection later in the argument when senior trial counsel implied a death sentence might not ever be carried out.

As the Government's argument **[*136]** continued, one of the court members became ill, and as a result the military judge put the court-martial in recess for two days. During the recess the Defense moved to remove the death penalty as a possible sentence due to prosecutorial misconduct during senior trial counsel's sentencing argument. Specifically, the Defense contended senior trial counsel "improperly argu[ed] a lack of evidence from the [D]efense" with regard to facts the Government was required to prove to satisfy the second and third "gates;" conveyed the false impression that Appellant could have participated in rehabilitative programs during his pretrial confinement; improperly argued the mitigating factors could actually be weighed as aggravating factors; and "us[ed] common sense as a pretext to introduce constitutionally impermissible inferences that a sentence of death would be delayed if it was ever carried out." The Defense argued that instructions were an insufficient remedy, and that

removal of the death penalty as a possible punishment was an appropriate remedy because the errors "all relate[ ] to findings that are only relevant to determine if death is a possible punishment." In the alternative, the Defense **[*137]** requested the military judge declare a mistrial. In response, the Government argued senior trial counsel correctly described the capital sentencing procedure, made fair comments on the evidence, and did not attempt to shift the Government's burden.

When the court-martial resumed, the military judge discussed the defense motion with counsel. The military judge denied the Defense's request to remove the death penalty or to declare a mistrial. However, before senior trial counsel resumed his sentencing argument, the military judge provided the following additional instructions to the court members:

> [I]f you look at that second gate, the existence of an aggravating factor, the burden for that is on the prosecution to prove that beyond a reasonable doubt, like you heard before when you were deliberating before on findings. Same standard. I'll instruct you on it again. They have to prove beyond a reasonable doubt that the aggravating factor exists. And that is on them.
>
> If you go down to that next gate, you got the mitigating factors, it's extenuating [sic] and mitigation are substantially outweighed by the aggravating circumstances, to include the aggravating factors. So, if you get through **[*138]** the aggravating factor and you're down into that third step, you're going to get a list of extenuation of mitigation. And you're seeing that list as the prosecutor goes through their argument. You're going to get a list of things that you must consider as extenuating and mitigating. However, the weight that you give each of those is within your discretion. You have to consider it but, again, you're going to have to figure out the weight because you're going to go through this, if you get to this third gate, this balancing of aggravating circumstances and extenuation and mitigating factors. So, it's entirely appropriate for the prosecution to talk to you about it and discuss with you why they don't believe it's worth significant weight, but ultimately the weight you give these circumstances is within your discretion.
>
> [ ] But you do have to consider them.

**2. Law**

***HN51***[↑] Improper argument is a question of law that we review de novo. *United States v. Pabelona, 76 M.J. 9, 11 (C.A.A.F. 2017)* (quoting *United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)*). The "test for improper argument is whether the argument was erroneous and whether the argument materially prejudiced the appellant's substantial rights." *Id.* (quoting *Frey, 73 M.J. at 248*). When there is no objection at trial, we review the propriety of trial counsel's argument **[*139]** for plain error. *United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013)* (citation omitted). To prevail under a plain error analysis, the appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007)* (citations omitted).

***HN52***[↑] "Improper argument is one facet of prosecutorial misconduct." *Sewell, 76 M.J. at 18* (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Hornback, 73 M.J. 155, 159 (C.A.A.F. 2014)* (alteration in original) (quoting *Fletcher, 62 M.J. at 179*). "[T]rial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" *Halpin, 71 M.J. at 479* (quoting *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)*). "A prosecutorial comment must be examined in light of its context within the entire court-martial." *United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005)* (citation omitted).

***HN53***[↑] We need not determine whether a trial counsel's comments were in fact improper if we determine that the error, if any, did not materially prejudice the appellant's substantial rights. *See Halpin, 71 M.J. at 479-80*. "[I]n the context of an allegedly improper sentencing argument, we consider whether 'trial counsel's comments, taken as a whole, were so damaging that we cannot be confident' that [the **[*140]** appellant] was sentenced 'on the basis of the evidence alone.'" *Id. at 480* (alteration in original) (quoting *Erickson, 65 M.J. at 224*) (internal quotation marks omitted).

**3. Analysis**

On appeal, Appellant contends this court should set aside his sentence because senior trial counsel's argument "exceeded the bounds of fair comment in

several ways." Appellant specifically cites three aspects of the Government's argument: that the Defense failed to provide a motive for TF's murder other than that Appellant did it to obtain money or something of value; that the Defense failed to introduce any witness statements in support of Appellant; and the "false impression" that Appellant had access to rehabilitative programs during his pretrial confinement. In response, the Government contends senior trial counsel's arguments were fair comments on the evidence that did not improperly shift the burden, and in the alternative that these comments did not materially prejudice Appellant.

We find it unnecessary to affirmatively determine whether any of senior trial counsel's statements that Appellant cites were in fact improper, and instead resolve the assignment of error on the absence of prejudice. However, we do find it appropriate to sound **[*141]** a note of caution. To an extent, we agree with the Government that the substance of senior trial counsel's remarks were comments on the state of the evidence. However, his decision to repeatedly frame his rhetorical questions as whether the court members had been "presented" with evidence of one type or another was a step into dangerous territory. The implication was that the Defense was permitted to, yet failed to produce such evidence. Appellant notes this court has previously (and descriptively) warned: "Whenever trial counsel chooses to argue that an accused has not 'shown' the sentencing authority something, counsel treads backwards into a mine field in over-sized galoshes while wearing a blindfold." *United States v. Feddersen, No. ACM 39072, 2017 CCA LEXIS 567, at *9 (A.F. Ct. Crim. App. 21 Aug. 2017)* (unpub. op.). ***HN54***[⬆] Caution is particularly appropriate in the context of a capital sentencing proceeding, where the Government bears special burdens of proof.

Nevertheless, assuming *arguendo* senior trial counsel erred, we find Appellant was not prejudiced by the errors. Several factors lead to this conclusion.

First, we find the severity of the alleged misconduct was low. *See* *Halpin, 71 M.J. at 480* (citing *Fletcher, 62 M.J. at 184*). The statements Appellant cites were brief comments in a sentencing argument that lasted over an hour. **[*142]** In general, senior trial counsel correctly articulated the applicable capital sentencing procedures and the Government's burden of proof.

Second, the military judge gave additional instructions in the midst of the Government's argument to ensure the court members were not confused about the Government's burden or the sentencing procedures. *See id.* (citing *Fletcher, 62 M.J. at 184*).

Third, the alleged errors primarily related to whether the Government had met the requirements for the imposition of the death penalty, and the court-martial did not sentence Appellant to death. The Defense's motion at trial acknowledged as much in seeking, as a primary remedy, to have the death penalty removed as a sentencing option.

Fourth, the court members' sentencing options were limited. If the court members did not impose the death penalty, Appellant faced a mandatory minimum term of confinement for life; the only other confinement option was confinement for life without the possibility of parole. We are entirely confident the alleged errors played no role in the imposition of Appellant's dishonorable discharge, reduction in rank, forfeiture of pay and allowances, and reprimand, nor in the imposition of confinement for life **[*143]** without, rather than with, the possibility of parole.

Fifth, the Defense's sentencing case was comparatively weak, and the Government's sentencing case was comparatively strong, including testimony from several friends and relatives of the victim. The preeminent question during sentencing was whether or not the court members would impose the death penalty. They did not.

Accordingly, we are confident Appellant was sentenced on the basis of the evidence alone, and that senior trial counsel's allegedly improper comments did not affect the outcome of the sentencing proceeding.

**N. Post-Trial Delay**

**1. Additional Background**[21]

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[21] This additional background is based in part on information contained in the record of trial, including a memorandum attached to the SJAR signed by the wing staff judge advocate (SJA) which details the progress of the post-trial process until delivery of the record to the convening authority's SJA. In addition, we have considered a sworn declaration from Captain TS, a member of the convening authority's SJA's staff, which was submitted by the Government and describes the post-trial process after the record was received by the convening authority's SJA. ***HN55***[⬆] We understand that we are permitted to consider matters from outside the record of

Appellant was sentenced on 22 February 2017. The court reporters completed transcribing the proceedings on 30 May 2017, and the wing legal office received the military judge's authentication of the record on 23 June 2017. The wing legal office completed assembling the eight copies of the record on 25 September 2017, and the convening authority's legal office received its copy two days later. The record consists of 44 volumes, including 4,317 pages of transcript and a total of 681 Prosecution, Defense, and Appellate Exhibits comprising several thousand pages in addition **[*144]** to numerous discs of recordings and digital information. The convening authority's staff judge advocate (SJA) signed the SJAR on 8 November 2017 after members of the SJA's staff reviewed the entire record and identified more than 20 corrections. The record was served on Appellant on 15 November 2017. The Defense submitted clemency matters on 25 November 2017, including 114 assertions of legal error; one of the alleged errors was violation of Appellant's right to speedy post-trial review. The SJA signed the SJAR addendum on 19 December 2017,[22] and the convening authority took action on 20 December 2017, 301 days after sentencing.

The record was docketed with this court on 10 January 2018, 21 days after action. Thereafter, the Defense requested and was granted 20 enlargements of time (EOTs) in which to file Appellant's assignments of error. Appellant was initially represented by Captain (CAPT) Mizer, who continued his representation despite being involuntarily mobilized in May 2018 to serve as defense counsel for military commissions. CAPT Mizer was joined in November 2018 by Major (later Mr.) Bruegger. Lieutenant Colonel (Lt Col) Ortiz also served as an appellate defense counsel for Appellant **[*145]** between 16 May 2019 and 30 September 2019. CAPT Mizer withdrew as Appellant's counsel in February 2020 after he was mobilized a second time, and ultimately Mr. Bruegger alone filed Appellant's assignments of error on 1 June 2020.[23] The Government filed its answer brief on 31 July 2020 after this court granted it one 30-day EOT. The Defense filed Appellant's reply brief on 18 August 2020.

**2. Law**

***HN56***[↑] "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)* (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay where the convening authority does not take action within 120 days of sentencing, where the record of trial is not docketed with the Court of Criminal Appeals within 30 days of the convening authority's action, and where the court does not issue its decision within 18 months of docketing. *Id. at 142*. Where there is such a facially unreasonable delay, we consider the four non-exclusive factors identified in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the **[*146]** appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno, 63 M.J. at 135* (citing *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)*; *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004)* (per curiam)). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id. at 136* (citing *Barker, 407 U.S. at 533*).

***HN57***[↑] However, where there is no qualifying 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)*. In *Moreno*, the CAAF identified three interests protected by an appellant's due process right to timely post-trial review: (1) preventing oppressive incarceration; (2) minimizing anxiety and concern; and (3) avoiding impairment of the appellant's grounds for appeal and ability to present a defense at a rehearing. *63 M.J. at 138-39* (citations omitted).

**3. Analysis**

Two periods of delay were facially unreasonable under *Moreno*: the delay between sentencing and action, and the delay between docketing and the issuance of this court's opinion. Accordingly, we consider each period of delay in light of the *Barker* factors.

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trial when necessary to resolve issues raised by materials in the record of trial. *See* *Jessie, 79 M.J. at 442-44*.

[22] With respect to post-trial delay, the SJA opined that the time taken to assemble, ship, and review the record was reasonable given the size of the record of trial.

[23] The history of Appellant's representation on appeal is addressed in more detail in relation to the next assignment of error, *infra*.

***a. Sentence to Action Delay***

***i) Length of Delay***

The 301 days that elapsed between sentencing and action **[*147]** substantially exceeded *Moreno's* 120-day threshold for a facially unreasonable post-trial delay. We find this factor favors Appellant.

***ii) Reasons for Delay***

We find the reasons for the delay favor the Government. The record of this capital murder trial is unusually large, as described above. Moreover, although the court reporters began transcribing the preliminary motions hearings well in advance of the trial, the bulk of the transcript was from the approximately six-week period between 9 January 2017 and 22 February 2017 when the trial occurred. The Government involved multiple court reporters in transcribing the proceedings in order to speed the process. Under the circumstances, we find completion of the transcript by 30 May 2017 and receiving the military judge's authentication by 23 June 2017 were not unreasonable. Similarly, we find the time taken to accurately create and assemble eight copies of the 44-volume, 681-exhibit record was not unreasonable.

Nor do we find the processing of the case at the office of the convening authority's SJA to be unreasonably dilatory. In most cases, 42 days to review the record and prepare and sign the SJAR would be unreasonable. However, the size **[*148]** of the record in this case warranted a significant amount of time for review. Similarly, 24 days to prepare the SJAR addendum after receiving clemency matters was not unreasonable given that the SJA responded to 114 alleged legal errors, albeit in cursory fashion for the vast majority of them.

In short, although the delay was *facially* unreasonable, the unusual size and complexity of the record justified the time taken to thoroughly and accurately process the case.

***iii) Demand for Speedy Post-Trial Review***

Appellant, through counsel, asserted his right to speedy post-trial review on the record immediately after the sentence was announced. The Defense reasserted Appellant's right to speedy post-trial review in his clemency submission. Accordingly the Government concedes, and we find, this factor favors Appellant.

***iv) Prejudice***

We do not find Appellant suffered prejudice to any of the three interests the CAAF identified in *Moreno* as a result of the delay between sentencing and action. ***HN58***[↑] Where, as in this case, the appellant has not prevailed on the substantive grounds of his appeal, there is no oppressive incarceration. *Id. at 139*. Similarly, where Appellant's substantive appeal fails, his ability to present **[*149]** a defense at a rehearing is not impaired. *See id. at 140*. Moreover, we cannot perceive, and Appellant does not articulate, how the substantive grounds for his appeal have been impaired.

***HN59***[↑] With respect to anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id. at 140*. Appellant cites the fact that CAPT Mizer ultimately withdrew from representing Appellant due to being involuntarily mobilized a second time, after Appellant approved numerous EOTs in order to retain CAPT Mizer as his lead counsel. We are not persuaded. ***HN60***[↑] First, as we discuss in more detail below in relation to the next assignment of error, an appellant before a Court of Criminal Appeals does not have the right to select his detailed appellate counsel. *See 10 U.S.C. § 870*; *compare 10 U.S.C. § 838(b)(3)(B)*; *see also United States v. Patterson, 22 C.M.A. 157, 46 C.M.R. 157, 161-62 (C.M.A. 1973)*; *United States v. Jennings, 42 M.J. 764, 766 (C.G. Ct. Crim. App. 1995)* ("[A]ppellate defense counsel is detailed by the Judge Advocate General, or his designee, pursuant to *Article 70, UCMJ* and the appellant has no right to request a particular individual to represent him."). In other words, during the period of post-trial delay Appellant **[*150]** had no entitlement to have CAPT Mizer detailed to represent him on appeal, and no right to request him if he was not. Second, CAPT Mizer's ultimate unavailability was not caused by, and did not exist during, the post-trial delay preceding the convening authority's action, but occurred due to subsequent events. Accordingly, we are not persuaded Appellant's anxiety and concern during the post-trial process was distinguishable from that of other appellants serving confinement pursuant to their adjudged sentences.

***v) Conclusion with Regard to Sentence to Action Delay***

Having weighed the applicable factors, we find the 301-day delay between sentencing and action was not a violation of Appellant's due process rights. In the absence of prejudice cognizable under *Moreno*, under the circumstances we find the delay was not so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey, 63 M.J. at 362*. Moreover, assuming *arguendo* that Appellant's later anxiety and concern regarding CAPT Mizer is attributable to the post-trial delay, and weighing that factor in Appellant's favor, we would still find no due process violation because the reasons for the **[*151]** delay is the decisive factor in this case. The delay, although *facially* unreasonable, was justified by the size and complexity of the record, and the need to address Appellant's multitude of alleged legal errors. Where the Government's actions are not *actually* unreasonable, under the particular circumstances of this case, in the absence of oppressive incarceration or prejudice to Appellant's ability to defend himself at a retrial or on appeal, we do not find a violation of his constitutional rights.

Furthermore, recognizing our authority under *Article 66(c), UCMJ*, *10 U.S.C. § 866(c)*, 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 United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002)*. After considering the factors enumerated in *United States v. Gay, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*, we conclude no such relief is warranted.

***b. Appellate Delay***

***i) Length of Delay***

The approximately 41 months that elapsed between docketing and issuance of this court's opinion substantially exceeded *Moreno's* 18-month standard for facially unreasonable delay. We find the length of the delay favors Appellant.

***ii) Reasons for Delay***

The reasons for the delay strongly favor the Government. The vast majority of the delay is attributable to the 20 EOTs **[*152]** this court granted at the Defense's request, often over the Government's objection. Appellant contends these EOTs were driven by CAPT Mizer's unavailability due to his involuntary mobilization, and therefore responsibility for the delay should be attributed to the party responsible for CAPT Mizer's unavailability—the Government. We disagree.

Appellant was not entitled to select or even request a specific detailed appellate defense counsel. We do not discount the significance of the attorney-client relationship once it is formed. However, whether the Government improperly interfered with Appellant's attorney-client relationships is a separate issue which we consider below; for reasons we explain there, we conclude in this case there was good cause for CAPT Mizer's withdrawal from representation and no indication of a Government purpose to sever that relationship. With respect to the delay, with Appellant's concurrence the Defense sought to delay filing his assignments of error, and this court consistently granted the EOTs in order to accommodate the Defense. Appellant complains he "will never receive the benefit of his bargain," but we are not aware of any "bargain"—only a desire that **[*153]** CAPT Mizer would eventually be available to work on his appeal.

The period of delay that is attributable to the Government was justified. The Government received one 30-day EOT in which to file its 239-page answer brief. This was entirely reasonable given the size and complexity of the record and the number of issues Appellant has raised. We note that six different government appellate counsel have signed the Government's answer brief, suggesting the Government dedicated considerable effort to prepare its brief as expeditiously as possible.

In addition, the length of time attributable to this court's review is also reasonable. We have already commented on the extraordinary size of the record. In addition, Appellant has raised 26 distinct issues which we have carefully considered. This court is releasing its opinion approximately 12 months after receiving Appellant's assignments of error and 10 months after receiving the Government's answer. Under the circumstances, the court has not unreasonably delayed its review of the case.

***iii) Demand for Speedy Appellate Review***

Because Appellant repeatedly invoked his right to

speedy post-trial processing, we find this factor weighs in his favor. **[*154]** However, its significance with respect to the delay in appellate review is greatly diminished by the Defense's 20 motions for EOT specifically requesting delay.

***iv) Prejudice***

As noted above, because Appellant has not prevailed on his appeal, he has suffered no oppressive incarceration or prejudice to his ability to defend himself at a rehearing, nor do we perceive any impairment to the substantive grounds for his appeal. With regard to particularized anxiety or concern, such concern is not attributable to the delays which the Defense itself requested, but to the unavailability of CAPT Mizer to prepare his case, which is a distinct matter. We do not find particularized anxiety or concern related to the periods of delay after June 2020, at which point CAPT Mizer had already withdrawn, which are attributable to the Government and to the court.

***v) Conclusion with Regard to Appellate Delay***

Having weighed the applicable factors, we find the approximately 41-month delay between docketing and issuance of the court's opinion did not violate Appellant's due process rights. Under the circumstances, the most decisive factor is the reason for the delay, specifically the 20 Defense-requested EOTs which **[*155]** delayed the filing of Appellant's assignments of error until 1 June 2020. Although we find no cognizable prejudice, even if we assume *arguendo* Appellant experienced some particularized anxiety and concern from the delay regarding CAPT Mizer's unavailability to work on his appeal, we would still find no due process violation.

In addition, we have considered whether relief for excessive post-trial delay is appropriate in the absence of a due process violation; we conclude it is not. *See* *Tardif, 57 M.J. at 225*; *Gay, 74 M.J. at 742*.

**O. Interference with Appellant's Attorney-Client Relationships**

**1. Additional Background**

Appellant's record of trial was docketed with this court on 10 January 2018. As noted above, the record of trial consisted of 44 volumes, including 4,317 pages of transcript and a total of 681 prosecution, defense, and appellate exhibits.

Prior to his trial, Appellant requested CAPT Mizer be appointed as his trial defense counsel based upon CAPT Mizer's experience with capital litigation. CAPT Mizer was a civilian Air Force attorney assigned to the Appellate Defense Division, as well as a reserve judge advocate in the United States Navy.[24] This request, however, was denied, and Appellant was represented at trial by other **[*156]** detailed military defense counsel.

On appeal, Appellant was initially represented by CAPT Mizer. Over government opposition, this court granted the Defense's first motion for a 60-day enlargement of time (EOT) in which to file Appellant's assignments of error until 9 May 2018. On 9 May 2018, CAPT Mizer submitted a second motion for EOT, this time requesting an enlargement of 180 days. CAPT Mizer explained that on 30 March 2018 the Secretary of Defense had approved CAPT Mizer's involuntary activation for a period of two years beginning 14 May 2018 in order to serve as defense counsel to the Chief Defense Counsel for Military Commissions in the case of *United States v. Al-Nashiri*. CAPT Mizer indicated he believed he might still be able to complete his review of Appellant's case by the summer of 2019, as he had originally anticipated. The Government opposed the EOT. In accordance with Rule 23.3(m)(3) of this court's Rules of Practice and Procedure, this court granted an enlargement of 30 days until 8 June 2018. A.F. CT. CRIM. APP. R. 23(m)(3) (amended 19 May 2017).

CAPT Mizer submitted six more 30-day motions for EOT, which this court granted, extending the Defense's filing deadline until 6 December 2018. Over the course of three **[*157]** status conferences held during that period, CAPT Mizer indicated that *United States v. Al-Nashiri* was his first priority and, other than communicating with Appellant, he had made minimal progress in reviewing Appellant's record.

In November 2018, Major (Maj) Bruegger was assigned as an additional appellate defense counsel for Appellant. Maj Bruegger submitted the Defense's ninth motion for EOT, which indicated that CAPT Mizer would remain on the case and "still project[ed] to complete briefing on this case by summer of 2019 depending on

[24] For consistency and clarity, throughout the opinion we refer to CAPT Mizer using his Navy grade.

his litigation of other assigned matters." However, CAPT Mizer was actively involved in *Al-Nashiri* and continued to prepare briefs for other Air Force appellants as well. The court granted the EOT until 5 January 2019 over the Government's opposition. This was followed by tenth and eleventh motions for EOT, which this court also granted.

On 4 February 2019, the Defense moved to "dismiss this case without prejudice" on the grounds of actual and apparent bias of the military judge.[25] The Government opposed the motion. This court denied the motion without prejudice to Appellant's ability to raise the issue in his assignments of error; this court also denied **[*158]** a subsequent motion to reconsider its ruling.

A motion for a twelfth EOT on 27 February 2019 resulted in another status conference. The Defense reported CAPT Mizer's work at the military commissions had expanded beyond *Al-Nashiri*, a development which could result in delays beyond the previously anticipated summer 2019 completion date; nevertheless, Appellant wanted to retain CAPT Mizer as counsel and agreed to the delay. In addition, by this point Maj Bruegger had separated from the Air Force, but he remained assigned to the Appellate Defense Division (JAJA) as a civilian Air Force attorney and continued to represent Appellant. Like CAPT Mizer, now-Mr. Bruegger continued to work on other cases; he estimated he would complete his review of Appellant's record in May 2019. This court granted the twelfth EOT, as well as the Defense's thirteenth EOT requested the following month. By that time, Mr. Bruegger reported he had reviewed 750 pages of the 4,317-page transcript.

On 5 April 2019, citing this court's "broad powers" to "ensure the timely progress of cases reviewed under *Article 66[, UCMJ]*," *United States v. Roach, 66 M.J. 410, 418 (C.A.A.F. 2008)* (citation omitted), in light of appellate defense counsel's limited progress in reviewing **[*159]** the record, this court ordered counsel for both parties to show good cause as to why this court should not request The Judge Advocate General (TJAG) to direct the assignment of additional or substitute appellate defense counsel. In response, the Government requested this court inform Appellant of his rights to counsel, determine whether Appellant desired to continue to be represented by CAPT Mizer and/or Mr. Bruegger, and then request TJAG assign additional or substitute counsel in accordance with Appellant's wishes. The Defense responded that Appellant was aware of the delays and wanted to continue to be represented by CAPT Mizer and Mr. Bruegger, and opposed the appointment of substitute or additional appellate defense counsel. On 3 May 2019, this court issued an order requesting TJAG appoint additional counsel to represent Appellant.

The Government subsequently informed the court that Lt Col Ortiz had been detailed as an additional appellate defense counsel for Appellant on 16 May 2019.[26] Lt Col Ortiz was a reserve Air Force judge advocate previously assigned to JAJA on extended Military Personnel Appropriation (MPA) active duty orders which were scheduled to end on 30 September 2019. **[*160]** Lt Col Ortiz filed a written notice of appearance on behalf of Appellant on 1 July 2019. However, like CAPT Mizer and Mr. Bruegger, Lt Col Ortiz was also assigned to other cases which, in addition to other roles within JAJA, consumed the lion's share of his time and attention.

At the Defense's request, this court granted motions for a fifteenth, sixteenth, seventeenth, and eighteenth EOT after more status conferences and over government opposition. At status conferences, appellate defense counsel related that CAPT Mizer's activation was scheduled to end in early March 2020. The Defense affirmed Appellant wanted CAPT Mizer to continue to represent him, agreed to the requested EOTs, and understood the EOT requests would extend into 2020. The Defense anticipated it might be able to submit Appellant's assignments of error in April 2020.

JAJA requested to have Lt Col Ortiz's MPA orders extended beyond 30 September 2019, but they were not. On 19 September 2019, the Defense submitted to this court a petition for extraordinary relief in the nature of a writ of prohibition, essentially seeking to have this court require the Government to extend Lt Col Ortiz's MPA orders. This court denied the **[*161]** petition on 4 October 2019. *In re Wilson, Misc. Dkt. No. 2019-05, 2019 CCA LEXIS 390 (A.F. Ct. Crim. App. 4 Oct. 2019)* (order).[27] At the time Lt Col Ortiz's active duty orders ended on 30 September 2019 he had read

[25] The basis for this motion was substantially the same as for Appellant's assignment of error relating to the military judge's alleged bias, addressed *supra*.

[26] Evidently, Lt Col Ortiz had been detailed by the chief of JAJA.

[27] The CAAF denied Appellant's writ-appeal petition on this matter on 22 November 2019. *Wilson v. JAG of the Air Force, 79 M.J. 322 (C.A.A.F. 2019)*.

approximately 1,500 pages of the 4,317-page transcript.

On 1 October 2019, this court granted a nineteenth EOT until 30 April 2020 and stated further EOT requests would "not be granted absent extraordinary circumstances." In addition, this court ordered the Defense to provide the court with monthly written updates on each appellate defense counsel's progress in reviewing the record. As of the 4 December 2019 update, Mr. Bruegger had reviewed the entire record of trial. However, as of 6 January 2020, CAPT Mizer had still not completed his review of the transcript.

On 21 February 2020, CAPT Mizer moved to withdraw as Appellant's counsel. CAPT Mizer explained that although he had expected to be demobilized and return to duty at JAJA in early March 2020, the military judge in *Al-Nashiri* had denied CAPT Mizer's motion to withdraw as counsel in that case over the defendant's objection. Thereafter, the United States Navy ordered CAPT Mizer's indefinite recall to active duty and required him to report to the Military Commissions Defense Organization on 2 March 2020. CAPT **[*162]** Mizer "respectfully submit[ted] that his indefinite recall to active duty constitute[d] good cause to sever his attorney-client relationship with the Appellant," in spite of Appellant's opposition. The Government also requested this court grant the motion to withdraw. This court granted the motion on 17 March 2020.

On 23 April 2020, Mr. Bruegger moved for a twentieth EOT, citing in part obstacles in communicating with Appellant due to the COVID-19 pandemic. This court granted the EOT, and Mr. Bruegger ultimately filed Appellant's 26 assignments of error on 1 June 2020, signing the brief as Appellant's sole appellate defense counsel.

**2. Law**

***HN61***[↑] "We review issues affecting the severance of an attorney-client relationship de novo." *United States v. Barnes, 63 M.J. 563, 565 (A.F. Ct. Crim. App. 2006)* (citation omitted).

***HN62***[↑] "The attorney-client relationship may be broken over defense objection when there is 'good cause' to sever it. . . . Such determinations are necessarily fact specific." *Id.* (citations omitted). "Although separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case." *United States v. Hutchins, 69 M.J. 282, 290-91 (C.A.A.F. 2011)*.

***HN63***[↑] *Sixth Amendment* rights to counsel are strictly trial rights; "[t]he *Sixth Amendment* does not include any **[*163]** right to appeal." *Martinez v. Court of Appeals, 528 U.S. 152, 160, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000)*. The right to appeal in criminal cases "is purely a creature of statute." *Id.* (quoting *Abney v. United States, 431 U.S. 651, 656, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977)*). An appellant before a Court of Criminal Appeals has the right to be represented by detailed counsel, but does not have the right to select his detailed appellate counsel. *See 10 U.S.C. § 870*; *compare 10 U.S.C. § 838(b)(3)(B)* (providing that an accused may be represented at a general or special court-martial "by military counsel of his own selection if that counsel is reasonably available"); *see also Jennings, 42 M.J. at 766*.

**3. Analysis**

Appellant contends the Government improperly severed his attorney-client relationships with both Lt Col Ortiz and CAPT Mizer, and thereby prejudicially infringed his right to appellate counsel. We address each contention in turn. As an initial matter, we note the question is not whether the Government improperly interfered with Appellant's *choice* of counsel; Appellant had no enforceable right to request a specific detailed counsel under *Article 70, UCMJ*. The question is whether there was good cause for the termination of two of Appellant's existing attorney-client relationships, an inquiry which is necessarily fact-specific.

***a. Lt Col Ortiz***

Appellant contends the Government improperly terminated his attorney-client relationship **[*164]** with Lt Col Ortiz when it failed to extend his active duty MPA orders. He cites *United States v. Spriggs* for the principle that "[a]lthough there may be a 'financial, logistical, [or] . . . administrative burden' associated with providing representation by the military counsel with whom an accused has formed an attorney-client relationship, 'it is the duty and obligation of the Government to shoulder that burden where possible.'" *52 M.J. 235, 240 (C.A.A.F. 2000)* (quoting *United States v. Eason, 21 C.M.A. 335, 45 C.M.R. 109, 114 (C.M.A. 1972)*). Appellant argues the Government shirked its obligation to maintain his relationship with Lt Col Ortiz

because it could have continued his active duty status, but it simply chose to allocate the limited pool of MPA days to other priorities.

We are not persuaded. The point of departure for our analysis is that "separation from active duty normally terminates representation . . . ." *Hutchins, 69 M.J. at 290-91*. *Spriggs* does not hold to the contrary. The context for the CAAF's quotation of *Eason* in *Spriggs* was not the trial defense counsel's separation from active duty, but the transfer of the appellant and the proceedings from Vietnam, where the attorney-client relationship was formed, to the United States, which caused the defense counsel to be absent from the trial. *Eason, 45 C.M.R. at 109-11*. In **[*165]** contrast, the instant case does not involve the relatively routine "[s]light expense or inconvenience" of traveling a military defense counsel from one location to another to participate in a trial. *Id.* at 114. Appellant contends The Judge Advocate General's (JAG) Corps was required to reprioritize its MPA allocations and, in effect, its missions in order to enable Lt Col Ortiz's continued participation as a third detailed appellate defense counsel, which is a different matter entirely.

Moreover, through no apparent fault of his own, Lt Col Ortiz was always a problematic choice as an additional counsel for Appellant. At the time of his detailing, it was known his MPA orders lasted only until 30 September 2019, and that there was no guarantee they would be extended. Moreover, Lt Col Ortiz already had a number of other clients whose appeals he continued to prepare after he was detailed to Appellant's case. Given the size of the record and the minimal progress CAPT Mizer and Mr. Bruegger had been able to make, it was obvious Appellant's assignments of error would not be prepared before Lt Col Ortiz's MPA orders expired. As events transpired, Lt Col Ortiz read only 1,500 pages of transcript in the **[*166]** four-and-a-half months he was detailed to Appellant's case, for an estimated average of less than 20 pages per duty day. Whatever considerations led JAJA to detail Lt Col Ortiz, rather than any of several active duty appellate defense counsel, to Appellant's case, we are not inclined to require that decision to wag the proverbial dog of JAG Corps-wide MPA allocations.

Other considerations in this fact-specific inquiry weigh against Appellant's argument. Appellant does not allege, and we find no indication, that Lt Col Ortiz's orders were not extended for the purpose of interfering with Appellant's attorney-client relationship. Moreover, after Lt Col Ortiz's MPA orders expired, Appellant continued to be represented by two experienced appellate defense counsel whose representation of Appellant substantially antedated Lt Col Ortiz's involvement. In addition, we note that before Lt Col Ortiz was detailed, Appellant through CAPT Mizer and Mr. Bruegger opposed the appointment of any additional counsel to represent Appellant. In light of the limited progress Lt Col Ortiz had made in Appellant's case, his departure after 30 September 2019 did not materially prejudice the preparation of the **[*167]** appeal.

Accordingly, we find the expiration of Lt Col Ortiz's MPA orders on 30 September 2019 constituted good cause for the termination of his attorney-client relationship with Appellant.

***b. CAPT Mizer***

Appellant contends the Government "actively removed" CAPT Mizer as Appellant's counsel without good cause by mobilizing him to participate as defense counsel in the Military Commissions, most notably the defense of *Al-Nashiri*. Appellant concedes "the Government's interest in prosecuting an alleged terrorist is significant," but contends that protecting his right to challenge his convictions and sentence is also significant. Appellant argues CAPT Mizer's role was particularly important because he was the lead appellate defense counsel, and the only counsel with capital murder litigation experience.

Ultimately, CAPT Mizer himself moved to withdraw from the case, citing his reactivation for active duty in March 2020 as good cause for the motion. However, we recognize this motion, opposed by Appellant himself, was driven by decisions the Government made that rendered CAPT Mizer's continued participation impractical. Accordingly, we have assessed whether good cause existed for the involuntary **[*168]** termination of the attorney-client relationship. Having again made a fact-specific inquiry of the circumstances, we conclude there was good cause.

We note that the Government's activation of CAPT Mizer in May 2018 and again in March 2020 was due to the specific requirement for CAPT Mizer's participation as defense counsel in *Al-Nashiri*. CAPT Mizer had previously established an attorney-client relationship with Al-Nashiri. On 17 November 2017, the military judge in *Al-Nashiri* [28] denied a defense motion to abate

[28] At the time, the military judge in *Al-Nashiri* was the same

the proceedings in that case, but refused to sever CAPT Mizer's attorney-client relationship with the accused and ordered the Government to provide "weekly updates on the status of the Convening Authority's efforts to recall [CAPT] Mizer to serve as learned counsel in this case." CAPT Mizer's activation was evidently necessary in order to continue the prosecution of *Al-Nashiri* in accordance with the military judge's order. Similarly, as CAPT Mizer related in his 21 February 2020 motion to withdraw, the military judge in *Al-Nashiri* denied CAPT Mizer's motion to withdraw as counsel in that case over the accused's objection. Furthermore, the military judge indicated the commission **[*169]** would "favorably consider any request to cancel pending sessions so long as CAPT Mizer's participation is foreclosed by the failure of the Department of Defense to definitively resolve his continuing military status." Again, CAPT Mizer's specific participation and activation were evidently necessary in order to continue the case.

In contrast to CAPT Mizer's role as learned counsel in the capital prosecution of *Al-Nashiri*, learned appellate counsel was not uniquely required in Appellant's case. *Article 70, UCMJ*, entitled Appellant to competent representation by a qualified counsel, and he received that from Mr. Bruegger. Appellant was not entitled to retain CAPT Mizer where good cause existed to terminate CAPT Mizer's representation. Good cause may have existed to terminate that representation upon CAPT Mizer's initial activation beginning in May 2018. We recognize CAPT Mizer endeavored to continue representing Appellant and a number of his other JAJA clients during his activation. This court accommodated that effort and Appellant's desire to retain CAPT Mizer's representation by granting many extensions of time, often after holding status conferences and usually over the Government's objection. **[*170]** CAPT Mizer initially hoped to be able to file Appellant's assignments of error in the summer of 2019 notwithstanding his activation; later, he estimated he could do it by the end of April 2020 after he returned to JAJA in early March 2020. Ultimately, in light of his reactivation, it became apparent that CAPT Mizer simply could not effectively serve as Appellant's counsel. It is notable that, so far as the record discloses, in approximately two years as Appellant's counsel, CAPT Mizer never completed reviewing the trial transcript, much less the entire record.

Appellant contends he was prejudiced by the extraordinary delay in this court's review of his case, which he attributes to the Government's interference with his representation by CAPT Mizer. Appellant's entitlement to relief for post-trial and appellate delay is a separate issue addressed above; the causes and effects of the delay are appropriately considered there. However, Appellant further contends that as a result of the Government's actions, at the time his brief was filed he was represented by only one counsel. Yet one counsel is all Appellant is entitled to. More importantly, we note Mr. Bruegger was added to the defense **[*171]** team in November 2018, and had more than 18 months to thoroughly familiarize himself with Appellant's case before filing the assignments of error on 1 June 2020. This court has granted an extraordinary number of EOTs in order to ensure the Defense had adequate time to prepare the appeal. Appellant's brief is robust and well-prepared, as the length of this opinion attests, and includes ten issues Appellant personally asserts pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. Moreover, Appellant has not indicated any issue or matter that his counsel lacked the time to adequately prepare in the assignments of error and the reply to the Government's answer.

Accordingly, we find that CAPT Mizer's reactivation for active duty in March 2020 to serve as defense counsel in *Al-Nashiri* constituted good cause for his withdrawal from Appellant's case.

**P. Appellant's IMDC Request for Mr. BM**

**1. Additional Background**

On 3 November 2016, Appellant requested that CAPT Mizer be appointed as his trial defense counsel. The request cited CAPT Mizer's experience as appellate defense counsel in three capital courts-martial, and as detailed military defense counsel in two capital military commissions prosecutions. Appellant's request acknowledged **[*172]** that at the time of the request CAPT Mizer was an Air Force civilian attorney assigned to JAJA, and therefore his appointment as an IMDC was specifically prohibited by R.C.M. 506(b)(1)(D).[29] However, Appellant's request expressed the hope that the convening authority would find the *Eighth*

military judge who presided at Appellant's court-martial.

[29] At the time, as described in relation to Appellant's assignment of error regarding interference with his appellate representation, *supra*, CAPT Mizer was also a reserve judge advocate in the United States Navy.

Amendment barred application of this rule in the context of a capital prosecution.[30] The convening authority denied the request on 16 November 2016, citing R.C.M. 506(b)(1)(D).

On 18 November 2016, the Defense submitted a motion requesting the military judge require CAPT Mizer's appointment as Appellant's trial defense counsel. The Defense contended R.C.M. 506(b)(1)(D) was "void" because it conflicted with Article 38, UCMJ, 10 U.S.C. § 838, and "violate[d] a capital accused's rights to counsel in violation of the Fifth, Sixth, and Eighth Amendments." However, the Defense acknowledged the CAAF had previously rejected claims that learned counsel were required in military capital cases, and that the military judge had denied a separate prior motion for the appointment of learned counsel.[31] The Government opposed the motion.

The military judge denied the defense motion in a written ruling dated 20 December 2016. The military judge found the convening authority did not abuse his discretion in denying the IMDC request. The military **[*173]** judge further found no support for the Defense's claim that R.C.M. 506(b)(1)(D) conflicted with Article 38, UCMJ, and found the rule was consistent with the statute.

**2. Law**

HN64[↑] "We will examine the denial of the requested counsel and its review for an abuse of discretion." United States v. Anderson, 36 M.J. 963, 973 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 431 (C.M.A. 1994) (citing United States v. Quinones, 23 C.M.A. 457, 1 M.J. 64, 50 C.M.R. 476, 480 (C.M.A. 1975)) (additional citations omitted).[32]

HN65[↑] Article 38(b), UCMJ, provides that an accused at a general or special court-martial has the right to be represented by civilian counsel provided by the accused, by detailed military counsel, or "by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7))." 10 U.S.C. §§ 838(b)(1), (2), (3)(A), (3)(B). Article 38(b)(7) provides, in pertinent part:

> The Secretary concerned shall, by regulation, define "reasonably available" for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. . . . To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. . . .

10 U.S.C. § 838(b)(7).

HN66[↑] R.C.M. 506(b)(1) also requires the "Secretary concerned" to define "reasonably available" **[*174]** for purposes of an accused's request to be represented by a particular military counsel. However, the rule goes on to state that certain categories of individuals "are not reasonably available to serve as individual military counsel because of the nature of their duties or positions," to include appellate defense counsel and appellate government counsel. R.C.M. 506(b)(1), (b)(1)(D).

Air Force Instruction (AFI) 51-201, *Administration of Military Justice* (6 Jun. 2013, as amended by AFGM

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[30] *See* United States v. Loving, 62 M.J. 235, 236 (C.A.A.F. 2005) ("'Death is different' is a fundamental principle of Eighth Amendment law.") (citing Ring v. Arizona, 536 U.S. 584, 605-06, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); United States v. Curtis, 32 M.J. 252, 255 (C.M.A. 1991)).

[31] *See* Akbar, 74 M.J. at 399 (citing United States v. Gray, 51 M.J. 1, 54 (C.A.A.F. 1999); United States v. Curtis, 44 M.J. 106, 127 (C.A.A.F. 1996); United States v. Loving, 41 M.J. 213, 300 (C.A.A.F. 1994)).

[32] Appellant cites *Spriggs* for the proposition that "[t]he ruling of a military judge on an IMC request . . . is a mixed question of fact and law," which appellate courts review de novo and for clear error, respectively. 52 M.J. at 244. However, in Spriggs the CAAF did not purport to overrule its recent decision in *United States v. Calhoun* where the CAAF stated that it "review[ed] decisions pertaining to requests for counsel for abuse of discretion." 49 M.J. 485, 487 (C.A.A.F. 1998) (citing Anderson, 36 M.J. at 973). We further note that *Spriggs* specifically involved a factual issue as to whether an attorney-client relationship had been formed, and that our review has disclosed no subsequent decision of the CAAF or this court that reviewed a military judge's ruling on an IMDC request as a mixed question of law and fact. *Cf.* United States v. Richards, No. ACM 38346, 2016 CCA LEXIS 285, at *172 (A.F. Ct. Crim. App. 2 May 2016) (unpub. op.), *aff'd*, 76 M.J. 365 (C.A.A.F. 2017) ("We examine the denial of requested counsel and the military judge's review of such denial for an abuse of discretion.") (citing Anderson, 36 M.J. at 973)). We conclude our application of an abuse of discretion standard is consistent with the weight of authority.

2016-01, 3 Aug. 2016), provided at ¶ 5.4.3 that a requested counsel is "'reasonably available' if not considered unavailable by the terms of the [*Manual for Courts-Martial*] or this instruction, and the appropriate approval authority determines the requested counsel can perform the duties of IMDC without unreasonable expense or detriment to the United States and without unreasonable delay in the proceedings."

**3. Analysis**

On appeal, Appellant essentially relies upon the same arguments he made at trial. He asks this court to find his request for CAPT Mizer was improperly denied and to set aside the findings and sentence. We decline to do so.

We find no abuse of discretion by the convening authority or the military judge. The plain terms **[*175]** of R.C.M. 506(b)(1)(D) mandated denial of the IMDC request. We find the military judge did not abuse his discretion in concluding the promulgation of R.C.M. 506(b)(1)(D) was not an unlawful exercise of the President's rule-making authority. *See* 10 U.S.C. § 836; *United States v. Wilson, 76 M.J. 4, 6 (C.A.A.F. 2017)*. ***HN67***[↑] The rule is not in conflict with the statute; in fact, R.C.M. 506(b)(1) echoes the statutory requirement that the service Secretaries define the term "reasonably available." The Secretary of the Air Force has done so in part by adopting the standards of the *Manual for Courts-Martial*, including the categorical exclusions set forth in R.C.M. 506. Appellant has cited no decision by the CAAF, this court, or any other court finding the categorical exclusions in R.C.M. 506(b)(1) to be invalid, and we have found none.

With regard to Appellant's contention that the Constitution requires a different analysis in capital cases, the military judge noted and the Defense conceded the CAAF has held a capital accused does not have a right to learned counsel. *See* *Akbar, 74 M.J. at 399* (citations omitted). Accordingly, it was reasonable for the military judge to conclude there was no constitutional imperative to override the plain language of R.C.M. 506 to secure CAPT Mizer's participation in Appellant's trial. Therefore, we deny the requested relief.

**Q. TF's Hearsay [*176] Statement Regarding Her Purchase of a Firearm for Appellant**

**1. Additional Background**

In the course of the investigation of TF's death, investigators spoke with TF's coworker and friend, TS. TS told investigators about a conversation during which TF said Appellant had asked TF to buy a gun for Appellant. TF explained to TS that Appellant needed the weapon for protection because the police had confiscated his other firearms after an incident in the summer of 2012. TF told TS that TF and Appellant had gone to a pawn shop and TF bought a handgun with cash Appellant had given her. TS recalled TF had commented on how easy it was to buy the gun.

Before trial, the Defense moved to exclude these statements as inadmissible hearsay. The Government initially countered that these statements were admissible as a statement offered against the party who wrongfully caused the declarant's unavailability under Mil. R. Evid. 804(b)(6), and under the residual hearsay exception, Mil. R. Evid. 807. However, in a hearing on the motion, trial counsel additionally argued the statements were admissible as statements by an unavailable declarant that were against the declarant's interests under Mil. R. Evid. 804(b)(3). Trial counsel noted that in order to purchase the weapon, **[*177]** TF had been required to sign an ATF Form 4473, *Firearms Transaction Rec-ord*, that warned her (1) that she could not buy the firearm if she was "acquiring the firearm(s) on behalf of another person" and was not the "actual buyer;" (2) that falsely claiming she was the "actual buyer" was "punishable as a felony under Federal law;" and (3) that making a false oral or written statement "with respect to this transaction" was also "punishable as a felony under federal law."[33] TF "certified" that she understood that such false claims were federal crimes by signing below these warnings. In response, at the motion hearing trial defense counsel noted TS's additional statement that TF told TS that two or three weeks later, after an argument, TF asked Appellant to give the gun back to her; Appellant refused, and TF told him to "just keep" it. Trial defense counsel argued this indicated TF believed she had a possessory interest in the gun, and had believed she was being truthful when she indicated she was the "actual buyer."

The military judge ruled these statements by TF to TS were admissible. In a written ruling, he explained TF was unavailable because she was dead, and the

[33] Investigators had obtained a copy of the form TF signed and the Government introduced it at trial as a prosecution exhibit.

statements were against **[*178]** her penal interests. In regard to the latter, the military judge found the ATF Form 4473 "particularly relevant."[34] The military judge additionally found that if the statements were not statements against interest admissible under Mil. R. Evid. 804(b)(3), they would be admissible under the Mil. R. Evid. 807 residual hearsay exception in light of various circumstantial guarantees of trustworthiness and corroborating evidence.

At trial, TS testified regarding this conversation with TF. Similar to her statement to investigators, TS testified TF told her Appellant asked her to buy the gun with money he gave her because he needed it for protection because "[t]he cops took his guns." TS did not recall the exact date, but it was before TF was known to be pregnant. TS testified that when she heard this, she warned TF "to be careful because you got your career and he could do something with that gun and mess you up." In response, TF said, "Yeah, you know but," and changed the subject.

**2. Law**

*HN68*[↑] The military judge's decision to admit or exclude hearsay evidence is reviewed for an abuse of discretion. *United States v. Hyder, 47 M.J. 46, 48 (C.A.A.F. 1997)* (citation omitted).

*HN69*[↑] A statement against the declarant's interest is an exception to the general prohibition **[*179]** on the admissibility of hearsay evidence, where:

> a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.

Mil. R. Evid. 804(b)(3)(A); *see also* Mil. R. Evid. 801, 802. This exception "is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States, 512 U.S. 594, 599, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994)*. "The criterion . . . [is] whether the declarant would himself have perceived at the time that his statement was against his penal interest." *United States v. Greer, 33 M.J. 426, 430 (C.M.A. 1991)* (citations omitted). "[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context." *Williamson, 512 U.S. at 603*.

*HN70*[↑] Mil. R. Evid. 807 provides that a hearsay statement not otherwise admissible under Mil. R. Evid. 803 or Mil. R. Evid. 804 may nevertheless be admissible if the statement: (1) "has equivalent circumstantial guarantees of trustworthiness;" (2) "is offered as evidence of a material fact;" (3) "is more probative on the point for which it is offered than **[*180]** any other evidence that the proponent can obtain through reasonable efforts;" and (4) admission "will best serve the purposes of these rules and the interests of justice."

**3. Analysis**

We find the military judge did not abuse his discretion in admitting TS's testimony regarding TF's statements about buying a handgun for Appellant. The military judge could reasonably find the predicates for application of Mil. R. Evid. 804(b)(3)(A) existed. First, the deceased declarant, TF, was obviously unavailable at the time of trial. Second, viewed in context, the military judge could reasonably conclude TF knew the statements were against her penal interest. When TF made the statements to TS, she had been presented and signed a form warning her that buying a firearm for another person and falsely representing that she was the actual buyer of the firearm were federal offenses. Yet, as she told TS, she bought the handgun at Appellant's request, with money he provided, to give to him because he needed it for "protection." Accordingly, the military judge's ruling was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *McElhaney, 54 M.J. at 130* (internal quotation marks and citations omitted).

Assuming for purposes of argument that TF's **[*181]**

[34] The military judge also found the "corroborating circumstances clearly indicated the circumstances indicated the trustworthiness of the statement," citing *United States v. Benton, 57 M.J. 24, 30 (C.A.A.F. 2002)*. However, this additional requirement applies only when a hearsay statement "tend[ing] to expose the declarant to criminal liability . . . is *offered to exculpate the accused*," as was the situation in *Benton* but not in the instant case. Mil. R. Evid. 804(b)(3)(B) (emphasis added); *see Benton, 57 M.J. at 30*. The military judge's finding of additional indicia of trustworthiness, although unnecessary for admissibility under Mil. R. Evid. 804(b)(3)(A), does not, of course, vitiate the admissibility of the statements.

statements about purchasing the gun for Appellant were not qualifying statements against interest, we find the military judge's determination that the statements would be admissible under Mil. R. Evid. 807 was also not an abuse of discretion. There were abundant circumstantial guarantees of trustworthiness that TF had purchased a gun for Appellant, including *inter alia* evidence that police had seized Appellant's firearms in the summer of 2012; the signed ATF Form 4473 dated 9 November 2012; and the recovery from Appellant's residence of the box in which the gun was sold. Evidence of how Appellant came into possession of the presumed murder weapon was evidence of a material fact. No equivalent evidence was reasonably available to the Government, in light of the fact that TF was deceased. Finally, we perceive no reason why admitting the statements would not serve the purposes of the Military Rules of Evidence and the interests of justice. *See* Mil. R. Evid. 807.

**R. Ineffective Assistance of Counsel: Failure to Request Expert in Geology**

**1. Additional Background**

During the investigation, the GBI collected a soil sample from the boots seized at Appellant's residence and sent the sample to the United States Army Criminal Investigation **[*182]** Laboratory (USACIL) for comparison with a soil sample from TF's residence. On 25 July 2014, 2 September 2014, and 1 October 2014, the Defense requested that the convening authority appoint a confidential expert consultant in the field of forensic geology. On 17 November 2014, the convening authority denied the request.

On 2 December 2014, the Defense submitted a motion to the military judge to compel the appointment of an expert forensic geologist. As of that date, the Defense had not received or been informed of the results of the soil analysis. The Government opposed the motion on 11 December 2014. The Government explained USACIL had generated two reports which "provided no conclusive evidence in support of the charges or exculpatory evidence for [Appellant]." The Government averred that as of 11 December 2014, the Defense had been provided the results of the soil sample analysis. The Government explained that it did not intend to present any evidence related to soil analyses, and therefore the Defense could not demonstrate the requested expert was necessary.

The military judge received brief oral argument on the motion on 15 December 2014. The Government reiterated that it did not **[*183]** intend to introduce evidence of soil analysis. The Defense maintained its request for the expert consultant, contending that interviewing the analyst who performed the testing on a non-confidential basis was not an adequate substitute. On 16 December 2014, the military judge denied the motion to compel in an oral ruling that he subsequently reduced to writing. He explained that other investigative support provided to the Defense, coupled with access to the geologist who had performed the analysis, were adequate at that point in time. However, he stated the Defense could renew its motion if it felt the geologist was not providing "fair" answers, or if the Defense found it needed an expert to testify at trial.

The original trial defense counsel were replaced by three different military counsel, Lt Col CG, Lt Col SK, and Maj CS. The question of a confidential defense expert in geology resurfaced at a hearing on 10 January 2017, after the Defense had learned the Government had changed its position and now intended to put on evidence regarding the soil testing. The military judge noted the Defense had not renewed its request for an expert geologist. The military judge advised trial defense **[*184]** counsel, "if you believe you need expert assistance, probably not too late to start working through that. I would suggest talking to Dr. [KM, the Government's expert witness,] and seeing if you could get there with or without her. And then let me know, okay?" Trial defense counsel did not renew the Defense's motion to compel the production of a confidential expert in geology.

At trial, Dr. KM testified regarding the results of the soil analysis. She explained that soil from the crime scene could not be excluded as the source of the soil removed from the boots seized from Appellant's residence. She further testified that the soil from the boots was excluded from originating in the front yard of Appellant's residence, but could not be excluded as having originated in Appellant's back yard. On cross-examination, Dr. KM acknowledged she did not know how common the color of soil removed from the boots was in that region of Georgia, or in the state of Georgia as a whole, or in the United States.

At the Government's request, this court ordered and received sworn declarations from Lt Col CG, Lt Col SK, and Maj CS, Appellant's trial defense counsel. The declarations were generally consistent; **[*185]** all three counsel agreed that after interviewing Dr. KM, they

believed the Government's soil analysis evidence was weak, and the Defense did not require expert assistance in order to address it. Lt Col CG further noted the Defense "had numerous experts, i.e., firearms, gunshot residue 'GSR' analysis, trace fiber analysis, neuro-science, eyewitness identification, DNA, investigator, mitigation specialist, social historian, etc. . . . An additional expert on the team would have diverted our attention, out of proportion to the limited probative value of the geology evidence."

**2. Law**

HN71[] We review allegations of ineffective assistance de novo. *Akbar, 74 M.J. at 379* (citation omitted). However, "our scrutiny of a trial defense counsel's performance is 'highly deferential,' and we make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time." *Id.* (quoting *Strickland, 466 U.S. at 689*). We utilize the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" **[*186]** (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers;" and (3) if defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result? *Gooch, 69 M.J. at 362 (C.A.A.F. 2011)* (alteration and omission in original) (quoting *Polk, 32 M.J. at 153*). The burden is on the appellant to demonstrate both deficient performance and prejudice. *Datavs, 71 M.J. at 424* (citation omitted).

**3. Analysis**

On appeal, Appellant faults his trial defense counsel for failing to renew the defense motion to compel production of a confidential forensic geologist after learning the Government did intend to introduce the soil analysis results. Appellant contends that because of this failure, the Defense was unable to "challenge the science" behind the soil testing. As a result, he contends, the Government was able to present "unrefuted evidence" that the soil sample from the boots were a "potential match" to soil from the crime scene.

We conclude Appellant has failed to meet his burden to demonstrate either deficient performance or prejudice. Although it is true that trial defense counsel failed to renew the motion to compel **[*187]** production of a confidential expert geologist, there is a reasonable explanation. Specifically, we agree with trial defense counsel's assessment that the Government's soil evidence was weak, which echoed the Government's own initial assessment that the testing was "inconclusive." Nor were the limitations of this evidence difficult to grasp or explain. Trial defense counsel's cross-examination of Dr. KM with respect to soil analysis was concise but effective in identifying its limited significance. Accordingly, we find it was reasonable and well within the standard of performance to be expected of defense counsel to forego requesting such an expert, particularly in light of the numerous other experts and specialists assigned to assist the Defense on more complex and impactful matters.

In addition, we conclude that, in multiple respects, Appellant has failed to demonstrate prejudice. Appellant suggests the Government was able to present the soil analysis because the Defense did not have its own expert; yet he fails to explain how such an expert would have enabled the Defense to "challenge the science" or otherwise prevent the evidence from being introduced exactly as it was. In addition, **[*188]** on its own terms, the evidence was not very persuasive with regard to Appellant's guilt. Dr. KM could testify only that the soil from the boots could not be excluded as having come from TF's residence; but it also could not be excluded as having originated in Appellant's own back yard, or presumably from many other locations across the region, state, or country. Furthermore, juxtaposed with all of the inculpatory evidence in the case, including *inter alia* eyewitness testimony, the rental car, ballistics evidence, GSR analysis, fiber analysis, a wealth of circumstantial evidence, motive, and opportunity, the significance of the soil analysis becomes vanishingly small. Thus, Appellant has not shown the appointment of a forensic geologist would have materially affected the evidence introduced at trial, or that the preclusion of the Government's soil analysis evidence would have led to a reasonable probability of a more favorable result.

**S. Denial of Motion for Mistrial Due to Discovery Violation**

**1. Additional Background**

At trial, the Government called CJ, a GBI employee who

testified as an expert in firearms and tool mark examination and identification. CJ testified regarding several aspects **[*189]** of the investigation related to firearms, including her examination of the apparent bullet ricochet mark on the rental car window. CJ testified that according to her measurements the mark was consistent with having been made by a bullet fired from CF's .38 caliber pistol.

During his cross-examination of CJ, trial defense counsel indicated he had several slides created from CJ's report on the car window that he intended to use as a demonstrative aid. Trial counsel had not previously seen these slides and requested an *Article 39(a), UCMJ*, session, which the military judge granted. During that session, trial defense counsel attempted to pre-admit the slides as a defense exhibit. However, CJ's responses revealed the Defense had not received the final version of the report which included the data upon which CJ had based her analysis.

CJ testified that although the measurements she made supported her analysis, she initially recorded the wrong data in the report. She explained that she later annotated her report with the corrected data. However, when the GBI provided the report to the Government for disclosure to the Defense in discovery, a GBI employee mistakenly provided the non-annotated version of the report. **[*190]** As a result, the version of the report the Defense received contained data that appeared to contradict CJ's conclusions. Trial defense counsel intended to confront CJ with this data during its cross-examination, and the Defense did not question CJ about the apparent discrepancy during its pretrial interviews with CJ. Consequently, counsel for both parties and the military judge learned of the apparent discovery violation for the first time after CJ's cross-examination had begun.

The Defense moved for a mistrial. Senior trial defense counsel argued the Defense had relied on the non-annotated report, which had affected the Defense's opening statement and how the Defense had cross-examined government witnesses who testified before CJ. After the military judge received argument and discussed the situation with counsel, he recessed the court-martial early for the day in order for the parties to prepare written briefs on the Defense's mistrial motion.

The military judge received and reviewed the parties' briefs overnight and marked them as appellate exhibits when the court-martial resumed in the morning. The Government put on additional testimony from CJ as well as the GBI crime laboratory **[*191]** manager, who explained how a report could be mistakenly printed without annotations. The military judge also received additional argument from counsel. The Defense maintained that a mistrial was the only appropriate remedy for the discovery violation. The Government acknowledged the annotated report should have been provided, but argued the appropriate remedy was additional time for the Defense to prepare and to adjust its case.

The military judge denied the Defense's mistrial motion in an oral ruling he subsequently supplemented in writing. The military judge noted that both parties agreed there had been a discovery violation. However, the military judge found that the erroneously withheld information correcting the report was not constitutionally required, because it was neither substantively exculpatory nor impeachment of CJ's testimony, but rather corroborating evidence of Appellant's guilt. *See United States v. Bagley, 473 U.S. 667, 674-76, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*. The military judge further found the Defense had demonstrated "minimal to non-existent" prejudice. The military judge explained the Defense's primary theory was alibi rather than focusing on forensic evidence. He observed that references to the window in the Defense's opening were "minimal" **[*192]** and nonspecific, and were not contradicted by the evidence. He further noted that although the Government had introduced much forensic evidence before CJ's testimony, none of it related to the apparent bullet mark on the rental car window. The Defense would still be able to point out that CJ initially made an error in her report, albeit one that was discovered during a peer review process. The Defense would still be able to argue alibi and to argue that human errors are possible in forensic testing. The military judge found the Defense was in the same position it was in before CJ's cross-examination; the Defense merely had to settle for a less-dramatic impeachment of CJ's testimony than it had hoped for. The military judge concluded that a mistrial was not warranted, and that the Defense did not consider any other remedy—such as a continuance or recalling witnesses—to be helpful.

**2. Law**

*HN72*[↑] "A military judge has discretion to 'declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt

upon the fairness of the proceedings.'" United States v. Coleman, 72 M.J. 184, 186 (C.A.A.F. 2013) (quoting R.C.M. 915(a)). Mistrial is "'a drastic remedy' which should **[*193]** be used only when necessary 'to prevent a miscarriage of justice.'" United States v. Harris, 51 M.J. 191, 196 (C.A.A.F. 1999) (quoting United States v. Garces, 32 M.J. 345, 349 (C.M.A. 1991)). "Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions." United States v. Ashby, 68 M.J. 108, 122 (C.A.A.F. 2009) (citations omitted). "We will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *Id.* (citation omitted).

HN73[↑] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The United States Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence." Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (citations omitted); *see* United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017).

HN74[↑] "A military accused also has the right to obtain favorable evidence under Article 46, UCMJ . . . as implemented by R.C.M. 701-703." Coleman, 72 M.J. at 186-87 (footnotes omitted). Article 46, UCMJ, and these implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. **[*194]** *See* id. at 187 (citing United States v. Roberts, 59 M.J. 323, 327 (C.A.A.F. 2004) (additional citation omitted). With respect to discovery, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, *inter alia*, any documents "within the possession, custody, or control of military authorities, and which are material to the preparation of the defense . . . ."

**3. Analysis**

Appellant contends the military judge abused his discretion in denying the Defense's mistrial motion. Citing United States v. Eshalomi, 23 M.J. 12, 28 (C.M.A. 1986), Appellant contends the nondisclosure gave the Defense a false impression that the Government's evidence was incorrect, which distorted its preparation of the case and "cast a cloud of unfairness over the proceedings." Appellant also contends the military judge erroneously found the Defense failed to show how the nondisclosure had impacted its case. Furthermore, assuming *arguendo* that declaration of a mistrial was not necessary, Appellant contends the military judge erroneously believed that he could not fashion alternative remedies, such as striking CJ's testimony, because the Defense did not request it.

We do not find "clear evidence" the military judge abused his discretion by denying the mistrial motion. Ashby, 68 M.J. at 122. We agree with the military judge and parties that the **[*195]** nondisclosure of the annotated report was an error. However, the significance of the nondisclosure must be understood in context. The erroneous nondisclosure was of annotations to a single page of one report. There is no allegation or evidence of bad faith on the Government's part. We agree with the military judge that the undisclosed information, although material to the preparation of the defense, was not *Brady* material because it was neither exculpatory nor impeaching; it was additional inculpatory evidence that supported CJ's testimony.

The Defense made a strategic decision not to explore the apparent discrepancy with CJ before trial. The Defense had its own expert consultant and access to the damaged window. Rather than investigate the apparent discrepancy between the data in the report and CJ's conclusions, trial defense counsel made the "strategically defensible" decision—in the military judge's words—to wait until CJ's cross-examination in hopes of dramatically impeaching her conclusions. However, the Defense was never entitled to a dramatic in-trial impeachment, because the reality was CJ's measurements and analysis were not incorrect; she had simply made a clerical error in **[*196]** creating the report, which was identified during the GBI crime laboratory's peer review process. The Defense arrived at that understanding later than they would have had the annotated report been properly disclosed, but the military judge did not abuse his discretion in concluding the Defense was in substantially the same position it would have been had the discovery error not occurred. The Defense could still impeach the reliability of CJ's testimony to a lesser degree by exposing the error she made in preparing her report, but the dramatic moment trial defense counsel evidently hoped for was never to

be in any event.

Moreover, we agree with the military judge that the significance of CJ's measurements of the apparent ricochet mark on the car window must be viewed in the context of the entire trial. Even discounting CJ's testimony regarding the window entirely would not undo the other powerful ballistics evidence, CF's identification of Appellant, the evidence of Appellant's motive, and other incriminating evidence, as well as the Government's effective impeachment of the Defense's sole alibi witness, TB. In light of the total volume of the evidence and scope of the trial, the military **[*197]** judge did not clearly abuse his discretion in finding the nondisclosure of these annotations from one page of one report manifestly required a mistrial to prevent a miscarriage of justice.

Instead, the military judge offered the Defense other remedies, including additional time to prepare its case, and to have the Government recall prior witnesses for additional cross-examination. Trial defense counsel declined these offers and did not request any alternative remedies. Specifically with respect to the Defense's opening statement, trial defense counsel made a brief passing reference that the members should pay attention to evidence about the mark on the car window without referring to CJ directly or indirectly. The military judge did not abuse his discretion in concluding this comment did not require an instruction or other alternative corrective action, and the Defense did not request any. We are not persuaded that the military judge abused his discretion by not taking alternative corrective actions the Defense either affirmatively rejected or did not request.

**T. Trial Counsel's Findings Argument**

**1. Additional Background**

During the Defense's opening statement, the area defense counsel **[*198]** told the court members: "I would like to talk with you about the defense's case which is very simple. It is that [Appellant] had an alibi. . . ."

Trial counsel's closing argument on findings included the following comments regarding the Defense's alibi witness, TB:

> We called her to the stand knowing very well she was the only alibi witness of the accused. . . .
>
> . . . .
>
> Now, members, in opening statement, defense said this case was simple. And again, defense has no burden. The burden is always with the government. But they said this case is simple, that [Appellant] had an alibi. That he was in Byron, Georgia all night long and the government could not prove [Appellant] was in Dawson, Georgia. The only evidence that you have that the accused was in Byron, Georgia is the property girl, [TB].
>
> . . . .
>
> This case is simple. Pretty straight forward. There's a whole lot of evidence. And 41 witnesses later it's clear. But what's not clear and what it's not, what this case is not, is it's not [Appellant] having an alibi. [Appellant] was at [TF's residence] at three a.m. for about 38 minutes. To do the deed. To get her out of his life.

During rebuttal argument, trial counsel made the following statements: **[*199]**

> There's no proof about the rental car. That he didn't take it somewhere else. That that rental car didn't go somewhere -- what evidence do you have before you in this case that that rental car went anywhere else? None.
>
> . . . .
>
> And his alibi witness. His alibi witness. He's asking his alibi witness about the rental car. Again, how many times do I have to say it? He's telling his alibi witness not to talk to police. She's his only alibi for the murder. And it's supposed to be used for some other purpose? Some other purpose with some other evidence that you don't know?
>
> . . . .
>
> [I]n every single case -- and this is what [SA JS] testified to -- do they do every single thing there is to do in every single case and hindsight is twenty/twenty? Absolutely. And that's what defense's job is. To pick. To pick. To poke holes. Absolutely.
>
> The burden is always with the government but defense is doing their job. Did they reach out and get that phone? No, they didn't get that phone number. They had all the evidence that -- all the other evidence but did they reach out and get the 6680 phone records?[35] No, they did not. But what do we know about the 6680 and how did that effect the case at all? We know potentially **[*200]** there

[35] Referring to the last four digits of the phone from which TF received two calls at 0221 and 0222 on the night of the murder.

> were call logs that we don't have. We know that maybe we would have known whatever -- what [transmission] tower in Shellman[, Georgia,] that actually went off of. And we would know duration. Other than that, burner phones -- which we know the duration because we had it off [TF's] phone. Other than that, what do we know from burner phones? That's why people use them. So they can't be traced.
>
> . . . .
>
> Defense also said the life insurance. [The Defense argued] [t]he fact that the life insurance was in [Appellant's] name doesn't show motive. It tells you more about the relationship that [TF's mother AT] and [TF's brother CF] had with [TF]. What evidence is there of that? What evidence? They throw out the computer. Well, the investigators had the computer. You don't think everyone has the same access to evidence? You didn't see evidence on the computer. There could be stuff out there.

The Defense did not object to any of these statements by trial counsel.

**2. Law**

HN75[] "We review prosecutorial misconduct and improper argument de novo and where . . . no objection is made, we review for plain error." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and **[*201]** (3) the error results in material prejudice to a substantial right of the accused." Fletcher, 62 M.J. at 179 (citation omitted). The burden of proof under a plain error review is on the appellant. *See* Sewell, 76 M.J. at 18 (citation omitted).

HN76[] "Improper argument is one facet of prosecutorial misconduct." *Id.* (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" Hornback, 73 M.J. at 159 (alteration in original) (quoting Fletcher, 62 M.J. at 179). Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example], a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." Andrews, 77 M.J. at 402 (quoting United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)). "A prosecutorial comment must be examined in light of its context within the entire court-martial." Carter, 61 M.J. at 33 (citation omitted).

HN77[] "The Due Process Clause of the Fifth Amendment to the Constitution requires the Government to prove a defendant's guilt beyond a reasonable doubt." United States v. Czekala, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing In re Winship, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). For trial counsel to suggest the accused has any burden to produce evidence demonstrating his innocence is "an error of constitutional dimension." Mason, 59 M.J. at 424 (citation omitted).

HN78[] Relief for improper argument will be **[*202]** granted only if the trial counsel's misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." Fletcher, 62 M.J. at 178 (quoting Meek, 44 M.J. at 5). "[P]rose-cutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." Id. at 184. In assessing prejudice from improper argument, we balance three factors: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. Id. "In the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt." Carter, 61 M.J. at 35 (citation omitted).

**3. Analysis**

Appellant contends the portions of trial counsel's findings argument quoted above impermissibly shifted the burden of proof to the Defense, and as a result the findings and sentence must be set aside. We consider the portions of the cited arguments in turn.

***a. Statements Regarding the Alibi Witness, TB***

Trial counsel's argument regarding TB as Appellant's alibi witness were fair comments by **[*203]** a "zealous advocate of the Government" regarding the evidence before the members. Baer, 53 M.J. at 237 (citation omitted). HN79[] "[T]he prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." Carter, 61 M.J. at 33 (citation omitted). From the outset, the Defense

indicated the core of its case was an alibi defense. Trial counsel could properly comment on the strength or weakness of that defense, including the fact that it largely depended on the testimony of a single witness, TB. Commenting on the weakness of Appellant's alibi defense is not the same as improperly implying Appellant was required to demonstrate his innocence. We find no error, obvious or otherwise, in this portion of the argument.

***b. Statements Regarding Phone Records***

Similarly, we find trial counsel's comments regarding the phone records were not obviously erroneous. We agree with the Government that, in context, trial counsel's comments "[d]id they reach out and get that phone? No, they didn't get that phone number," "they" referred to the investigators rather than the Defense. During the testimony of one of the GBI agents, it came out that investigators had not sought phone records related to the number **[*204]** that called TF twice at 0221 and 0222 on 29 August 2013, shortly before her death.[36] During the Defense's closing argument, senior trial defense counsel commented on this failure to investigate the number in order to impugn the thoroughness and reliability of the GBI's investigation. In context, trial counsel's argument was not a comment on the Defense's failure to produce evidence, but a fair and rational response to the Defense regarding the limited significance of the GBI's failure to further investigate this phone number.

***c. Statements Regarding the Rental Car, Insurance Policy, and TF's Computer***

Trial counsel's comments regarding the absence of evidence that the rental car was used for an innocent purpose, his rhetorical question as to "what evidence" supported the Defense's interpretation of the significance of TF's insurance policy, and his comment that "everyone" had the same access to TF's computer, call for a somewhat different analysis. In each of these instances, trial counsel's statements might fairly be understood as a comment, albeit fleeting, on the absence of evidence supporting defense arguments. Arguably, the members might have interpreted these comments as **[*205]** criticizing the Defense's failure to produce evidence. On the other hand, as noted above, "the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." *Carter, 61 M.J. at 33* (citation omitted). Certain factors, including the fact that trial counsel was responding to specific defense arguments about the state of the evidence, the brief nature of each comment in the course of an argument and rebuttal totaling over two hours, trial counsel's repeated explicit acknowledgment that the Government bore the burden of proof, and the Defense's failure to object, suggest that any crossing of the line into impermissible argument was not "obvious."

However, we need not definitively resolve whether these instances rose to the level of plain or obvious error, because we find that in light of the three-factor test for prejudice set forth in *Fletcher*, any error was harmless beyond a reasonable doubt. *62 M.J. at 178*.

For the reasons set forth above, we find the severity of any misconduct to be low. These were brief comments in trial counsel's rebuttal argument responsive to particular aspects of senior trial defense counsel's argument. The statements were a tiny fraction of trial **[*206]** counsel's overall argument. The general point trial counsel evidently sought to make—that the evidence supported the Government's theory and not the Defense's theories—was not improper. ***HN80***[↑] Moreover, the CAAF has noted that "the lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" *Gilley, 56 M.J. at 123* (quoting *United States v. Carpenter, 51 M.J. 393, 396 (C.A.A.F. 1999)*).

With regard to curative measures, the military judge did not specifically address or react to the unobjected comments. However, we note trial counsel repeatedly explicitly reminded the court members that the Government bore the burden of proof, which tended to mitigate any risk the comments above implied any burden on the Defense.

Finally, and most importantly, as described above with respect to legal and factual sufficiency, the weight of the evidence supporting Appellant's conviction was overwhelming. An eyewitness, CF, saw Appellant flee the scene of the murder. Other than Appellant, CF, and the victim, no one else was present. Ballistics evidence indicated the handgun TF gave Appellant was the murder weapon. There are no identified realistic

[36] The Government later called a representative from the service provider who testified, *inter alia*, the phone in question was a prepaid "phone in a box," not traceable to a particular user.

alternative suspects. The Government introduced strong evidence regarding Appellant's motive, opportunity, **[*207]** and intent to commit the murder, as well as his consciousness of guilt. The Government effectively eviscerated the credibility of TB, the Defense's alibi witness, in multiple respects. Accordingly, we are satisfied beyond a reasonable doubt that the court members convicted Appellant on the strength of the evidence alone and not upon any impermissible implications from trial counsel's argument.

### U. Cumulative Error

***HN81***[↑] The doctrine of cumulative error provides that "a number of errors, no one perhaps sufficient to merit reversal, [may] in combination necessitate" relief. *Banks, 36 M.J. at 170-71* (quoting *United States v. Walters, 4 C.M.A. 617, 16 C.M.R. 191, 209 (C.M.A. 1954)*). However, "[a]ssertions of error without merit are not sufficient to invoke this doctrine." *United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999)*. We have found the majority of Appellant's assertions of error to be without merit. As described above, for purposes of analysis we have assumed without deciding that five of Appellant's assertions of error may have merit: (1) that the military judge failed to consider that the Government's opening statement opened the door to evidence of TF's "swinging" behavior; (2) that the military judge permitted the Government to use Appellant's suppressed letter to TB as rebuttal evidence; (3) that the military judge's instruction **[*208]** that the court members could consider evidence of Appellant's IRS deficiency notice in rebuttal of his alibi defense; (4) a small portion of the Government's findings argument; and (5) small portions of the Government's sentencing argument. In each case, we found Appellant was not prejudiced by the alleged error. We have also considered the cumulative effect of these alleged errors, assuming *arguendo* that they are errors, and we conclude that in combination they had no effect on the result of Appellant's trial. Accordingly, Appellant is not entitled to relief under the cumulative error doctrine.

### III. Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and sentence are **AFFIRMED**.

**Concur by:** POSCH

## Concur

POSCH, Senior Judge (concurring):

I join this court's resolution of the 26 issues Appellant raises on appeal and the conclusion reached by my esteemed colleagues. However, I question whether the standards for facially unreasonable delay in post-trial processing and appellate review established by our superior court in *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*, should apply here. Although I propose different **[*209]** standards for cases like Appellant's, I nonetheless agree with the majority that Appellant's due process right to timely post-trial processing and appellate review were *presumptively* violated as defined by *Moreno* and as might be defined by a different standard. While the *Moreno* presumptions for facially unreasonable delay are "fully entitled to the benefit of *stare decisis*," *Flood v. Kuhn, 407 U.S. 258, 282, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)*, it is another case the United States Supreme Court decided near the end of the Court's 1971-1972 Term, *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, that gives me pause to apply the *Moreno* presumptions to post-trial processing in more complex cases such as the death sentence eligible court-martial under review.

In *Moreno*, the United States Court of Appeals for the Armed Forces (CAAF) announced when a presumption of unreasonable delay will trigger the four non-exclusive factors identified in *Barker, 407 U.S. at 530*. *Moreno, 63 M.J. at 135*. These factors are used to assess whether an appellant's due process right to timely post-trial and appellate review has been violated. *Id.* In *Moreno*, our superior court's holding quantified the threshold for a presumptive due process violation that it measured in days and months when any of the following occur: (1) the convening authority takes action more than 120 **[*210]** days after completion of trial; (2) the record of trial is docketed by the service Court of Criminal Appeals (CCA) more than 30 days after the convening authority's action; or (3) a CCA completes appellate review and renders its decision over 18 months after the case is docketed with the court. *Id. at 142*.

For reasons made clear in the opinion of the court, the 120-day and 18-month standards that the Government manifestly failed to meet here were, in a word, unachievable. Among the reasons for the delay, the 44-

volume record includes over four thousand pages of transcript and many hundreds of exhibits comprising several thousand pages. Tellingly, Appellant's clemency submission included 114 claims of legal error, including a claim of facially unreasonable delay because the Government violated the 120-day standard for timely post-trial review. Predictably, the proceedings below generated comparable proceedings on appeal whether measured by time or complexity. Even before Appellant had filed his assignments of error with this court, the Government was held to answer to not just one presumptive due process violation, but two. To be sure, "convicted servicemembers have a due process right to timely **[*211]** review and appeal of courts-martial convictions." *Id. at 136* (citing *Toohey v. United States, 60 M.J. 100, 101 (C.A.A.F. 2004)*; *Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 37-38 (C.A.A.F. 2003)*). And, no one can seriously quarrel about holding the Government to adhere to processing standards meant to "to deter excessive delay in the appellate process and remedy those instances in which there is unreasonable delay and due process violations." *Id. at 142*. However, while I join my colleagues in dutifully abiding by our superior court's *Moreno* holding, I do so with the reservation that, as applied here, it may stray too far from *Barker* in cases like Appellant's that are referred capital and are uncharacteristic of cases like *Moreno* under review.

The appellant in *Moreno* was tried for the offense of rape in violation of *Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920*. *Id. at 132*. Remarkably, in that case 1,688 days elapsed between adjournment and the CCA's decision. *Id. at 135*. The CAAF found excessive the 490 days that elapsed before convening authority action, and the 925 days from when the case was docketed at the CCA and briefing was complete. *Id. at 136-38*. In looking to *Barker*, which "addressed speedy trial issues in a pretrial, *Sixth Amendment* context," the CAAF nonetheless acknowledged, by analogy, that the *Barker* opinion's "four-factor analysis has been broadly adopted for reviewing post-trial **[*212]** delay due process claims." *Moreno, 63 M.J. at 135* (emphasis added).

In *Barker*, the Supreme Court could "find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *407 U.S. at 523*. But, at the same time, the Court observed that "[t]he States . . . are free to prescribe a *reasonable* period consistent with constitutional standards . . . ." *Id.* (emphasis added). When a defendant's speedy trial is at issue, "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id. at 530*. Importantly, "the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Id. at 530-31*. To illustrate this point, the Court explained: "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id. at 531*.

Continuing the analogy in *Moreno* to the pretrial speedy trial context in *Barker*, the case under review is hardly ordinary, and should generate considerable uncertainty whether the *Moreno* standard for facially unreasonable delay **[*213]** is "reasonable" under the circumstances. Rather than apply a fixed 120-day and 18-month standard as the "triggering mechanism," *Barker, 407 U.S. at 530*, that will prompt an examination of other factors identified in *Barker*, in cases like Appellant's that are referred capital, I would call upon our superior court to apply a 270-day and 3-year standard, respectively, before finding a presumptive violation of an appellant's due process right to timely post-trial processing and appellate review. In such cases, I believe each to be "a reasonable period consistent with constitutional standards." *Id. at 523*. As proposed, the 270-day standard between completion of trial and convening authority action adjusts for the time it takes to accurately prepare the record of trial and to complete clemency in complex cases such as the capital-referred court-martial under review. At the same time, increasing the time for appellate review, as proposed, allows both parties to review what predictably will be a lengthy record of proceedings and for a CCA to render a decision.

Under the *Moreno* standards and the standards proposed here, I would find a presumption of facially unreasonable delay. Nonetheless, I join the opinion of the court in **[*214]** finding Appellant's due process right to timely post-trial and appellate review was not violated.

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