IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

Colonel (O-6)
PRITCHARD, CHARLES L.,
Military Judge,
Respondent

Lieutenant Colonel (O-5)
DIAL, ANDREW J.,
U.S. Army
Real Party in Interest

GOVERNMENT PETITION FOR WRIT OF PROHIBITION

Case No. ARMY Misc. 20220001

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW the United States, by and through undersigned appellate government counsel, pursuant to the Joint Rules of Appellate Procedure for the Courts of Criminal Appeals [J.R.A.P. R.], (1 Jan. 2019) 19(b), and seeks extraordinary relief. Pursuant to 28 U.S.C. § 1651, the United States petitions this court for extraordinary relief in the nature of a writ of prohibition. Specifically, this court should prevent the military judge from issuing his unanimous verdict instruction.[1]

[1] The government fashions this request as a writ of prohibition such that the military judge is prevented from issuing his unanimous panel instruction. To the

Table of Contents

---

extent this writ would be more appropriately fashioned as a writ of mandamus, the government hereby makes this alternative request. This court applies "the same test for a writ of prohibition as for a writ of mandamus," and therefore, the substance of the writ applies the same. *United States v. Gross*, 73 M.J. 864, 866 (Army Ct. Crim. App. 2014).

Table of Authorities

United States Supreme Court

United States Court of Appeals for the Armed Forces

Court of Military Appeals

Courts of Criminal Appeals

Courts of Military Review

Federal Circuit Court Cases

Uniform Code of Military Justice

Statutes, Regulations, and Other Authorities

History of the Case

On 6 April 2021, the government preferred three specifications of sexual assault, one specification of attempted sexual assault, and one specification of indecent conduct in violation of Articles 120, 80, and 124, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920, 880, and 924, against Lieutenant Colonel (LTC) Andrew J. Dial, the accused and real party in interest. (Charge Sheet; Gov't App. Ex. 1). On 20 August 2021, the convening authority referred the charges to a general court-martial. (Charge Sheet; Gov't App. Ex. 1).

On 15 November 2021, the accused filed a motion for relief requesting a unanimous verdict for any findings of guilty. (Gov't App. Ex. 2). On 18 November 2021, the government responded in opposition. (Gov't App. Ex. 3). Neither party requested oral argument. (Gov't App. Exs. 2, 3). On 6 December 2021, the accused filed a notice selecting a panel forum. (Gov't App. Ex. 8). On 17 December 2021, the military judge ordered the parties to file briefs on several specified issues regarding a unanimous verdict. (Gov't App. Ex. 4). The government and defense both responded in writing on 31 December 2021. (Gov't App. Exs. 5–6). The military judge issued his ruling on 3 January 2022. (Gov't App. Ex. 7). That same day, the government requested this court issue a Stay of Proceedings until this court determined whether to grant the petition for

extraordinary relief. On 5 January 2022, this court granted that request. No prior actions have been filed or are pending for the same relief in any court.

Facts Relevant to the Issue Presented

On 15 November 2021, defense requested that the military judge "require a unanimous verdict for any finding of guilty and to modify the instructions accordingly." (Gov't App. Ex. 2, p. 1). Alternatively, defense requested the military judge "provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names." (Gov't App. Ex. 2, p. 1). The defense made this motion pursuant to the Fifth and Sixth Amendments to the U.S. Constitution, as well as Rules for Courts-Martial [R.C.M.] 906, 920, and 921. (Gov't App. Ex. 2, p. 1). After the government filed a written pleading opposing the motion, the military judge ordered the parties to file supplemental pleadings because "the parties' briefs [did] not adequately address certain aspects of this issue." (Gov't App. Ex. 4, p. 1). The military judge submitted seven additional questions and ordered both parties to file additional pleadings. (Gov't App. Ex. 4, pp. 1–2).

Three days after both parties submitted their respective additional pleadings, the military judge ruled that neither the Sixth Amendment nor the Fifth Amendment Due Process Clause required a unanimous verdict. (Gov't App. Ex. 7, p. 1). However, the military judge found that equal protection under the Fifth

Amendment Due Process Clause "require[d] a unanimous verdict of guilty in a military court-martial." (Gov't App. Ex. 7, p. 1). In granting the defense motion, the military judge stated his intent to "instruct the panel that any finding of guilty must be by unanimous vote, and the Court will ask the panel president before announcement of findings if each guilty finding was the result of a unanimous vote." (Gov't App. Ex. 7, p. 16).

Statement of the Issue

The military judge erroneously ruled that Article 52(a)(3), UCMJ, violates the accused's Constitutional Due Process rights by denying him equal protection of the law, and intends to issue an *ultra vires* instruction to the panel.

Jurisdictional Basis for Relief Sought

This court has jurisdiction over this case pursuant to the All Writs Act, which grants power to "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This case meets the Act's required criteria, as (1) the requested writ is "in aid of the court's existing jurisdiction," and (2) the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotations omitted).

A. This writ is "in aid of" this court's existing jurisdiction because (1) the military judge's ruling has the potential to directly affect the findings and sentence; (2) it seeks to determine the proper exercise of a military judge's authority; and (3) it serves to confine the lower court to a lawful exercise of its prescribed jurisdiction.

This writ is "in aid of" the court's existing jurisdiction because it supports Article 66, UCMJ, statutory jurisdiction. *See LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) (quoting *Denedo*, 66 M.J. at 120) ("In the context of military justice, 'in aid of' includes cases where a petitioner seeks 'to modify an action that was taken within the subject matter jurisdiction of the military justice system.'"). This court has subject-matter jurisdiction over appeals by an accused "from the judgment of a court-martial," cases with certain sentences, and those that trigger automatic review. UCMJ art. 66(b)(1)–(3). In order for this court to conduct an Article 66, UCMJ review, there must first be a conviction. *See Kastenberg*, 72 M.J. at 368 (quoting *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)) ("To establish subject-matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'").

Here, the military judge increased the votes required for a guilty finding. He left untouched the rules for a finding of not guilty. As a result, the accused could receive an acquittal simply by virtue of a non-unanimous, but three-fourths concurrence (or greater), verdict of the panel members. Therefore, his ruling has "the potential to directly affect the findings and the sentence" because, based on

the proposed instruction, the panel members, even after having met the statutorily required concurrence for a finding of guilty, would not convict the accused. *Ctr. for Constitutional Rights*, 72 M.J. at 129 (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)). As the ruling could impact the foundation of any guilty findings, this case satisfies this court's subject-matter jurisdiction. *See Kastenberg*, 72 M.J. at 368 (finding subject-matter jurisdiction where the military judge's ruling bore directly on "the issues of guilt or innocence—which will form the very foundation of a finding and sentence").

This writ petition is also "in aid of" this court's jurisdiction because it seeks to determine the proper exercise of a military judge's authority and to protect the integrity of the military justice system. *United States v. Reinert*, ARMY 20071195, 2008 CCA LEXIS 526, at *28 (Army Ct. Crim. App. 7 Aug. 2008) (mem. op.); *see also United States v. Shahan*, ARMY MISC 20160776, 2016 CCA LEXIS 740, at *11–12 (Army Ct. Crim. App. 23 Dec. 2016) (mem. op.) (granting writ after analyzing whether "a judge [can] exercise an inherent power that is contrary to any express grant of or limitation . . . contained in a rule or statute") (internal quotations omitted). Such is true even "on interlocutory matters where no findings or sentence has been entered in the court-martial." *Kastenberg*, 72 M.J. at 368 (citing *Hasan v. Gross*, 71 M.J. 416); *see also United States v. Redding*, 11

M.J. 100, 104–06 (C.M.A. 1981) (holding military appellate courts have jurisdiction under the All Writs Act to review government interlocutory petitions).

The unknown verdict does not prevent jurisdiction of this writ. In *Hasan v. Gross*, the Court of Appeals for the Armed Forces [CAAF] considered a petition for a writ of prohibition to prevent enforcement of the military judge's order to forcibly shave the appellant's beard prior to trial, before ever calling the members. 71 M.J. at 417. The CAAF also found jurisdiction in *United States v. Brown*, noting the very same procedural posture in *Hasan* and *Kastenberg* where it was "unknown whether the appellant would be convicted, and whether the case would be eligible for mandatory review." 81 M.J. 1, 5 (C.A.A.F. 2021). Comparable to the present case, the CAAF held a writ of prohibition was appropriate—regardless of it being "impossible to know in advance how the members . . . would act." *Id.*

This extraordinary writ also meets this court's jurisdiction requirement because it serves "to confine an inferior court to a lawful exercise[] of its prescribed jurisdiction." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382 (1953). In this case, not only is the military judge's instruction *ultra vires*, but so is his intent to "ask the panel president before announcement of findings if each guilty finding was the result of a unanimous vote." (Gov't App. Ex. 7, p. 16).

The military judge cites R.C.M. 922(e) in his law section, quoting the prohibition on "polling panel members." (Gov't App. Ex. 7, p. 5). Indeed, the rule

states that "members may not be questioned about their deliberations and voting." R.C.M. 922(e); *see also* Mil. R. Evid. 509 (stating deliberations, but not results, are "privileged"). Military Rule of Evidence 606 also confirms that members of courts-martial generally are prohibited from testifying about deliberations. Mil. R. Evid. 606(b)(1). While certain exceptions exist,[2] it is unclear how any apply here.

Without any subsequent analysis as to how he was not bound by these prohibitions, the military judge exceeded his authority in his anticipated inquiry of the panel president. (Gov't App. Ex. 7, p. 16); *see United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . ."); *United States v. Brooks*, 41 M.J. 792, 798 (Army Ct. Crim. App. 1995) (noting "strong public policy reasons bar the military judge . . . from entering the sanctity of the deliberation room"). Additionally, this court has recently granted a writ of prohibition when a military judge similarly intended to intrude upon the normal deliberative process. *See United States v. Lara*, ARMY 20170025, 2018 CCA LEXIS 604, at *12 (Army Ct. Crim. App. 27 Dec. 2018) (mem. op.) (finding a writ of prohibition appropriate

[2] Military Rule of Evidence 606(b)(2)(A)–(C) lists the following exceptions: "A member may testify about whether: (A) extraneous prejudicial information was improperly brought to the members' attention; (B) unlawful command influence or any other outside influence was improperly brought to bear on any member; or (C) a mistake was made in entering the finding or sentence on the finding or sentence forms."

where the military judge intended to reopen deliberations after announcement of the findings and issue an additional instruction). Given the military judge is making a "decision [not] within his authority to make," this "equates to a judicial usurpation of power" and is appropriate for a writ of prohibition. *United States v. Gross*, 73 M.J. 864, 869 (Army Ct. Crim. App. 2014).

B. This writ is "necessary or appropriate" because no adequate legal remedy is available.

This requested writ is "necessary or appropriate" because no adequate legal remedy is available. *Denedo*, 66 M.J. at 119. This is true especially under the "contextual analysis" that this determination requires, given the practical ramifications of the proposed instruction. *Id*. at 121. Should this panel announce a finding of not guilty following the military judge's instruction, the government would have no other adequate legal remedy available. *See United States v. Hitchcock*, 6 M.J. 188, 189 (C.M.A. 1979) (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)) ("However mistaken or wrong it may be, an acquittal cannot be withdrawn or disapproved."). Additional prosecution would be barred. UCMJ, art. 44; *see also Serfass v. United States*, 420 U.S. 377, 387 (1975) (noting the Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense"); *United States v. Easton*, 71 M.J. 168, 172 (2012) ("Once double jeopardy has attached, it precludes retrial under a variety of scenarios including acquittal[.]").

For this reason, the government has no other opportunity for relief during the ordinary course of appellate review and a writ is appropriate. Therefore, because the requested writ is "in aid of the court's existing jurisdiction" and "necessary or appropriate," this court has jurisdiction over this writ of prohibition. *Denedo*, 66 M.J. at 119 (internal quotations omitted).

Specific Relief Sought

The government asks this court to prohibit the military judge from issuing his unanimous verdict instruction, and asking the panel president if each guilty finding was the result of a unanimous verdict. This is appropriate because the prohibition would not "control the decision of the trial court," but rather confine the military judge to his sphere of discretionary power. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *see also Dew v. United States*, 48 M.J. 639, 648 (Army Ct. Crim. App. 1998) (noting a writ is not to order inferior courts "how they should perform their respective duties," but to confine them to the sphere of their discretionary power).

Reasons for Granting the Relief Requested

To obtain relief through a writ of prohibition, the government must show that (1) it has no other adequate means to obtain relief, (2) the right to issuance of the writ of prohibition is clear and indisputable, and (3) the issuance of the writ is appropriate under the circumstances. *Cheney v. United States Dist. Court for D.C.*,

542 U.S. 367, 380–81 (2004); *see also Gross*, 73 M.J. at 866–67 (applying the "same test for a writ of prohibition as for a writ of mandamus"). While an extraordinary writ is a "drastic instrument," this is a "truly extraordinary situation" where relief is necessary. *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985) (quoting *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)).

A. The government has no other adequate means to obtain relief.

Without this writ of prohibition, the government has no other adequate means to obtain relief. *Gross*, 73 M.J. at 867. The government has no remedy under Article 62, UCMJ. *See* 10 U.S.C. § 862(a)(1)(A)–(G) (limiting the scope of appeal to its enumerated bases); *see also Reinert*, 2008 CCA LEXIS 526, at *13 (analyzing how a writ of prohibition is appropriate in cases without a viable Article 62, UCMJ, appeal). It is the sole province of a military judge to instruct the panel at a court-martial. R.C.M. 920(a). While the government had an "opportunity to be heard" on the proposed instructions, R.C.M. 920(c), the government is unable to prevent the military judge from issuing the proposed instruction outlined in his ruling unless this court intervenes. (Gov't App. Ex. 7, p. 16). Without this writ, issuing this instruction will constitute "judicial overreaching [that] could deny the government the rightful fruits of a valid conviction." *Gross*, 73 M.J. at 867 (internal quotations omitted).

The requirements for a unanimous verdict to find the accused guilty create "a high probability of failure of prosecution—a failure the government [cannot] then seek to remedy by appeal or otherwise." *Id.* (citing *United States v. Wexler*, 31 F.3d 117, 129 (3d Cir. 1994)). After all, in a contested court-martial, the "government has no means to challenge an actual and entered finding of not guilty." *Id*. Therefore, without a writ of prohibition preventing the military judge from issuing this instruction, the government has no alternate remedy or other adequate means to attain relief.

B. The right to issuance of the writ is clear and indisputable.

The government has a clear and indisputable right to a writ of prohibition in this case. *Gross*, 73 M.J. at 867. For three reasons, the military judge erred such that this court must issue a writ of prohibition. First, equal protection under the Fifth Amendment Due Process Clause is inapplicable because servicemembers and civilians are not similarly situated for purposes of criminal trials. Second, assuming arguendo that equal protection applies, the military judge failed to apply the requisite level of deference under the rational basis standard of review. Finally, this ruling represents judicial overreach as it usurps power from Congress.

1. Accused servicemembers and civilian defendants are not similarly situated.

The military judge's equal protection application is unsupported in law. In order to apply the equal protection principles of the Fifth Amendment, all persons

affected by the legislature's distinctions must be "similarly situated." *Cleburne v. d Living Center, Inc.*, 473 U.S. 432, 439 (1985); *United States v. Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999) ("The Equal Protection Clause is generally designed to ensure that the [g]overnment treats 'similar persons in a similar manner.'"). Congress has a "wide range of discretion in [this] regard," and the classifications Congress applies must simply have "a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Accused servicemembers and civilian defendants are not similarly situated for the purpose of criminal trials. *See United States v. Akbar*, 74 M.J. 364, 404 (C.A.A.F. 2015) ("Appellant, as an accused servicemember, was not similarly situated to a civilian defendant.") (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). When called upon to assess whether two groups are similarly situated, the CAAF looked to whether the groups were "in all relevant respects alike." *United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Here, an assessment of the criminal justice process afforded to servicemembers accused and civilian defendants exposes how they are not similarly situated.[3]

[3] The military judge erroneously narrowed and then enlarged the "similarly situated" analysis. (Gov't Ex. App. 7, pp. 9–10) (stating first that the only "relevant" time to analyze the issue is at the time of "rendering the verdict," but

The aim of a military trial has always been to promote good order and discipline in the armed forces—a concept absent from the civilian sector. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], Part I, ¶ 3. While there are certainly similarities between the two proceedings they will face—as the military judge identifies—that does not mean they are "similarly situated" for an equal protection analysis. *See F.S. Royster Guano Co.*, 253 U.S. at 415. In fact, despite the military judge's mention of just two distinct procedural differences, ("grand jury indictment and trial by jury"), and a pre-trial difference ("the Article 32 preliminary hearing"), there are a number of other relevant differences worthy of consideration. (Gov't Ex. App. 7, pp. 7–8).

Pretrial proceedings are quite different for an accused and a defendant. Notably, there is no civilian equivalent for the senior commanders authorized to convene courts-martial. R.C.M. 201(b)(1) ("The court-martial must be convened by an official empowered to convene it."). Overall, this partnership between legal

---

later including considerations outside of that time period, such as the "consequences of conviction," when concluding servicemembers and civilians are similarly situated). Here, we address the criminal proceeding as a whole, while recognizing additional distinctions are also relevant. Indeed, servicemembers are differently situated than civilians in aspects outside of their respective criminal justice systems, to include, *inter alia*, the requirements to deploy, wear a uniform, submit to readiness requirements, and remain on post in the absence of a pass. *See Begani*, 81 M.J. at 280–81 (considering pay, readiness, and recall criteria—"benefits and obligations"—in finding that even *within* the military, members of the Fleet Reservists and Retired Reservists were not similarly situated).

advisors, staff judge advocates, and senior commanders is a distinct feature of the military justice system.[4] *See* Art. 34(a)(1), UCMJ (requiring advice of the staff judge advocate before referral of charges). Once the command has a view towards court-martial in the military, confinement before trial is permitted under broader circumstances than in civilian practice, and with no potential for bail. *Compare* R.C.M. 302–305 (providing immediate and layered military review within forty-eight and seventy-two hours, and another seven-day review not conducted by a military judge, assessing "serious criminal misconduct"), *with* Fed. R. Crim. P. 5(a)(1)(A) (only requiring the person making an arrest "must take the defendant without unnecessary delay before a magistrate judge," who allows for release unless there is a flight or public safety risk); *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976). Search authorizations are different in the military, given the operational realities of the workplace. *United States v. Long*, 64 M.J. 57, 63–64 (C.A.A.F. 2006); *see also* Mil. R. Evid. 314(d)(1) (authorizing a "commander" to authorize certain searches). Just like Article 52, UCMJ, these are field expedient rules allowing commanders to promote good order and discipline.

[4] The Military Justice Review Group Report (22 Dec. 2015) [MJRG Report] provides a comprehensive review on the differences between the military justice system and the civilian system, a few of which are highlighted in this brief as nonbinding but persuasive points.

The settings in which these trials might take place are also vastly dissimilar. "In the military, there is a unique need to conduct trials in deployed environments during ongoing combat operations around the world," among other locations. MJRG Report, p. 19. Notwithstanding courts-martial conducted during combat deployments, courts-martial are "routinely conducted in nations with which the United States has Status of Forces Agreements; these agreements establish priority of criminal jurisdiction over offenses committed by servicemembers between the host nation's law and the UCMJ." MJRG Report, p. 19.

Further, while the civilian sector distinguishes between misdemeanors and felony *charges* in criminal trials, the military has the unique ability to convene separate proceedings with jurisdictional *limits*. R.C.M. 1301(d)(1) (limiting confinement to one month following summary courts-martial); R.C.M. 201(f)(2)(B) (limiting confinement to one year following special courts-martial). Attachment of double jeopardy is also different, "due to the unique nature of the military." *Easton*, 71 M.J. at 176 ("By enacting Article 29, UCMJ, as it did, Congress evinced the intent that, in light of the nature of the military, an accused does not have the same right to have a trial completed by a particular court panel as a defendant in a civilian jury trial does."). Should an accused elect to plead guilty, the colloquy in front of the military judge is far more scrupulous than that of a civilian judge and a civilian defendant. *See United States v. Care*, 18 U.S.C.M.A.

535, 40 C.M.R. 247 (1969); MJRG Report, p. 33 (noting the "subtle pressures inherent to the military environment that may influence the manner in which servicemembers exercise (and waive) their rights").

There are no juries in the military; instead, trial for a servicemember is "by a unique, military tribunal that is essentially different from the jury envisioned by the Sixth Amendment." *United States v. Guilford*, 8 M.J. 598, 602 (A.C.M.R. 1979) (noting the unique "composition" and "functioning" of the military panel as compared to the civilian jury). Indeed, the very attributes of these two institutions are different. Unlike the civilian system, "an accused is not entitled to a panel that represents a cross-section of the eligible military population." *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997). The formality with which the military panel operates—including a seating chart in order of military grade and rank, name plates, as well as the strict uniform requirement—all demonstrate unique military characteristics. Rules of Practice Before Army Courts-Martial, dated 1 Jan. 2019 [Rule of Practice] 4.1.8. Whereas a civilian jury takes two oaths, a military panel member's oath was even combined due to "administrative convenience." *Easton*, 71 M.J. at 180 (quoting *MCM*, Analysis of the Rules for Courts-Martial app. 21 at A21-49 (2008 ed.)).

Even the optics of a criminal trial are distinct. Bailiffs and escorts in military courts-martial are borrowed military manpower, totally contrary to the

civilian sector, and are active duty servicemembers. Rules of Practice 31–32. Finally, following any finding of guilty by the military panel, Courts of Criminal Appeals offer another failsafe for servicemembers that civilians do not have. Art. 66(d), UCMJ (requiring correctness "in law and fact" for affirmation). Thus, while the court-martial panel and civilian jury may serve a similar purpose, the distinct manner in which these bodies accomplish their purpose demonstrates that they are not similarly situated. In sum, the distinct voting requirements simply follow a long line of other service-related, unique characteristics in the military justice system. For these reasons, the only logical conclusion is that accused servicemembers and civilian defendants are not similarly situated.

2. The military judge misapplied the rational basis test.

Assuming arguendo that equal protection under the Fifth Amendment Due Process Clause applies, the military judge failed to provide the requisite deference under the rational basis test—inappropriately shifting the burden onto the government. To begin, the military judge found unconstitutional the statute, Article 52(a)(3), UCMJ, that requires at least three-fourths concurrence of the present members to sustain a conviction. 10 U.S.C. § 852(a)(3) (2019). This statute does not concern a suspect class. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting the "traditional indicia of suspectness: the class is [] saddled with such disabilities, or subjected to such a history of

purposeful unequal treatment, or relegated to such a position of political powerlessness").

The statute also does not infringe upon a servicemember's fundamental constitutional rights.[5] After all, "[c]ourts-martial have never been considered

[5] The military judge correctly recognizes that the Sixth Amendment right to jury trial does not apply to the military. (Gov't App. Ex. 7, p. 7); *see United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (*quoting Ex parte Quirin*, 317 U.S. 1, 39 (1942)) ("[T]here is no Sixth Amendment right to trial by jury in courts-martial."). Likewise, a non-unanimous guilty verdict does not violate the Fifth Amendment Due Process Clause. (Gov't App. Ex. 7, p. 7); *Johnson v. Louisiana*, 406 U.S. 356, 362, 92 S. Ct, 1620, 1624–25 (1972). Yet, the military judge later states, "Congress encroaches on service members' fundamental 5th Amendment due process right to an impartial panel by authorizing the panel to find guilty by a non-unanimous vote." (Gov't App. Ex. 7, p. 10). It appears the military judge relies upon *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)—a Sixth Amendment case—to support this statement. (Gov't App. Ex. 7, p. 10). This is a significant expansion of *Ramos*, in that it shoehorns language relevant to an inapplicable constitutional amendment. The term "impartial," as the Court in *Ramos* defined it, meant "impartial" specifically "against [the] backdrop" of the Sixth Amendment. *Ramos*, 140 S. Ct. at 1396. What *Ramos* does not do, however, is to define impartiality in a Fifth Amendment context. Nor does it mean the term "impartial" always means unanimous in other military justice contexts. To that end, while the military judge may imply this to be the case, (Gov't App. Ex. 7, p. 11) (saying "[t]he Government provided no reason why court-martial panel impartiality should mean anything different than jury impartiality"), that is unsupported. There cannot be a blanket definition of "impartiality," especially when considering that the cases cited in his ruling concern other panel member criteria. (Gov't App. Ex. 7, p. 6) (citing *Wiesen*, *Bess*, *Kirkland*, and *Riesbeck*—all of which concern voir dire and panel member composition). For example, the CAAF has used this term in varying contexts, expressing that "[w]hile the military defendant does not enjoy a Sixth Amendment right to trial by 'impartial jury,' he or she does have a right to 'members who are fair and impartial.'" *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). Regardless, the military judge applies the rational basis test, which is applicable when there is no infringement upon a fundamental constitutional principle. *Beach Communications, Inc.*, 508 U.S. at 313; *see also*

subject to the jury-trial demands of the Constitution," *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986), and "servicemembers have never had a right to a trial by jury." *United States v. Curtis*, 44 M.J. 106, 132 (C.A.A.F. 1996); *see also Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957) (when discussing how grand jury indictment is not required "in cases subject to military trial," that "the requirements of jury trial are inapplicable"); *Kahn v. Anderson*, 255 U.S. 1, 8 (1921) (rejecting claim that an accused could not be tried by a military court that did not provide him a jury trial).

As this statute "neither proceeds along suspect lines nor infringes fundamental constitutional rights," it "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Fcc v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). This standard of review—the rational basis test—is "a paradigm of judicial restraint," *Id*., and the statute bears a strong presumption of validity. *Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988) ("We have stressed that this standard of review is typically quite deferential; legislative classifications are presumed to be valid, . . . largely for the reason that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.") (internal quotations omitted). "[T]he

---

United States v. Begani, 81 M.J. 273, 288 (C.A.A.F. 2021) (declining to find a fundamental right implicated in a case where appellant contended the Sixth Amendment was implicated).

burden is on the one attacking the legislative arrangement to negat[e] every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Judging the constitutionality of an act of Congress—"the gravest and most delicate duty" courts are called upon to do (*Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.))—courts keep in mind that "Congress is a coequal branch of government whose members take the same oath the Supreme Court does to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981).

While the military judge appears to acknowledge judicial deference "is at its apogee" in this exact scenario, (Gov't App. Ex. 2) (citing *Solorio v. United States*, 483 U.S. 435, 447 (1987)), he actually afforded much less deference to the statute than it was owed. *See Dallas v. Stanglin*, 490 U.S. 19, 26 (1989) (noting the "nature of rational-basis scrutiny" was "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause"); *see also Beach Communications, Inc.*, 508 U.S. at 313 ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.").

a. The military judge failed to provide the requisite deference.

The military judge acknowledged that Congress at one time articulated a basis for this rule—citing the 1912 Congressional Hearing where Major General Crowder and Representative Kahn discussed the impairment of successful field

operations. (Gov't App. Ex. 7, p. 12). Yet, the military judge appears to be unpersuaded by this reasoning, as he held there "is no apparent or logical reason for the disparate treatment." (Gov't App. Ex. 7, p. 12); *see Heller*, 509 U.S. at 320–21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)) (noting "'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' *whether or not the basis has a foundation in the record*.") (emphasis added). In so holding, he failed to provide the requisite deference to Congress.

The question is not whether Congress's rationales persuade the military judge; the question is whether there exists "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications Inc.*, 508 U.S. at 313. Courts are "compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321 2643 (1993). However, contrary to the rational basis test, the military judge did not accept these appropriate generalizations.

The language in the military judge's ruling demonstrates his disregard for the reasonably conceivable rational bases for the statute. For example, the military judge desired "further explanation" as to how a non-unanimous verdict would impair the success of field operations; he wanted robust discussion "balancing that

need against the due process rights of service members;" and he went on to explain why the other reasons offered were either "unsupported" or "unfounded." (Gov't App. Ex. 7, pp. 12–14). This was far too stringent a review. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (forbidding the judiciary from sitting "as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines"); *Goldberg*, 453 U.S. at 67–68 (noting courts "must be particularly careful not to substitute [their] judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch"). Substituting his own view for the persuasiveness of the state's rationale, the military judge failed to provide the requisite deference owed in the rational basis test.

b. The military judge's rational basis test incorporated errors.

The military judge relied on two faulty bases in arriving at his conclusion. First, he erroneously concluded that "the non-unanimous verdict in courts-martial simply slipped into congressional legislation . . . without much thought." (Gov't App. Ex. 7, p. 12). Despite the burden being on the party attacking the legislative arrangement, *Heller*, 509 U.S. at 320, the military judge led the charge with his own attacks. He only cited one hearing before the Committee on the Armed Forces. (Gov't App. Ex. 7, p. 12). In doing so, he failed to consider other relevant

hearings that occurred four years later, where General Crowder also addressed the "essential differences between a military criminal code and a civil criminal code." Revision of the Articles of War, United States Senate, Subcommittee on Military Affairs, Statement of Brig. Gen. Enoch H. Crowder, United States Army, Judge Advocate General of the Army (1916), p. 27 [1916 Hearing].[6]

"Neither can we have the vexatious delays and failures of justice incident to the requirement of a unanimous verdict. Our code, and I think all military codes that have preceded it, have recognized the principle of majority verdicts." 1916 Hearing, p. 35. This subsequent hearing shows that Congress wished to include a non-unanimous verdict provision in the Uniform Code of Military Justice, and it disputes the military judge's conclusion that "Congress never offered a reason for authorizing a non-unanimous vote for guilt." (Gov't App. Ex. 7, p. 14).

Indeed, as evidenced from General Crowder's subsequent discussions on the death penalty, Congress again considered and maintained the non-unanimous verdict feature of a court martial: "You will note the concluding clause of this article [on the death penalty] expressly authorizes majority verdicts with the exception noted." 1916 Hearing, p. 64. The Judge Advocate General felt so strongly about the majority vote—the feature "courts-martial have [had] for all time"—he wished to "put into this code an express recognition of majority verdicts

[6] https://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol1.pdf#page=53.

except in cases where the death penalty is mandatory." 1916 Hearing, p. 64. Members of Congress understood and agreed. 1916 Hearing, p. 64. This colloquy directly disputes the military judge's conclusion that "[n]o further explanation was apparently needed, however, for Congress to justify continuation of the non-unanimous verdict in courts-martial." (Gov't App. Ex. 7, p. 12).

Finally, the military judge misapplied Article 52(b)(2), UCMJ, to support his ruling. In holding that a unanimous verdict would not impair successful operations of the military, he found the concern to be unfounded "because Congress has since required a unanimous guilty verdict in capital courts-martial." (Gov't App. Ex. 7, p. 12). Later, the military judge again stated that Congress required "a unanimous verdict in capital cases." (Gov't App. Ex. 7, p. 14). His ruling conflates a verdict with a sentence. Specifically, Article 52(b)(2), UCMJ only requires "a unanimous finding of guilty" when the panel sentences an accused to death. *See also* R.C.M. 1004(a)(2)(A) (requiring "the unanimous vote of all twelve members" in order to adjudge the death penalty). Simply put, Congress did not require "a unanimous verdict in capital cases." (Gov't App. Ex. 7, p. 12). A non-unanimous panel could still issue a verdict of guilty on a capital case—undercutting the military judge's disbelief as to the impact on military operations. (Gov't App. Ex. 7, p. 14). Therefore, the military judge's subsequent conclusion—that the "'impairment' was

apparently unfounded, because Congress has since required a unanimous guilty verdict in capital courts-martial"—is incorrect. (Gov't App. Ex. 7, p. 12).

c. Plausible reasons for the statute exist, which ends judicial inquiry.

Multiple bases "could provide a rational basis for the classification." *Beach Communications, Inc.*, 508 U.S. at 313. Addressing each in turn, the plausibility becomes obvious. "Where, as here, there are plausible reasons for Congress's action, our inquiry is at an end." *United States R. Ret. Bd. v. Fritz,* 449 U.S. 166, 179 (1980).

i. Efficiency.

Military panel members cannot be endlessly absorbed in courts-martial—a potential consequence of unanimous verdict requirements. Article 52, UCMJ, is a field-expedient measure aimed at helping our fighting forces. However, the military judge erroneously held "a non-unanimous verdict does not further the military mission and a unanimous verdict requirement would not hinder it." (Gov't App. Ex. 7, p. 10). This is pragmatically incorrect.

Every hour spent in service to a court-martial is time, energy, and manpower subtracted from their "primary business . . . to fight or be ready to fight wars should the occasion arise." *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975). A panel member deliberating on an accused's verdict is a servicemember not attending to his or her regular place of duty—be that daily maintenance, training,

or warfighting.[7] The military manpower necessary to host a court-martial, even throughout deliberations, is unparalleled in the civilian sector and a diversion from the military mission. *See* R.C.M. 501(c) (listing "[o]ther personnel" involved in a court-martial, including "interpreters, bailiffs, clerks, escorts, and orderlies").

Such time spent in their deliberative process was exactly what concerned General Crowder: "Neither can we have the vexatious delays and failures of justice incident to the requirement of a unanimous verdict." 1916 Hearing, p. 35; *see also* H. Rept. No. 81–491, p. 8 (1949) (Conf. Rep.) ("We cannot escape the fact that the law which we are now writing will be as applicable and as workable in time of war as in time of peace, and regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions

---

[7] This pragmatic concern is tangentially related to the concern regarding hung juries, and that is yet another plausible basis for this statute. *See Mendrano v. Smith*, 797 F.2d 1538, 1546 (10th Cir. 1986) (noting the non-unanimous verdict "lessens the problem of the hung jury"). This has been reflected in academic discussions highlighting the need for efficiency: "Do we want hung juries and retrials? I think the answer . . . must be 'No.' We do not want blindly to copy civilian justice. Its shockingly bad record of delay does not justify the naive faith held by some that civilian justice is necessarily and inevitably superior to military justice. Military justice is speedy, as even its most severe critics admit." Professor Delmar Karlen, *Civilianization of Military Justice: Good or Bad*, 60 Mil. L. Rev. 113, 114 (1973). A non-unanimous verdict precludes the need to retry an entire court-martial. The government disputes the military judge's logic that hung juries are only a problem if a "unanimous vote [is required] to acquit." (Gov't App. Ex. 7, p. 15). Unanimity itself—whether to convict or to acquit—can cause a hung jury. It is the non-unanimous verdict that actually offers a fail-safe and prevents the wasted time of a retrial because any vote that does not meet the three-fourths threshold automatically results in a finding of not guilty. R.C.M. 921(c)(3).

which will unduly restrict those who are responsible for the conduct of our military operations."). In fact, the Supreme Court has long recognized that the "[t]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Toth v. Quarles*, 350 U.S. 11, 17 (1950).

Military readiness requires these distinct features, while also contemporaneously providing the most robust and fair criminal proceeding possible for a servicemember accused. One federal circuit appellate court found this to be a rational basis for "resolving the due process issue" as it related to a non-unanimous verdict. *Mendrano v. Smith*, 797 F.2d 1538, 1546 (10th Cir. 1986). "This accommodation of legal procedure to the critical mission to prepare for and win wars and the need to minimize diversions from this task force the military to turn to 'other and swifter modes of trial than are furnished by the common law courts . . .'" *Id*. (quoting *Ex Parte Milligan*, 71 U.S. [4 Wall.] 2, (1866)). As such, military efficiency is indeed a rational basis for this statute.

Given the "primary business of armies and navies to fight or be ready to fight wars should the occasion arise," this makes good sense. *Schlesinger*, 419 U.S. at 510 (internal quotations omitted). Courts-martial must operate effectively "both at home and abroad, during times of conflict and times of peace." MJRG

Report, p. 20. Therefore, Congress—who has plenary authority to "raise and support Armies" and to "provide and maintain a Navy," (U.S. Const. art. I, § 8, cls. 12–13)—has continued to include this provision in the statute, given its "legitimate governmental purpose." *Doe*, 509 U.S. at 320. This practice comports with Congress's original consideration "that certain provisions of the UCMJ which were designed to provide protection to an accused should be repealed or limited in the interest of military order and efficiency." *Reid*, 354 U.S. at 90 n.67 (1957) (citing Joint Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury (1954)).[8]

This is far from a "platitude," as the military judge labeled it in his footnote. (Gov't App. Ex. 7, p. 9). Rejecting the government's explanation, the military judge noted that if this were true, "Congress could dispense entirely with the court-martial simply because the military is a specialized society." (Gov't App. Ex. 7, p. 9). Indeed, Congress could dispense with military courts-martial, as this is relevant

[8] The chief legal officers of the armed services had already recommended to Congress that certain provisions of the UCMJ which were designed to provide protection to an accused should be repealed or limited in the interest of military order and efficiency. *See* Joint Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury, p. 5 (1954) (noting, for example, how certain guilty plea procedures "unnecessarily wastes the time and efforts" of certain officers).

to congressional authority "over national defense and military affairs"—and "perhaps in no other area has the Court accorded Congress greater deference." *Goldberg*, 453 U.S. at 64–65; *see also Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (citing U.S. Const., Art. I, § 8) (noting that courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces").

The military judge indicates his dissatisfaction that recent congressional reports focused on unifying voting requirements, rather than engaging in continued discussions regarding the impact on military operations. (Gov't App. Ex. 7, pp. 13–14). The military judge also finds unpersuasive the trial counsel's "speculation about Congress' intent." (Gov't App. Ex. 7, p. 15).[9] But this overlooks two points—first, Congress is not required articulate its rationale at all. *See Fritz*, 449 U.S. at 179 (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)) ("It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the

[9] Despite the military judge's acknowledgement that his "inquiry does not end" with Congress's reasoning, (Gov't App. Ex. 7, p. 14), the military judge continued to focus on Congress's reasoning—folding the supposed legislative purpose into his analysis of "all possible reasons" for the statute. (Gov't App. Ex. 7, pp. 14–16) (noting it was "highly unlikely that Congress entertained [finality of verdicts] as a reason for authorizing non-unanimous verdicts," and again that "Congress could also have been concerned" about unduly burdening the military justice system). As discussed *supra* pp. 30–31, this is in error. "It is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications Inc.*, 508 U.S. at 315 (citing *Fritz*, 449 U.S. at 179).

legislative decision,' . . . because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."). True to this notion, when conducting equal protection analyses, the Supreme Court has simply looked at what "would have been plausible for the [legislature] to believe," not what they actually believed. *Heller*, 509 U.S. at 326; *see also Hahn*, 505 U.S. at 25 (holding equal protection "does not demand for purposes of rational-basis review that a legislature . . . actually articulate at any time the purpose or rationale supporting its classification"). Here, the military judge rebuffed the government's "finality of verdicts" argument on the basis that "it is highly unlikely that Congress entertained this as a reason for authorizing non-unanimous verdicts." (Gov't App. Ex. 7, p. 15). His reasoning fails to recognize that the defense has the burden to negate "every conceivable basis" supporting this statute. *Heller*, 509 U.S. at 320. The defense did not negate every conceivable basis, but merely lodged hollow words that "Congress [did] not have any plausible reason . . . other than the impermissible reason of making a conviction and deprivation of liberty and property easier at a court-martial." (Gov't App. Ex. 6, p. 11). Congress's intent is "constitutionally irrelevant," and the defense failed to negate every rational basis. *Fritz*, 449 U.S. at 179. Therefore, when the military judge rejected the government's "finality of verdicts" argument instead of holding defense to their burden, this was error.

Second, Congress has had the opportunity to revisit this provision and elected not to make it unanimous. Most recently, despite a "comprehensive review" review of the UCMJ, Memorandum from Gen. Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, to Chuck Hagel, Sec'y of Def. (5 Aug. 2013), Congress declined an opportunity to make the voting requirements unanimous and elected instead to require only a three-fourths concurrence of court-martial panel members. UCMJ art. 52 (2019); Pub. L. No. 114–328, §§ 5001–5542 (23 Dec. 2016); *see Fritz*, 449 U.S. at 179 (noting the Supreme Court "historically assume[s] that Congress intended what it enacted"). The military judge's discontent with the recent legislative history is simply a product of failing to afford appropriate deference under the rational basis test. *See also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (". . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

ii. Influence within the deliberation room.

Non-unanimous guilty findings protect the integrity of the military verdict. The "military environment is inherently coercive." *United States v. Finch*, 64 M.J. 118, 129 (C.A.A.F. 2006). "The public perceives accurately that military commissioned and non-commissioned officers are expected to lead, not just

manage; to command, not just direct; and to follow, not just get out of the way." *United States v. Wiesen*, 56 M.J. 172, 176 (C.A.A.F. 2001). Without the pressure of a unanimous verdict, the deliberation room transitions from the inevitable coercive warzone, to a zero-judgment and amicable forum. This better promotes discussion of all points without the need to come to agreement at the end, creating a reliable verdict.

The Army Court of Criminal Appeals has addressed this very concern. *United States v. Mayo*, ARMY 20140901, 2017 CCA LEXIS 239, at *20 (Army Ct. Crim. App. 7 Apr. 2017) (unpub.). "Military life and custom may condition a panel member to be wary of questioning the reasoning of senior members, or a senior panel member may be unaccustomed to having his or her reasoning or decisions questioned." *Id*. While the military judge was not bound to this unpublished opinion, he again disagreed with it on grounds contrary to the realities of a military panel. (Gov't App. Ex. 7, p. 14).

Should there be a holdout for a particular verdict, rank creates unique concerns. The military judge concedes—as he must—that members "may have suspicions from the discussion before voting" as to the identity of the lone dissenters. (Gov't App. Ex. 7, p. 15). Despite the junior member collecting the votes, the members would still need to hash out the disagreements in a system that mandated a unanimous verdict—exposing the identity of the holdout members to

the others. This inevitably leads to internal pressure that should be absent from the deliberative process as the rank inevitably shades the conversation.

Pragmatically and as the military judge noted, members will not intentionally violate the instructions and employ the "influence of superiority in rank." (Gov't App. Ex. 7, p. 15) (citing Dep't Army Pam. 27-9, Military Judges' Benchbook, para. 2-5-14 (10 January 2020) (unofficial update)). Instead, such influence is a product of "a lifetime of service in a rigid hierarchical system" that could not "always be briefly suspended during deliberations." *Mayo*, 2017 CCA LEXIS 239, at *22. However, without the need to achieve a unanimous verdict, the risk of the majority hectoring the subordinates dissipates—allowing all panel members to vote with their conscience and issue a reliable verdict.

3. The military judge overrode a legislative determination manifest in statute.

With this ruling, the military judge usurped legislative power, and implemented rules not equivalent to the civilian sector. Asymmetrically, the military judge held that a non-unanimous guilty verdict violates the Equal Protection Clause, but not a non-unanimous acquittal. (Gov't App. Ex. 7, p. 14) (citing an Oregon state case to support the proposition that "there is no countervailing constitutional requirement for a unanimous verdict"). Not surprisingly, this matches the desire of the accused. (Gov't App. Ex. 6, p. 13) ("The Defense is not arguing that all verdicts in a court-martial must be unanimous

but only that convictions require unanimity."). However, such a rule would be in contrast to the civilian federal sector, which requires all "verdict[s]"—not just guilty verdicts—to be unanimous. Fed. R. Crim. P. 31(a); *see also United States v. Scalzitti*, 578 F.2d 507, 511 (3d Cir. 1978) ("Congress has recognized in Fed. R. Crim. P. 31(a) that unanimity is an indispensable feature of federal criminal trials. That rule simply says 'the verdict shall be unanimous.' It contains no provision allowing waiver of unanimity."). If the military judge desired to afford the accused equal protection of the law, he should have actually made it equal; instead, he provided the accused with a windfall.

The military judge "overr[ode] a legislative determination manifest in a statute"—something a court is "unable" to do. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 493 (2001). In sum, the government's right to issuance of the writ is clear and indisputable because the instruction the military judge intends to give the panel in this case "exceed[s] his authority." *Labella*, 15 M.J. at 229.

C. The issuance of the writ is appropriate under the circumstances.

These are appropriate circumstances to issue a writ of prohibition. *Gross*, 73 M.J. at 867. For three reasons, this court should exercise its "largely discretionary" ability and issue a writ of prohibition. *United States v. Higdon*, 638 F.3d 233, 245 (3d Cir. 2011). First, the subject matter of this writ directly concerns "the

fundamental question of judicial authority" and there is "no reportable precedent on point," making this a case that "convince[s] [this court] this is an extraordinary matter." *Reinert*, 2008 CCA LEXIS 526, at *13. To date, while there are pending appellate cases, rulings have yet to issue.[10]

Second, should the military judge execute his ruling, the panel would decide the accused's verdict contrary to the UCMJ, existing case law, and how our sister services conduct courts-martial. *See United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) ("[M]ilitary criminal practice requires neither unanimous panel members, nor panel agreement on one theory of liability, as long as . . . the panel members agree that the government has proven all elements of the offense."); *United States v. Rollins*, No. 201700039, 2018 CCA LEXIS 372, at *25 (N-M Ct. Crim. App. July 20, 2018) (unpub.) (rejecting a Fifth Amendment Due Process challenge); *United States v. Roblero*, ACM 38874, 2017 CCA LEXIS 168, at *19–20 (A.F. Ct. Crim. App. 17 Feb. 2017) (unpub.) (declining the appellant's Fifth Amendment due process argument and holding the appellant "failed to meet his heavy burden to demonstrate that Congress's determination should not be followed"); *United States v. Novy*, ACM 38554, 2015 CCA LEXIS 289, at *9 (A.F. Ct. Crim. App. July 14, 2015) (unpub.) (rejecting a Fifth Amendment Due

[10] *United States v. Apgar*, ARMY 20200615, ___ M.J. ___ (Army Ct. Crim. App. ____); *see also United States v. Causey*, NMCCA No. 202000228, ___ M.J. ___ (N.M. Ct. Crim. App. ___).

Process argument for a unanimous panel); *United States v. Spear*, ACM 38537, 2015 CCA LEXIS 310, at *9 (A.F. Ct. Crim. App. 30 Jul. 2015) (unpub.) ("With our deference to Congress at its apogee, we find the appellant has failed to meet his heavy burden of showing the existence of any extraordinarily weighty factors that would overcome the balance struck by Congress between the needs of the military and the rights of service members."); *United States v. Grimes*, NMCM 9800955, 2000 CCA LEXIS 9, at *27, 30–31 (N.M. Ct. Crim. App. 28 Jan. 2000) (unpub.) (finding "without merit" the assignment of error that a non-unanimous vote violated appellant's constitutional rights under the Equal Protection Clause); *United States v. Garrett*, No. 20200028, 2021 CCA LEXIS 135, at *21 (N.M. Ct. Crim. App. 30 Mar. 2001) (summarily affirming appellant's finding and sentence when he raised this issue as a violation of his Sixth Amendment rights); *United States v. Albarda*, No. ACM 39734, 2021 CCA LEXIS 347 (A.F. Ct. Crim. App. 7 Jul. 2021) (same); *United States v. Brown*, No. ACM 39728, 2021 CCA LEXIS 414 (A.F. Ct. Crim. App. 16 Aug. 2021) (same).

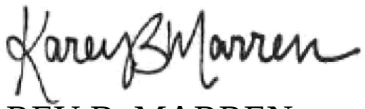
Finally, this is "characteristic of an erroneous practice which is likely to recur," and therefore it justifies the writ of prohibition. *Labella*, 15 M.J. at 229 (quoting *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1257 (10th Cir. 1979)). Indeed, the Government Appellate Division has already received notice of a similar ruling

at an upcoming court-martial before this military judge, and it expects an additional writ to follow.

In sum, granting a writ of prohibition would serve the interests of this court by "confin[ing] an inferior court to a lawful exercise of its prescribed jurisdiction." *Roche*, 319 U.S. at 26. Accordingly, this case merits the "extreme measure" of a writ of prohibition in order to "correct [the] erroneous ruling[]." *United States v. Morris*, ARMY MISC 20180088, 2018 CCA LEXIS 192, at *13 (Army Ct. Crim. App. 18 Apr. 2018) (mem. op.).

Conclusion

WHEREFORE, the United States respectfully asks this court grant this writ of prohibition, preventing the military judge from issuing his unanimous verdict instruction.



KAREY B. MARREN
CPT, JA
Branch Chief, Government
Appellate Division

CYNTHIA A. HUNTER
CPT, JA
Appellate Attorney,
Government Appellate Division

CRAIG J. SCHAPIRA
LTC, JA
Deputy Chief,
Government Appellate Division

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

Government Appellate Exhibit

1

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
Dial, Andrew J.		LTC	O-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Alpha Company, Allied Forces North Battalion, United States Army North Atlantic Treaty Organization Brigade, APO AE 09752	02 June 2001	Indef

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$9,556.00	$0.00	$9,556.00	NONE	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 134.

THE SPECIFICATION: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, commit indecent conduct, to wit: after providing his sixteen-year-old stepdaughter with alcohol, enter the hotel room she shared with Miss O.D. with a cell phone flashlight on, lift the covers of put his hand on her side, and then move his hand under her clothes toward her breasts, when he believed she was asleep, and that, under the circumstances, such conduct was of a nature to bring discredit upon the armed forces.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 120.

SPECIFICATION 1: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, touch the breast of with Lieutenant Colonel Andrew J. Dial's body part, to wit: his hand, with an intent to arouse and gratify the sexual desire of himself, without the consent of

SPECIFICATION 2: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, touch the vulva of with Lieutenant Colonel Andrew J. Dial's body part, to wit: his hand, with an intent to arouse and gratify the sexual desire of himself, without the consent o

SPECIFICATION 3: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, commit a sexual act upo by penetrating vulva with Lieutenant Colonel Andrew J. Dial's body part, to wit: a finger, with an intent to arouse and gratify the sexual desire of himself, without the consent of

(SEE CONTINUATION SHEET)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
Peliciano, Teodoro J.	O-3	Alpha Company, Allied Forces North Battalion

d. SIGNATURE OF ACCUSER

e. DATE (YYYYMMDD) 20210406

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 6th day of April, 2021, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either haspersonal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

LTC Benjamen J. Perry
Typed Name of Officer

O-5
Grade

Signature

21st Theater Sustainment Command
Organization of Officer

Article 136(a)(1), UCMJ
Official Capacity to Administer Oath
(See R.C.M. 307(b)_ must be commissioned officer)

12. On 6 April, 2021, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

Teodoro J. Feliciano
Typed Name of Immediate Commander

O-3
Grade

Signature

Alpha Company, Allied Forces North Battalion
Organization of Immediate Commander

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1445 hours, 6 Apr, 2021 at _____
Designation of Command or

Allied Forces North Battalion
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [1] _____

Gretchen J. Gardner
Typed Name of Officer

O-5
Grade

Signature

Commander
Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE (YYYYMMDD)
HQ, 21st Theater Sustainment Command	Kaiserslautern, Germany	20210820

Referred for trial to the General court-martial convened by Court-Martial Convening OrderCorrected Copy Number 7, this headquarters dated 7 April 2021, subject to the following instructions: [2]

By Command of Brigadier General James M. Smith
Command or Order

Brent R. Habley
Typed Name of Officer

O-4
Grade

Signature

Chief, Military Justice
Official Capacity of Officer Signing

15. On 20 August, 2021, I (caused to be) served a copy hereof on (each of) the above named accused.

Brandon A. Tower
Typed Name of Trial Counsel

Signature

O-3
Grade or Rank of Trial Counsel

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken.
2 - See R.C.M. 601(e) concerning instructions. If none, so state.

DD FORM 458 (BACK), MAY 2000

CONTINUATION SHEET, DD Form 458 – LTC Andrew J. Dial, 485-94-9077, U.S. Army, Alpha Company, Allied Forces North Battalion, United States Army North Atlantic Treaty Organization Brigade, APO AE 09752

Item 10 Continued:

CHARGE III: Violation of the UCMJ, Article 80.

THE SPECIFICATION: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, attempt to commit the offense of sexual assault upon by penetrating her vulva with his body part with an intent to arouse and gratify his sexual desire, without her consent and when he believed she was asleep, in that Lieutenant Colonel Andrew J. Dial did certain acts, to wit: entered the hotel room with a cell phone flashlight on; walked past Miss O.D.'s bed to the far side of bed; and lifted the covers off o

(END OF CHARGES)

Government Appellate Exhibit

2

IN A GENERAL COURT MARTIAL
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY

UNITED STATES OF AMERICA **v.** **Dial, Andrew J.** **LTC, U.S. ARMY** **Alpha Company,** **Allied Forces North Battalion,** **United States Army North Atlantic Treaty** **Organization Brigade, APO AE 09752**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: UNANIMOUS VERDICT** **15 November 2021**

RELIEF SOUGHT

The Defense in the above case respectfully moves this Court to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly. This motion is made pursuant to the Fifth Amendment to the United States Constitution; the Sixth Amendment to the United States Constitution; Rules for Courts-Martial (RCM), 906, 920, and 921; and applicable case law. If this Court does not grant this motion, the Defense requests that the Court provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names.

HEARING

The Defense does not request an Article 39(a) session to present oral argument for this motion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense has the burden of persuasion and proof on any factual matters by a preponderance of the evidence. R.C.M. 905(c)(1). However, the "burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for the different rule[.]" *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012).

FACTS

LTC Dial is charged with one specification of indecent conduct (Art. 134, UCMJ), three specifications of Article 120, UCMJ, and one specification of Article 80, UCMJ, (attempted sexual assault).

WITNESSES/EVIDENCE

The Defense will rely on the charge sheet.

LEGAL AUTHORITY AND ARGUMENT

In *Ramos v. Louisiana*, 206 L. Ed. 2d 583 (2020), the Supreme Court recently held that "[t]here can be no question . . . that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." *Id*. at 591. The Court's decision involved two cases out of the states of Louisiana and Oregon. Both states allowed convictions for serious offenses without a unanimous verdict, requiring a concurrence of 10 of 12 jurors. In reaching its holding, a majority of the Court agreed that "[t]he text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial." *Id*. at 589. After discussing the common law origins of the unanimous jury verdict, a majority of the Court concluded that "at the time of the [Sixth] Amendment's adoption, the right to

a jury trial *meant* a trial in which the jury renders a unanimous verdict." *Id*. at 595.

The Defense acknowledges that military appellate courts have repeatedly stated that "[t]he Sixth Amendment right to trial by jury does not apply to courts-martial." *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002). *See also United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001) ("The Sixth Amendment right to trial by jury does not apply to courts-martial."); *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) ("The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial."); *United States v. Curtis*, 32 M.J. 252, 267 (C.M.A. 1991) ("Appellant recognizes that courts-martial are not subject to the jury-trial requirements of the Sixth Amendment[.]").

However, due to the combination of the Supreme Court's recognition of how fundamental the unanimous verdict is to the American scheme of criminal justice and the Supreme Court's recognition of how trials by court-martial have gradually changed to be truly judicial in character, the law supports the conclusion that the unanimity requirement, an essential element of the right to a trial by a fair and impartial jury, applies to courts-martial for serious offenses. In light of *Ramos v. Louisiana*, the Defense is raising three distinct objections to allowing a non-unanimous verdict for the conviction of a serious offense at this court-martial: Sixth Amendment; Due Process Clause of the Fifth Amendment; and Equal Protection under the Fifth Amendment. While readily recognizing that *Ramos* was decided upon the Sixth Amendment right to a trial by jury, to the extent this Court finds that none of the elements of the right to a trial by jury apply to courts-martial, the Defense also separately objects on Fifth Amendment grounds, which the Supreme Court was not asked to consider.

Sixth Amendment

A full understanding of the *Ramos* opinion requires a review of the text of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Note that the text of the Sixth Amendment says nothing about unanimity. The unanimity requirement has been read into the text based upon a historical understanding of trials by jury at the time the amendment was adopted.

The *Ramos* opinion anchors the right to unanimity in a historical understanding of the text of the Sixth Amendment's guarantee to an "impartial jury." The Defense understands that courts have previously held there is no Sixth Amendment right to trial by jury in courts-martial. However, the origins of these rulings stem from cases that were decided during Reconstruction after the Civil War and in the midst of World War II, within the context of military commissions rather than courts-martial. Given the significant changes to the military justice system since that time, and the fact that over time every other right under the Sixth Amendment has been found to apply at courts-martial, the law now supports the requirement of unanimity for the conviction of serious offenses[1] at courts-martial.

[1] The Supreme Court provided a standard for determining whether an offense is serious or petty. "An offense carrying a maximum prison term of six months or less is presumptively petty, unless the legislature has authorized additional statutory penalties so severe as to indicate the legislature considered the offense serious." *Lewis v. United States*, 518 U.S. 322, 326 (1996).

In those cases where military appellate courts have determined that the Sixth Amendment's guarantee of a jury trial does not apply to courts-martial, they have routinely relied on the Supreme Court's decisions in *Ex parte Milligan*, 71 U.S. 2 (1866) and *Ex parte Quirin*, 317 U.S. 1 (1942). In *Milligan*, which was a case that arose during the Civil War but was not decided until after its conclusion, Mr. Milligan – an active member of the Sons of Liberty, a group seeking to overthrow the United States government – was arrested for conspiracy against the United States and other offenses. After a trial by a military commission in Indiana, he was convicted and sentenced to be hanged. However, the Supreme Court held that trying a civilian in a military commission, under the circumstances that existed at that location and time, was a denial of his right to trial by jury under the Sixth Amendment. *Milligan*, 71 U.S. at 130. In reaching that conclusion, the Court contrasted the status of a civilian with that of a person serving in the military, who surrenders his right to be tried in a civil court. *Id*. at 123. The Court went on to provide this often-quoted dictum: "[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Id*. The Court did not explain that inferential leap about the intent of the framers, besides observing that "[t]he discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts." *Id*.

Quirin also involved a military commission. During World War II, the FBI arrested several German nationals, and one individual who arguably had a claim to United States citizenship, who traveled by submarine to the United States as part of a conspiracy to commit sabotage and espionage in support of the war effort of the

German Reich. The Court held that "the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission." *Id*. at 40. The *Quirin* Court explained that, because the Fifth Amendment expressly excepts "cases arising in the land or naval forces," such cases "are deemed excepted by implication from the Sixth [Amendment]." *Id*. The Court further noted that this exception "was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different – to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in civil courts." *Id*. at 43. However, this language from *Quirin* is dicta, and the justices on the *Milligan* and *Quirin* Courts would not even recognize the current military justice system. Moreover, *Quirin* has since been described as "not this Court's finest hour" and in light of the history behind the ultimate resolution of the case, should be viewed with a skeptical lens. *Hambdi v. Rumsfeld*, 542 U.S. 507, 569 (Scalia, J., dissenting).

Since *Quirin* was decided, however, the Supreme Court has entertained the possibility that at least some clauses of the Fifth and Sixth Amendments apply to courts-martial. For example, in *Middendorf v. Henry*, 425 U.S. 25 (1976), it was tasked with determining whether or not servicemembers maintained a right to counsel at summary courts-martial under either the Fifth or Sixth Amendments. The Court ultimately concluded that no such right existed under these amendments, but based its conclusion on the unique nature of summary courts-martial and made several observations regarding the demands of the military justice system in different proceedings.

At the time the Court decided *Middendorf*, it stated, "The question of whether an

accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved." *Id*. at 33. The Court noted that "[d]icta in *Ex parte Milligan* said that 'the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.'" *Id*. at 33-34 (citation omitted). The Court also cited to *Quirin*'s comment that cases arising out of the armed forces "are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth." *Id*. at 34. However, the Court concluded that it was "unnecessary in this case to finally resolve the broader aspects of this question, since we conclude that even were the Sixth Amendment to be held applicable to court-martial proceedings, the summary court-martial provided for in these cases was not a 'criminal prosecution' within the meaning of that Amendment." *Id*. However, the Court in *Middendorf* also saw fit to point out that "the Sixth Amendment makes absolutely no distinction between the right to a jury trial and the right to counsel." *Id*. at 32 n.13.

Since then, not only has the Sixth Amendment right to counsel question been squarely resolved in favor of an accused servicemember, but so has every other protection afforded by the Sixth Amendment, except the right to a jury trial. A plain reading of the text of the Sixth Amendment reveals that it confers eight distinct protections: (1) the right to a speedy trial, (2) the right to a public trial, (3) the right to an impartial jury, (4) the right to a jury of the state and district wherein the crime allegedly occurred, (5) the right to be informed of the nature and cause of the accusation, (6) the right to be confronted with witnesses against the accused, (7) the right to compulsory process for obtaining favorable witnesses, and (8) the right to counsel.

Of these eight rights contained within the text of the Sixth Amendment, the Court of Appeals for the Armed Forces (CAAF) and its predecessor court have determined that six of them explicitly apply to courts-martial and are grounded in the Sixth Amendment itself rather than some other regulatory, statutory, or constitutional provision. An accused is entitled to a speedy trial pursuant to the Sixth Amendment separate and apart from the protections afforded by Article 10, UCMJ. *See* e.g., *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014). An accused is entitled to a public trial pursuant to the Sixth Amendment. *See United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) ("Without question, the sixth amendment right to a public trial is applicable to courts-martial."). An accused is entitled to rely upon the guarantees of the Sixth Amendment's confrontation clause. *See* e.g., *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010) (expressly and repeatedly citing to the Sixth Amendment's confrontation clause). An accused is entitled to the right to be informed of the nature and cause of the accusation for which he faces a court-martial. *See United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (applying the protections of the Fifth and Sixth Amendments to set aside convictions under Article 134, UCMJ). An accused is entitled to the right of compulsory process under the Sixth Amendment. *See United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) ("Under the Compulsory Process Clause a defendant has a 'right to call witnesses whose testimony is material and favorable to his defense.'") (quoting *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)). An accused is entitled to counsel under the Sixth Amendment. *See United States v. Watternbarger*, 21 M.J. 41, 43 (C.M.A. 1985) (discussing when the Sixth Amendment right to counsel attaches in the military). An accused is likewise entitled to the *effective assistance* of counsel

under the Sixth Amendment. *See United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) ("The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel."). As will be discussed below, CAAF has repeatedly stated that an accused has a constitutional right, as a matter of due process, to a "fair and impartial panel." *See United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005); *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). The only Sixth Amendment right that CAAF and its predecessor court have not recognized as applying to courts-martial is the right to a jury of the state and district wherein the crime allegedly occurred.

In sum, the evolution of courts' understanding of the applicability of the Sixth Amendment to courts-martial has evolved considerably since *Quirin* and *Milligan* to the point that their logic regarding the applicability of the Sixth Amendment no longer prevails. This point is most apparent in a footnote in *Reid v. Covert*, 354 U.S. 1 (1957), wherein the Court cited *Quirin* as the basis for the grand jury clause preclusion being read into the Sixth Amendment while simultaneously asserting that similar logic compelled the conclusion the double-jeopardy clause of the Fifth Amendment also does not apply. *Id*. at 37 n.68. If the logic of the latter has been abandoned, there is no reason that same logic should continue to prevail with respect to the right to juror unanimity.

This evolution of increasingly applicable constitutional rights has closely tracked the increasing convergence of contemporary courts-martial and civilian criminal prosecutions. This phenomenon was most recently recognized in *Ortiz v. United States*, 138 S. Ct. 2165 (2018), where the evolving character of the modern day court-martial

and its newfound likeness to state and federal criminal courts was dispositive to the Court's conclusion it was merely exercising appellate jurisdiction when reviewing cases emerging from the CAAF. In holding that it did have appellate jurisdiction, and that it was not exercising original jurisdiction, the Supreme Court reasoned that the military justice system's essential character is, in a word, "judicial." *Id*. at 2174. The Court explained that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Id*. (citing 1 D. Schlueter, *Military Criminal Justice: Practice and Procedure* §1-7, p. 50 (9th ed. 2015) (Schlueter)).

The Court also stated, "The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions we review. Although their jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service." *Id*. Moreover, the jurisdiction to try various crimes "overlaps significantly with the criminal jurisdiction of federal and state courts." *Id* at 2174-75. Finally, "[t]he sentences meted out are also similar[.]" *Id* at 2175.

The majority in *Ortiz* also took aim at the dissent's characterization of courts-martial as a function of mere military command. *Id*. Instead, the majority adopted the position that courts-martial exercise judicial power "of the same kind wielded by civilian courts." *Id*. In its opinion, the Court discussed its 1864 decision in *Ex parte Vallandigham*, 68 U.S. 243, wherein it "held that it lacked jurisdiction over decisions of a temporary Civil War-era military commission." *Id*. at 2179. The majority distinguished *Vallandigham* by explaining that such a case "goes to show that not every military tribunal is alike." *Id*.

Today's courts-martial not only stand in stark contrast to their ancestors which existed in 1866 and 1942, but they certainly reflect an entirely different system than a military commission – the type of tribunal from which *Milligan* and *Quirin* arose.

Justice Kagan's description of the judicial character of courts-martial is in stark contrast to how the Court viewed courts-martial in *Milligan*, *Quirin*, and *Middendorf*. In 1957, on its way to holding that it was unconstitutional to prosecute United States citizen-dependents overseas under the UCMJ, the Supreme Court clearly articulated the way it viewed the character of the court-martial. "Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice." *Reid*, 354 U.S. at 38. As another commenter recognized, "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969). Although the same term of "court-martial" is used to refer to the tribunal that tried cases arising out of the armed forces at the time of the Bill of Rights as well as now, the characteristics of that tribunal has changed drastically over time. It is more than a difference in degree; it is a difference in kind.

The current court-martial is more akin to a civilian federal criminal trial than it is to a court-martial of the late Eighteenth Century. Focused on military offenses necessary to maintain discipline, the Articles of War at the time of the Bill of Rights authorized flogging as one of the punishments to be adjudged by a court-martial. *See* Article 3 of Section XVIII, Articles of War (1776) ("nor shall more than one hundred lashes be inflicted on any offender, at the discretion of the court-martial"). Until the Twentieth

Century, the court-martial was presided over not by a military judge but by the president of the court-martial, who was one of the officers on the panel. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 248-51 (2d ed. 1896). As another example, until it was amended in 2014, Article 60(c)(1) of the Uniform Code of Military Justice stated, "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority." That provision was deleted, and Congress added restrictions to render the convening authority virtually powerless to modify the findings and sentence of a court-martial. Also, as of 1 January 2019, sentences no longer require the approval of the convening authority to be executed, and the judge enters the judgement of the court in the record of trial. *See* Articles 60a-60c, UCMJ. As Congress has taken away the power of the commander in the military justice system, Congress and the appellate courts have provided many of the procedural protections that exist in civilian criminal trials.[2] Over time, these developments have changed the character of the court-martial from a military tribunal that is a disciplinary tool of the commander into a court that is truly judicial in character. This proposition that courts-martial now mirror federal and state civilian criminal trials is also reflected in the comprehensive reforms brought on by the Military Justice Act of 2016, which were effective on 1 January 2019.

One of the increasingly "judicial" components of courts-martial has been the increase in jurisdictional breadth such that "courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to

[2] Congress has directed that the President's regulations on pretrial, trial, and post-trial procedures for courts-martial shall "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," to the extent the President considers practicable and not inconsistent with the UCMJ. Art. 36(a), UCMJ.

military service." *Ortiz*, 138 S. Ct. at 2174. A comparison of the crimes enumerated in the Articles of War in the late Eighteenth Century with those enumerated in the current UCMJ demonstrates a vast expansion of the scope of non-military offenses. As the Supreme Court observed in *Reid*, "The jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." 354 U.S. at 21.

Accordingly, to the extent that *Milligan* and *Quirin* relied on the logic of "rough justice" applied to a narrow class of military-specific offenses, that logic no longer applies. The right to trial by jury "ranks very high in our catalogue of constitutional safeguards." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (holding that Congress cannot subject a former airman, who has been wholly separated from service, to trial by court-martial). This protection should not be lightly abrogated, and any implied exception to the jury trial right rooted in dicta from a mid-nineteenth century case no longer meets that high burden. As the Supreme Court recognized in *Toth*, the power to authorize trial by court-martial, and thereby abrogate the full panoply of otherwise available constitutional rights, should be limited to "'*the least possible power adequate to the end proposed*.'" *Id*. at 23 (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821)). As the "end proposed" has transitioned to that of a traditional civilian criminal trial, it is no longer constitutional to deprive Soldiers of the right to a unanimous verdict.

To the extent that CAAF's pre-*Ramos* cases that insisted that the Sixth Amendment

right to a trial by jury and all of its elements do not apply to courts-martial relied on *Milligan* and *Quirin*, the true character of a court-martial has changed tremendously since then. Considering that *Ortiz* has reflected a willingness to depart from rules adopted within the context of military commissions and its simultaneous recognition of the fact that our system has evolved to mirror its state and federal counterparts, servicemembers are entitled under the Sixth Amendment to a unanimous verdict before being convicted of a serious offense at a court-martial. The Supreme Court, in *Ramos*, made it clear that the unanimity requirement is an essential element of the right to trial by jury. *Ramos*, 206 L. Ed. 2d at 591. Also, it is so fundamental to the American scheme of justice that even the doctrine of *stare decisis* did not stop the Supreme Court from overruling its own precedent[3] and holding that the unanimity requirement for conviction of serious offenses applies equally to federal and state courts. *Id*. at 591-92. In order to satisfy the American sense of justice, the unanimity requirement must also apply to courts-martial for serious offenses. The right to a trial by jury, with all of its essential elements, does not have to be applied as a package deal. In the spirit of *Toth* and *Easton*, this Court can conclude the right to a jury composed of a fair cross-section of the community or to be tried in the district of the offense remain implausible with the purpose and requirements of contemporary courts-martial. On the other hand, there is no such reason to deprive Soldiers of the right to a unanimous verdict, particularly where every other component of the Sixth Amendment—many of which impose much

[3] When confronted with this same issue in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), a four-justice plurality concluded that unanimity's costs outweighed its benefits and questioned whether the Sixth amendment required unanimity, and a fifth justice agreed with the other four justices that the Sixth Amendment did require unanimity but concluded under a dual-track approach of incorporation through the Fourteenth Amendment that the right did not apply to the states. *Ramos*, 206 L. Ed. 2d at 592.

more onerous requirements on the command, *e.g.* right to counsel—have been found to apply as much to courts-martial as civilian criminal trials.

Due Process Clause under the Fifth Amendment

If this Court concludes that the accused has no *Sixth* Amendment right to a unanimous verdict during a trial by court-martial, the accused does have that right as a matter of due process under the Fifth Amendment. The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CAAF has repeatedly stated that an accused has a Fifth Amendment right, as a matter of due process, to an "impartial panel." *See United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.") (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). Just as the "impartial" element of the right to trial by jury applies through the Due Process Clause of the Fifth Amendment, so too the unanimity requirement applies through the Due Process Clause to courts-martial.

After the Supreme Court found in *Middendorf* that the summary court-martial was not a "criminal prosecution" within the meaning of the Sixth Amendment, as discussed above, the Court shifted its focus from the Sixth Amendment to the Due Process Clause

of the Fifth Amendment. 425 U.S. at 34. It recognized that, even in a summary court-martial, servicemembers "may be subjected to the loss of liberty or property, and consequently are entitled to due process of law guaranteed by the Fifth Amendment." *Id*. at 43. However, whether due process required the assistance of counsel "depends upon an analysis of the interests of the individual and those of the regime to which he is subject." *Id*. The Court expressed that it "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces" under the Constitution. *Id*. The Court reasoned that it "need only decide whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress." *Id*. at 44.

Middendorf concluded that the factors weighed against overturning Congress's determination that counsel was not required at a summary court-martial, because it is a brief, informal proceeding for relatively insignificant offenses, and the accused has the right to object to it. *Id*. at 45-48. The result of the analysis is very different for the unanimity requirement for courts-martial of serious offenses. The factors weighing in favor of requiring a unanimous verdict at courts-martial for serious offenses are extraordinarily weighty.

In the majority opinion in *Ramos*, Justice Gorsuch stated, "If the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Id*. at 590. The opinion described the unanimity requirement as "fundamental to the American scheme of justice." *Id*. at 591 (citing *Duncan v. Louisiana*, 391 U.S. 141, 148-50 (1968)). In her concurring opinion, Justice Sotomayor explained why it is so fundamental. "[T]he constitutional protection here

ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment." *Id*. at 605. If one member of the jury – or the court-martial panel – has a reasonable doubt after deliberations, then the prosecution's burden has not been met, and the government cannot convict and impose on an individual a serious deprivation of life, liberty, or property.

This interplay between the unanimity requirement and the beyond a reasonable doubt standard has been recognized in the federal courts for decades.

> An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950). Less than three years after the D.C. Circuit's opinion in *Billeci*, the Sixth Circuit Court of Appeals found occasion to offer similar sentiments.

> The humanitarian concept that is at the base of criminal prosecutions in Anglo-Saxon countries, and which distinguish them from those of most continental European nations, is the presumption of innocence which can only be overthrown by proof beyond a reasonable doubt. The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms. We are of the view that the right

> to unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt.

Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953). As the Sixth Circuit recognized, the unanimity of the verdict is inextricably interwoven with the burden of proof, and there can be no doubt about the importance of the reasonable-doubt standard at criminal trials. "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

In addition, as mentioned above, CAAF has more than once held that the accused has the right to a fair and impartial panel under the Due Process Clause of the Fifth Amendment. If that has any meaning, it surely includes a requirement that is fundamental to the American scheme of justice. The factors militating in favor of the unanimity requirement are extraordinarily weighty, and they do demand overturning any determination by Congress, in Article 52(a)(3), to permit the conviction of a serious offense at a court-martial without requiring a unanimous verdict.

The need for a unanimous verdict is even greater at a trial by court-martial for two reasons. First, the members of the court-martial panel are hand-picked by the convening authority. Art. 25, UCMJ. The defense does not argue that the accused is entitled under the Sixth Amendment to a jury composed of a fair cross-section of the community, which would be inconsistent with the nature of a court-martial. However, the

convening authority's selection of panel members has been an aspect of the court-martial that favors the prosecution and has been criticized for decades. Correcting that was one of the main recommendations of the Cox Commission in 2001.

> There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits – indeed, requires – a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority.

Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001) page 7.

Second, Article 52(a)(3) requires only three-fourths of the eight panel members in a general court-martial to convict. This required concurrence of just three-fourths in a court-martial is a much greater deprivation of due process than the defendants faced in Louisiana or Oregon prior to *Ramos*. Those state systems used a 12-person jury and required a minimum of 10 votes in order to convict, so their 83% required concurrence was higher than the 75% required concurrence at a court-martial. Accordingly, not only is the lack of unanimity a problem from a burden of proof standpoint, but the convening authority's selection of the members and the lower percentage of required concurrence exacerbate the problem.

Moreover, as CAAF stated in *Easton*, the "burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for the different rule[.]" 71 M.J. at 175. On the issue of unanimity, the prosecution cannot satisfy that burden, because denying that right to individuals who

volunteered to serve their country is not justified in any way by military exigency. This is not like *Parker v. Levy* where the Court noted how the military can criminalize conduct in a way that would be impermissible in the civilian world; rather, this is a matter of criminal procedure. Given the decision in *Ramos*, the military justice system is now the only system of criminal law within the United States that authorizes non-unanimous verdicts. The government is likely to present an argument of efficiency – with a deployable system of justice, criminal trials need to be conducted in an efficient manner. Ultimately, this boils down to a question of whether the Constitution permits Congress to lower the prosecution's burden to convict American servicemembers of a serious offense, simply for the sake of efficiency. Considering the interests on both sides, the individual's interest in the fundamental right of requiring unanimity before conviction of a serious offense, which is enjoyed by criminal defendants in all other criminal courts in the United States, is extraordinarily weighty and overcomes any determination that Congress made about the proper balance of individual rights in a court-martial.

Equal Protection under the Fifth Amendment

The Due Process Clause also guarantees equal protection under federal laws. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (finding that racial discrimination in the Washington, D.C. public schools violated due process of law protected by the Fifth Amendment, which does not have an Equal Protection Clause like the one in the Fourteenth Amendment); *United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) ("An 'equal protection violation' is discrimination that is so unjustifiable it violates due process.") (quoting *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985)). "For the government to make distinctions does not violate equal protection guarantees

unless constitutionally suspect classification like race, religion, or national origin are utilized *or unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly*. *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981) (emphasis added). When an equal protection claim does touch upon a fundamental right, it "may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest." *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting *Oregon v. Mitchell*, 400 U.S. at 238 (Brennan, White, and Marshal, JJ., writing separately)). In other words, the test in a "fundamental rights case" would be strict scrutiny.

In *United States v. Santiago-Davilla*, 26 M.J. 380 (C.M.A. 1988), the Court of Military Appeals (CMA) considered an equal protection objection within the context of a *Batson* challenge. The Court acknowledged that *Batson* "is not based on a right to a representative cross-section on a jury" (i.e., a Sixth Amendment right); rather, *Batson* emanates from "an equal-protection right to be tried by a jury from which no 'cognizable racial group' has been excluded." *Id*. at 389. Furthermore, the CMA explained the applicability of the right to equal protection to courts-martial. "This right to equal protection is a part of due process under the Fifth Amendment . . . and so it applies to courts-martial, just as it does to civilian juries." *Id*. at 390.

The right to a unanimous verdict before conviction of a serious offense is a fundamental right, and the government may overcome this claim only if it survives strict scrutiny. The government must establish a compelling and substantial interest and demonstrate that the burden of depriving the accused of the protection of the unanimity requirement is necessary to achieve that interest. The government will likely argue that

hung juries hinder the efficient resolution of courts-martial in a way that interferes with the military mission. In *Ramos*, the Supreme Court criticized its "badly fractured set of opinions" in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), which established the precedent that it overruled. The Court took issue with the fact that the *Apodaca* plurality "subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Ramos*, 206 L. Ed. 2d at 586. However, the Court also went on to question the cost-benefit analysis in *Apodaca*'s plurality decision.[4] "And what about the fact, too, that some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries?" *Id*. at 592.

In addition, the composition of the court-martial panel actually makes it less prone to hung juries, if guilt has been proven beyond a reasonable doubt. The court-martial panel has been described as a blue-ribbon panel, because the convening authority selects the members who, in the convening authority's opinion, are the best qualified under the Article 25 criteria of age, education, training, experience, length of service, and judicial temperament. This homogenous group of educated and experienced members is far less likely to have individuals who are unreasonable or closed to the persuasion of logic. These educated and experienced members are accustomed to receiving information and listening to different viewpoints before making important

[4] This faulty analysis in *Apodaca* and *Johnson* and the Supreme Court's prior refusal to hold that the Constitution requires a unanimous verdict by a jury, which has been overturned, had been cited and relied on by appellate courts in rejecting the application of the unanimity requirement at courts-martial. *See e.g.*, *Mendrano v. Smith*, 797 F. 2d 1538, 1545 (10th Cir. 1986) (deferring to the "policy preference by Congress for lessening the hung-jury problem in courts-martial").

decisions.[5] If any one of the eight members of a general court-martial has a reasonable doubt, then the prosecution has failed to prove guilt beyond a reasonable doubt, and a criminal conviction and punishment based on that would violate due process. *See*, *e.g.*, *Hibdon*, 204 F.2d at 838. Furthermore, the lower number of eight versus twelve makes it easier for the prosecution in the military to achieve a unanimous verdict and requires fewer court-martial members who are diverted from their military mission.

In those rare cases where a trial by court-martial in an active combat zone results in a "hung jury," the Army has several options: order an immediate rehearing; transfer the case to a command that is not decisively engaged in combat; wait until the operational tempo decreases before ordering a rehearing; order alternative disposition; or dismiss the charges. The inconvenience to the prosecution for some rare situations does not justify denying all servicemembers of the protection of the requirement for a unanimous verdict for conviction of a serious offense, a protection that is granted in all other criminal trials in the United States. Because depriving servicemembers of this fundamental right is not necessary to achieve a compelling interest, Article 52(a)(3) does not survive strict scrutiny. This is especially true in cases, such as this one, involving non-military offenses that could be prosecuted in a civilian court with all the fundamental rights guaranteed by the Constitution. When it is not necessary, depriving a servicemember at a court-martial of a fundamental right that is constitutionally

[5] In *Sanford v. United States*, 586 F.3d 28 (D.C. Cir. 2009), the D.C. Circuit found that the "differences between civilian jurors and court-martial members" was significant to the challenge of the constitutionality of a conviction by four members at a special court-martial. *Id*. at 308. Although having only four jurors would be impermissible, a court-martial with only four members is permissible, because the court-martial members are selected as best-qualified rather than a cross-section of society. *Id*. at 310. While the qualifications of a court-martial panel allow for fewer members, they also remove any fears about hung juries based upon unreasonable doubts.

guaranteed in every other criminal trial in the United States is unacceptable in the American scheme of justice.

Announcement of Unanimity

If this Court does not grant this motion, the Defense requests that the Court provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names. This announcement of unanimity is consistent with Article 51 and RCM 922. The announcement concerning unanimity does not reveal any member's vote or deliberations, so it is consistent with Article 51(a)'s requirement for a secret ballot. It would be similar to what is expressly required by RCM 922(b) for capital offenses. Without disclosing any member's deliberations or vote, it is not prohibited polling under RCM 922(e). Finally, as a matter of judicial economy, an announcement of unanimity would moot any appeal based on the issue in this motion.

CONCLUSION

In summary, Americans tolerated a certain level of injustice at traditional courts-martial when they were a disciplinary tool of commanders. However, as the Supreme Court recognized in *Ortiz*, courts-martial have transformed into courts that are judicial in character rather than disciplinary tools of the commander. Congress has recognized this as it has gradually reduced the role of the commander in courts-martials for serious offenses. As modern courts-martial are judicial in character, they must adhere to the American scheme of justice. Because the Supreme Court recently overturned its own precedent and held that the unanimity requirement applied to the states because it was fundamental to the American scheme of justice, the United States Constitution requires

a unanimous verdict for the conviction of a serious offense at a court-martial. This truth is inescapable, whether approached through the Sixth Amendment, due process under the Fifth Amendment, or equal protection under the Fifth Amendment.

Based on the above, the Defense respectfully moves this Court to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly. If this Court does not grant this motion, the Defense requests that the Court provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names.

MIHAIL.ROBERT.VALERIAN.1521101063 Digitally signed by MIHAIL.ROBERT.VALERIAN.1521101063 Date: 2021.11.15 20:59:57 +01'00'

ROBERT MIHAIL
CPT, JA
Trial Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have served an electronic copy of the above on the court and trial counsel on 15 November 2021.

MIHAIL.ROBERT.VALERIAN.1521101063 Digitally signed by MIHAIL.ROBERT.VALERIAN.1521101063 Date: 2021.11.15 20:59:19 +01'00'

ROBERT MIHAIL
CPT, JA
Trial Defense Counsel

Government Appellate Exhibit

3

IN A GENERAL COURT-MARTIAL
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY

UNITED STATES OF AMERICA **v.** **DIAL, Andrew J.** **LTC, U.S. Army** **Alpha Company, Allied Forces North Battalion, United States Army North Atlantic Treaty Organization Brigade,** **APO AE 09752**	))))))))	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF: UNANIMOUS VERDICT** **18 November 2021**

RELIEF SOUGHT

The Government moves this Court to deny the Defense's motion to require a unanimous verdict for a finding of guilty.

HEARING

The Government does not request an Article 39(a) session to present oral argument for this motion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense has the burden of persuasion and proof on any factual matters by a preponderance of the evidence. RCM 905(c)(1).[1]

[1] The Defense's citation to *United States v. Easton* is inapplicable in this case. *Easton* described the burden on appeal and described it as: "The constitutionality of a statute is a question of law we review de novo." *United States v. Easton*, 71 M.J. 168, 171 (C.A.A.F. 2012). The language the Defense cites to is a citation by the court to *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976) (a case where statute and regulation were silent as to whether a Supreme Court ruling on a constitutional right applied similarly in the military context). At the trial court level, RCM 905(c)(1) supplies the correct burden.

LAW AND ARGUMENT

Sixth Amendment

According to binding precedent from the Supreme Court and C.A.A.F., there is no Sixth Amendment right to trial by jury in courts-martial. *Ex Parte Quirin*, 317 U.S. 1 (1942); *United States v. Wiesen*, 57 M.J. 48 (C.A.A.F. 2002). "The constitutional question here relates to [whether a unanimous jury verdict is required] in the military context. This is an issue addressed by case law, the Uniform Code of Military Justice ("UCMJ"), and the Rules for Courts-Martial ("RCM"), not the text of the constitution." *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012). While *Easton* dealt with when the Constitutional protection against double jeopardy attaches, the logic applies equally to the Sixth Amendment right to trial by jury.

Looking then to case law, military appellate courts have repeatedly stated that "[t]he Sixth Amendment right to trial by jury does not apply to courts-martial." *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002). *See also United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001) ("The Sixth Amendment right to trial by jury does not apply to courts-martial."); *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) ("The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial."); *United States v. Curtis*, 32 M.J. 252, 267 (C.M.A. 1991) ("Appellant recognizes that courts-martial are not subject to the jury-trial requirements of the Sixth Amendment[.]"). Unanimous panel verdicts are not required in Courts-Martial. *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007); *United States v. Rollins*, No. 201700039, 2018 CCA LEXIS 372, 25 (N-M. Ct. Crim. App. 2018)

The UCMJ does not require unanimous panel verdicts. "No person may be convicted of an offense in a general or special court-martial, other than…in a court-martial with members…by the concurrence of at least three-fourths of the members present when the vote is taken." Art. 52, UCMJ.

The Rules for Courts-Martial do not require unanimous verdicts either. "A finding of guilty results only if at least three-fourths of the members present vote for a finding of guilty." RCM 921(c)(2).

The opinion in *Ramos* itself supports the position that a panel at a court-martial is not a Sixth Amendment jury. While surveying the history of the right to trial by jury, the majority looks to 14th Century English Common law for the proposition that a conviction is required to "be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen" and "a verdict, taken from eleven, was no verdict at all." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020). The UCMJ, promulgated under Congress's power "[t]o make rules for the government and regulation of the land and naval forces" has, since its inception, applied different rules. U.S. Const. art. I, § 8. That is because the Sixth Amendment right to a trial by jury does not apply at courts-martial. *Wiesen*, 57 M.J. at 50, *Brown*, 65 MJ at 359. Unanimity is not required, three-fourths (formerly two-thirds) is sufficient to convict. Art. 52, UCMJ. Except in a capital case, twelve panel members are not required. RCM 501. In a general court-martial, eight members are sufficient. The court-martial panel is not composed of the accused's peers, in fact, the UCMJ provides that the panel should be senior in rank to the Accused. Art. 25(e)(1), UCMJ. The convening authority is required to detail members who are "best qualified for the duty by reason of age, education, training, experience,

length of service, and judicial temperament." Art. 25(e)(2), UCMJ. While *Ramos* dealt only with unanimity in deciding a verdict, the differences between a Sixth Amendment jury and a court-martial panel make clear that the holding in *Ramos* is inapplicable to courts-martial.

Due Process Clause under the Fifth Amendment

Congress establishes courts-martial procedures pursuant to its enumerated power to regulate the land and naval forces. "Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." *Weiss v. United States*, 510 U.S. 163, 177-178 (1994). "Judicial deference thus is at its apogee when reviewing congressional decisionmaking in [the area of military justice]." *Id*. "Our deference extends to rules relating to the rights of servicemembers[.]" *Id*. The test to be used in a due process challenge to a court-martial proceeding is whether the factors militating in favor of the claimed procedural right are so extraordinarily weighty as to overcome the balance struck by Congress. *Id*.

Congress struck a balance in the UCMJ where due process for an accused requires three-fourths of a panel in order to convict. UCMJ Art. 50(a)(2). A Supreme Court ruling that Louisiana and Oregon's jury voting scheme does not satisfy the Sixth Amendment is not so extraordinarily weighty in a military context where there is no Sixth Amendment to right to a trial by jury as to overcome that balance.

The Defense argues that the right to a unanimous verdict is a fundamental right triggering strict scrutiny analysis. As discussed above, the right to a trial by jury does

not apply at a court-martial. A long history of case law, statutes, and the rules for courts-martial bear this out. *Ramos* was decided on Sixth Amendment grounds as made applicable to the states through the Fourteenth Amendment. The implications for courts-martial are minimal given that there is no right to a jury trial in a court-martial. There is no fundamental right at issue and no suspect classification, therefore strict scrutiny analysis is not required. The proper test is that from *Weiss*, laid out above. Congress already struck a balance in the UCMJ. The recent decision in *Ramos*, a decision not considering the military context, does not overcome that balance.

Announcement of Unanimity

There is no need to deviate from the Military Judges' Benchbook in announcing the verdict in this case. RCM 922(b) does require an announcement of unanimity in a capital case if the finding was, in fact, unanimous but otherwise the rule is silent on announcing the vote. The fact that unanimity is to be announced specifically in a capital case implies that the President was aware of the ability to announce unanimity and deliberately chose to promulgate rules only requiring such an announcement in a capital case and in no others. Panel instructions in the Military Judges' Benchbook similarly differ between capital cases and non-capital cases. In non-capital cases the pattern instructions direct the members that either two-thirds or three-quarters of members, depending on when the case was referred, must concur in order to find the accused guilty. Dep't of Army Pam. 27-9, Military Judges' Benchbook (10 January 2020) (Unofficial Update), 69. In a capital case the pattern instructions require a finding of guilt by nine out of twelve votes and specifically provide for an announcement of

unanimity for a unanimous vote. *Id*. at 1846-1847. The Benchbook is not a binding source of primary law, but it is a guide to existing law. *United States v. Rush*, 51 M.J. 605, 609 (A. Ct. Crim. App. 1999) ("an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record"); *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) ("the Benchbook is intended to ensure compliance with existing law"); *United States v. Cornelison*, 78 M.J. 739, 745 (A. Ct. Crim. App. 2019) ("The Benchbook is not a source of law, but represents a snapshot of the prevailing understanding of the law, among the trial judiciary, as it relates to trial procedure…military judges are usually well-advised to follow the standard instructions in the Benchbook").

CONCLUSION

The Sixth Amendment Right to a trial by jury does not apply at courts-martial. Congress has provided rules borne out by case law on how a court-martial panel determines a verdict. There is no need to deviate from the law as established by Congress.

TABER HUNT
CPT, JA
Trial Counsel

Government Appellate Exhibit

4

United States Army Trial Judiciary
Fifth Judicial Circuit, Kaiserslautern, Germany

U N I T E D S T A T E S	)	
	)	
v.	)	**ORDER TO BRIEF SPECIFIED ISSUES RE: DEFENSE MOTION FOR APPROPRIATE RELIEF (UNANIMOUS VERDICT)**
DIAL, Andrew J. **LTC, U.S. Army** **A Co., Allied Forces North Bn.** **United States Army NATO Bde.** **APO AE 09752**	)	**17 DECEMBER 2021**

The Defense filed a motion requesting the Court to require the court-martial panel to vote unanimously for any findings of guilty. If the Court denies the request for a unanimous verdict, the Defense requests the Court require the president of the court-martial panel to announce whether the findings were unanimous or non-unanimous. The Government opposes the request. Neither party requested oral argument.

The Court finds that the parties' briefs do not adequately address certain aspects of this issue. Therefore the Court **ORDERS** the parties to file briefs addressing the following specified issues:

1. Did Ramos v. Louisiana, 140 S. Ct. 1390 (2020), overrule Johnson v. Louisiana, 406 U.S. 356 (1972)? If so, did it do so only with respect to the Johnson Court's decision regarding due process and the burden of proof, did it do so only with respect to the Johnson Court's decision regarding the Equal Protection challenge, or did it do so with respect to both? If Ramos did not overrule Johnson with respect to the Johnson Court's decision regarding the Equal Protection challenge, is that decision binding law on the Equal Protection issue raised before this Court?

2. Are service members and civilians "in all relevant aspects alike" (United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021)) for the purpose of unanimity of verdicts?

3. Does an accused have a constitutional due process right to a court-martial panel or only a constitutional right to panel impartiality if the accused exercises the statutory right to a court-martial panel? See United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001).

4. Do court-martial panels and juries serve the same or different purposes? If they serve the same purpose, is unanimity of verdicts a critical aspect of that purpose?

5. Does the Ramos opinion state that "impartiality" and "unanimity" are legal equivalents or, alternately, that "unanimity" is a critical aspect of "impartiality"? If so, does that have the same meaning in the context of court-martial panel impartiality?

6. Does Congress have a plausible reason for the non-unanimous verdict requirement?

7. If a unanimous verdict of guilty is required for courts-martial, is a unanimous verdict of acquittal also required?

The parties will file briefs no later than **31 December 2021**. There will be no Response or Reply briefs.

PRITCHARD.CHARLES.LESTER.JR.1064023086

Digitally signed by PRITCHARD.CHARLES.LESTER.JR.1064023086
Date: 2021.12.17 12:28:48 +01'00'

CHARLES L. PRITCHARD, JR.
COL, JA
Military Judge

Government Appellate Exhibit

5

IN A GENERAL COURT-MARTIAL
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY

UNITED STATES OF AMERICA **v.** **DIAL, Andrew J.** **LTC, U.S. Army** **Alpha Company, Allied Forces North Battalion, United States Army North Atlantic Treaty Organization Brigade, APO AE 09752**	)	**GOVERNMENT BRIEF ON SPECIFIED ISSUES RE: DEFENSE MOTION OF APPROPRIATE RELIEF (UNANIMOUS VERDICT)** **31 December 2021**

The Court ordered the parties to file briefs addressing seven specified issues regarding the Defense's motion requesting the Court to require the court-martial panel to vote unanimously for any findings of guilty, and should the Court deny that request, for it to require the president of the court-martial panel to announce whether the findings were unanimous or non-unanimous. The Government respectfully submits the following responses to the Court's specific questions.

1. Did Ramos v. Louisiana, 140 S. Ct. 1390 (2020), overrule Johnson v. Louisiana, 406 U.S. 356 (1972)? If so, did it do so only with respect to the Johnson Court's decision regarding due process and the burden of proof, did it do so only with respect to the Johnson Court's decision regarding the Equal Protection challenge, or did it do so with respect to both? If Ramos did not overrule Johnson with respect to the Johnson Court's decision regarding the Equal Protection challenge, is that decision binding law on the Equal Protection issue raised before this Court?

Ramos overruled *Johnson* with respect only to the *Johnson* Court's decision regarding due process and the burden of proof under the Sixth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020); *Johnson v. Louisiana,* 406 U.S. 356, 92 S. Ct. 1620 (1972). *Ramos* did not overrule *Johnson* in respect to the *Johnson*'s Court's decision regarding the Equal Protection challenge. Further, *Johnson* is not binding on the Equal Protection issue raised before this Court.

The Equal Protection issue in *Johnson* was whether the State may treat capital offenders differently from those charged with lesser crimes. *Johnson*, 406 U.S. 356. The distinction put under Equal Protection scrutiny in that case was the distinction between otherwise similarly situated capital offenders and non-capital offenders within the civilian criminal justice system. *Id.* Nowhere in *Johnson* was the distinction between otherwise similarly situated civilian defendants at civilian jury trial and military accused at military court-martial addressed. Congruently, the Equal Protection challenge in the present case says nothing of the distinction between capital and non-capital offenders at issue in *Johnson*. *Id.*

The Court's holdings in both *Ramos* and *Johnson* do not apply to military courts-martial. Rather, they apply to criminal jury trials. *Ramos*, 140 S. Ct. 1390; *Johnson*, 406 U.S. 356. The Equal Protection issue raised before this Court – whether it is a denial of the equal protection of the law to treat a service member accused at court-martial differently from a civilian defendant in a criminal jury trial – is distinct from the issue raised in *Johnson* – whether it was a denial of equal protection of the law for the State to treat capital offenders differently from those charged with lesser crimes. *Johnson*,

406 U.S. 356. The Court's holding in *Johnson* is neither binding on the issue at hand, nor is it applicable.

2. Are service members and civilians "in all relevant aspects alike" (United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021)) for the purpose of unanimity of verdicts?

Service members and civilians are not "in all relevant aspects alike" (*United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021)), for the purpose of unanimity of verdicts.

The military justice system and the civilian criminal justice system are distinct, and the former's jurisdiction over service members brands them unlike their civilian counterparts for the purpose of unanimity of verdicts. It is well-established that one's status as a military service member carries different protections and different procedural safeguards than those that exist in the civilian realm. *See Id.* at 780.

The *Ramos* Court made clear that unanimity of verdicts is central to the nature of the Sixth Amendment right to trial by jury. *Ramos,* 140 S. Ct. 1390. Therein, the Court stated that the very nature of a jury, as guaranteed by the Constitution and as molded by centuries of common law, includes unanimity. *Id*. The assertion that service members and civilians are in all relevant aspects alike, as applied to Equal Protection analysis, for the purpose of unanimity of verdicts, presupposes that both civilians and service members alike are entitled to the jury trial wherein unanimity is required. Within the context of the "military society," the right to a jury trial at a court-martial is not a

"fundamental right' under the Fifth Amendment. *See Parker v. Levy,* 417 U.S. 733, 743 (1974); *see also Begani*, 79 M.J. at 777 (N-M.C.C.A. 2020). "While there is no question the right to a grand jury and the right to a trial by jury are fundamental constitutional rights, they are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place." *Begani* at 776. A service member is by his or her very status as such "depriv[ed) of certain fundamental rights ... that is often the very nature of the profession of arms. *Id*. at 778.

There is precedent for military courts to find discrimination between service members and their similarly situated civilian counterparts to be justifiable*. See United States v. Akbar,* 74 M.J. 364, 406 (C.A.A.F. 2015*)* (holding Equal Protection was not violated when military members in capital cases did not receive the same death penalty protocols as civilians in federal courts). The court in *Akbar* stated, “[w]e do not find any unjustifiable discrimination in the instant case because Appellant, as an accused servicemember, was not similarly situated to a civilian defendant.” *Id*. at 406 (citing *Parker*, 417 U.S. at 743). Likewise, discrimination as to the provision of unanimous verdicts is justifiable based on an accused’s status as a service member and the differing rights, privileges, and procedures afforded him as such.

3. Does an accused have a constitutional due process right to a court-martial panel or only a constitutional right to panel impartiality if the accused exercises the statutory right to a court-martial panel? See United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001).

An accused does not have a constitutional due process right to a court-martial panel. In the armed forces, “there is no Sixth Amendment right to trial by jury in courts-martial.” See *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (*citing Ex Parte Quirin*, 317 U.S. 1, 39 (1942)); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)). *See also Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957) ("The exception in the Fifth Amendment has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.").

The Court in *Quirin* further held that military tribunals were exempted from the Sixth Amendment requirement for a jury trial and this deliberate exception extended "to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law." *Quirin*, 317 U.S.at 43.

An accused does have a right to trial by members, but that right derives from statute – specifically 10 U.S.C. § 829 (Article 29, UCMJ) – not from the Constitution. Should an accused elect to exercise his statutory right to a court-martial panel, however, he then has a constitutional (as well as a statutory) due process right for it to be a “fair and impartial” one. *See United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005); *Wiesen*, 56 M.J. 172, 174.

4. Do court-martial panels and juries serve the same or different purposes? If they serve the same purpose, is unanimity of verdicts a critical aspect of that purpose?

Court-martial panels and juries serve largely the same purposes, but juries lack one key purpose central to court-martial panels – the purpose of promoting the organization's primary fighting function.

Both juries and court-martial panels serve the purpose of acting as fair and impartial fact finders and verdict renderers. Prevention of "oppression by the Government by providing a safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge" (*Apodaca v. Oregon*, 406 U.S. 404 (1972) (internal quotations omitted)) is the province of both juries and court-martial panels alike. Public trust in the judicial system requires fairness and the appearance of fairness, regardless of civilian or military application. However, in a broader context, the military justice system is unique and distinct from the civilian system and must be free to remain different to serve its unique mission of preserving good order and discipline as a lethal fighting force.

In addition to serving the fact-finding and verdict-rendering purposes served by juries, though, court-martial panels also serve the distinct and fundamental purpose of promoting good order and discipline within the ranks of the armed forces. The military justice system exists, at its core, for the primary purpose of supporting the armed forces' ability to execute their larger primary purpose – to fight and win this country's wars. *Parker,* 417 U.S. at 743 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)). "[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Quarles*, 350 U.S. at 17. Executing courts-martial is

not the primary purpose of the armed forces, within which the military justice system wholly exists; consequently, courts-martial, and the rest of the military justice regime serve primarily to promote the military's ability to serve its primary fighting purpose. Such a purpose – ensuring good order and discipline within the community *in order to accomplish a larger concerted collective function* – is not the province of juries in the American civilian criminal justice system.

Charged with winning our nation's wars, commander must have tools to enforce good order and discipline, at home and on the battlefield. As such, the military justice system allows for panel members to be selected by the convening authority and need not be representative of a cross-section of society. While the specific role of the panel and jury are the same between the two systems, the broader purpose of the two systems are distinct and thus, variances are necessary to accomplish distinct goals. Requiring unanimity does not further the fair and impartial goal of a military panel and instead detracts from the military's need for swift justice. A unanimous verdict requirement will inevitably lead to hung juries in the military justice system. Hung juries significantly impair efficiency and effectiveness, returning accused back to their units and the time consuming, expensive process of trying them again, thus thwarting the central role of military justice. Because there is a difference in the broader context, unanimity of verdicts is not required to achieve a fair trial in the military system. Not only is unanimity of verdicts not a critical aspect of the distinct purposes served by court-martial panels, it stands in direct obstruction to their primary purpose of enabling fair but swift justice in furtherance of the military's ability to carry out its larger purpose.

5. Does the Ramos opinion state that "impartiality" and "unanimity" are legal equivalents or, alternately, that "unanimity" is a critical aspect of "impartiality"? If so, does that have the same meaning in the context of court-martial panel impartiality?

While the *Ramos* Court appears to state that "unanimity" is a critical aspect of "impartiality" in application to juries, it does not go so far as to declare "impartiality" and "unanimity" legal equivalents. *See Ramos*, 140 S. Ct. 1390.

As *Ramos* points out, the emergence of a unanimous jury emerged from 14th century English common law rooted in the idea that "the truth of every accusation...should...be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. *Id.* at 1395 (quoting W. Blackstone, Commentaries on the Laws of England 343 (1769)). Indeed, the "impartial jury" promised by the Sixth Amendment, and where the concept of unanimity is derived, guarantees that a defendant is judged by his equals and neighbors, indifferently chosen, and superior to all suspicion. Thus, impartiality complements unanimity in endowing the right to a jury trial, yet the two are not synonyms. Unanimity is the promise that all impartial jurors agree as to guilt before a defendant can be convicted. *Ramos* makes it clear that both impartiality and unanimity are key to the very nature of a jury verdict, but their joint necessity does not render them legal equivalents. *Id.*

Regardless of how the *Ramos* Court characterized "unanimity" and "impartiality," the legal meanings ascribed therein to those two words do not apply in the context of courts-martial. In *Ramos* the Court held the right to an impartial jury trial includes the

right to a unanimous verdict in order to convict the defendant. The Court's holding in *Ramos* is centered on the right to a civilian jury trial, which an accused in the military justice system does not possess. The Court's holding in *Ramos* does not apply to military courts-martial, and consequently its characterizations of the respective roles of "unanimity" and "impartiality" for a distinct entity (a jury) are not relevant to a panel. *See Id.*

6. Does Congress have a plausible reason for the non-unanimous verdict requirement?

Congress has two specific reasons for choosing not to subject military courts-martial to a unanimous verdict requirement: (1) to ensure the finality of verdicts, and (2) to circumvent unlawful command influence.

The military justice system has a uniquely strong interest in the finality of verdicts. One of the key purposes of the military justice system, as discussed above, is to promote good order and discipline within the ranks. Congress built the military justice system to instill discipline, for "[d]iscipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all." (G. Washington, letter to the captains of the Virginia Regiments, 1759). The finality of judgments in this system is especially important; the need to resolve cases quickly and efficiently without hung juries (or more appropriately, "hung panels") and the ensuing retrials is paramount in allowing the military writ large to focus on its primary fighting function.

Additionally, the specter of unlawful command influence in the military justice system is a unique condition against which Congress chose to protect by enabling non-unanimous verdicts. As the Army Service Court explained in *United States v. Mayo*, Congress legislated non-unanimous verdicts in the modern UCMJ to guard against unlawful command influence. *Mayo*, 2017 CCA LEXIS 239, at *20. Unlawful command influence is the "mortal enemy" of military justice. *United States v. Thomas*, 22 M.J. 388, 393 (1986). The availability of non-unanimous verdicts (and the lack of an announcement by the court identifying them where they occur) protects the anonymity of panel members' votes, and thus protects them from potential reprisal should their vote not coincide with their superiors' own wishes. Should panel members be given reason to fear the possibility of such reprisal, by removing the veil of anonymity provided by non-unanimous verdicts, the threat of unlawful command influence would loom much larger in the military justice system.

7. If a unanimous verdict of guilty is required for courts-martial, is a unanimous verdict of acquittal also required?

A unanimous verdict of guilty is not required for courts-martial, and neither is a unanimous verdict of acquittal.

All States except Oregon require unanimity for an acquittal. Similar to how unanimity for conviction reduces the error rate for a wrongful conviction, unanimity for acquittal reduces the error rate for a wrongful acquittal. Society has an equal interest in ensuring the innocent go free and the guilty punished. There are clear benefits within

the civilian criminal justice system to requiring unanimous acquittals, especially where unanimous guilty verdicts are required.

On the other hand, imposing unanimity for both convictions and acquittals will inevitably yield higher rates of hung juries and mistrials. This efficiency concern is uniquely salient regarding the regulation of military courts-martial and their purpose of executing fair but swift justice. The possibility of creating hung juries is justification for Congress's judgment that a non-unanimous verdict requirement is necessary to regulate the land and naval forces. The purpose of military justice is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MANUAL FOR COURTS-MARTIAL (MCM), United States (2019 ed.), Part I, ¶ 3

Hung juries significantly impair efficiency and effectiveness, returning accused back to their units and the time consuming, expensive process of trying them again. Congress appropriately struck a fair balance by giving them a shot at a 3/8-vote acquittal in exchange for a possibility of a 6/8 vote conviction.

For the same legitimate reasons Congress chose not to subject courts-martial to a unanimous verdict requirement for findings of guilty, these military tribunals should not be subject to such a requirement in order to acquit.

TABER HUNT
CPT, JA
Trial Counsel

Government Appellate Exhibit

6

IN A GENERAL COURT MARTIAL
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY

UNITED STATES OF AMERICA **v.** **Dial, Andrew J.** **LTC, U.S. ARMY** **Alpha Company,** **Allied Forces North Battalion,** **United States Army North Atlantic Treaty** **Organization Brigade, APO AE 09752**	**DEFENSE BRIEF OF SPECIFIED ISSUES RE: MOTION FOR APPROPRIATE RELIEF: UNANIMOUS VERDICT** **31 December 2021**

Pursuant to this Court's Order to Brief Specified Issues RE: Defense Motion for Appropriate Relief (Unanimous Verdict), dated 17 December 2021, the Defense in the above case respectfully submits this brief for those seven specified issues. The law and argument for each of those issues will be addressed in the order specified by this Court.

1. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), effectively overruled the decision in *Johnson v. Louisiana*, 406 U.S. 356 (1972), with respect to the Equal Protection challenge; and, whether or not it overruled the decision with respect to the Due Process challenge, the holding on the Due Process challenge was merely that the reasonable-doubt standard does not, in and of itself, require unanimity.

In *Ramos*, the Supreme Court disapprovingly referred to the badly fractured set of opinions in both of the 1972 companion cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson*, which allowed Oregon and Louisiana's schemes for non-unanimous verdicts for serious offenses to continue. *See Ramos*, 140 S. Ct. at 1397.

However, the Supreme Court's opinion in *Ramos* relied on the constitutional protections in the Sixth Amendment, which were at issue in *Apodaca*, and not the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment, which were at issue in *Johnson*. Therefore, while directly overruling the decision in *Apodaca*, the impact of *Ramos* on *Johnson* is less clear.

Concerning the Due Process challenge, the Court in *Johnson* concluded that a conviction based on nine of 12 jurors satisfied the State's burden of proving guilt beyond a reasonable doubt and that the disagreement of the three jurors did not alone establish reasonable doubt. *Johnson*, 406 U.S. at 362. The Defense acknowledges there is an argument that the Court's decision in *Ramos* does not overrule that part of the decision in *Johnson*. *See State v. Ramos*, 367 Ore. 292, 309, 478 P.3d 515, 527 (2020) (finding that "[t]he *Johnson* reasonable-doubt holding remains good law after *Ramos*"). However, the court in *Johnson* did not consider whether the relationship between unanimity and impartiality, as described in *Ramos (See Ramos*, 140 S. Ct. at 1396), requires a different result. Regardless of whether the part of the *Johnson* decision regarding the reasonable-doubt standard is still good law, it would only stand for the principle that a non-unanimous verdict does not per se violate that standard. Although the Defense's motion quoted opinions from the D.C. Circuit and Sixth Circuit and acknowledged the interplay between unanimity and the burden of proof beyond a reasonable doubt, the Defense's Due Process argument is broader than and unresolved by the decision in *Johnson*.

The majority of the Defense's motion is devoted to the primary argument that unanimity is a core aspect of the impartiality guaranteed in the Sixth Amendment. That

impartiality is distinct from the rights concerning the composition of the jury, and that impartiality applies with equal meaning to court-martial panels. As mentioned in the motion, an accused at a court-martial enjoys most of the rights under the Sixth Amendment. In addition, a right under the Sixth Amendment may apply to a court-martial through the Due Process Clause of the Fifth Amendment. *See e.g.*, *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court's decision in *Batson v. Kentucky* applies to courts-martial by virtue of due process). This concept, which was the primary Due Process argument in the Defense's motion, was not at issue in *Johnson*.

Concerning the Equal Protection challenge in *Johnson*, the decision that Louisiana's scheme did not constitute a denial of equal protection under the law does not survive *Ramos*. The Court analyzed the issue, and found a rational basis for Louisiana denying the requirement for unanimity for conviction of serious offenses in certain types of cases. After *Ramos*, a rational basis is not sufficient for a state to deny a certain classification of defendants the fundamental right of requiring unanimity to convict of a serious offense. The government interest provided in *Johnson* would clearly not satisfy a strict-scrutiny analysis. In addition, even if *Ramos* did not overrule that part of the *Johnson* decision, the Equal Protection challenge in *Johnson* was an attack on Louisiana's statutory scheme that required unanimity for capital and five-person jury cases, but requiring the concurrence of at least nine of 12 for other cases. *See Johnson*, 406 U.S. at 263. Those classifications were categories based on the seriousness of the crime and severity of the punishment that may be imposed, which bears no similarity to the classification at issue before this Court.

In summary, *Ramos* effectively overruled *Johnson*, with the only possible exception being the part of the decision concerning the holding that a non-unanimous verdict does not per se violate the reasonable-doubt standard under the Due Process Clause. Such a holding would not address the Defense's argument that unanimity is a required aspect of impartiality under either the Sixth Amendment or the Due Process Clause of the Fifth Amendment. The part of the decision in *Johnson* on the Equal Protection challenge does not survive *Ramos*; and, even if it did, it would not apply to the vastly different classification in this case. Either way *Johnson* is not binding law on the Equal Protection issue raised before this Court.

2. Servicemembers and civilians are "in all relevant aspects alike" for the purpose of unanimity of verdicts.

The Court of Appeals for the Armed Forces (CAAF) recently applied the analysis for the due process right to equal protection of the laws. In *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021), CAAF held that subjecting members of the Fleet Reserve and not retired reservists to UCMJ jurisdiction did not violate Equal Protection. *Id*. at 281. The first step of the analysis is "whether the groups are similarly situated, that is, are they 'in all relevant respects alike.'" *Id*. at 280 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

This Court has posed the question of whether service members and civilians are in all relevant aspects alike for the purpose of unanimity of verdicts. The Defense acknowledges the obvious fact that there are substantial differences between military society and civilian society, but the key phrase is "relevant aspects." When the different

treatment involves whether the verdict of guilt for a serious offense requires unanimity, the relevant aspects involve how the different individuals are situated in regard to the determination of the verdict.

A civilian, or even a servicemember, being prosecuted by the United States in a Federal district court for a non-capital serious offense is innocent until proven guilty beyond a reasonable doubt, as determined by the 12-member impartial jury of her or his peers. After the individual exercised the constitutional right to confront witnesses and present a defense, with the assistance of counsel, the decision of whether or not the individual is guilty is in the hands of the jury. If convicted, the civilian is subject to substantial deprivation of liberty and property, along with a host of possible collateral consequences, such as the loss of the rights to vote and possess firearms and registration as a sex offender, if applicable.

A servicemember being prosecuted by the United States in a general court-martial for a non-capital serious offense is innocent until proven guilty beyond a reasonable doubt, as determined by the eight-member impartial panel selected by the convening authority. After the individual exercised the constitutional right to confront witnesses and present a defense, with the assistance of counsel, the decision of whether or not the individual is guilty is in the hands of the panel. If convicted, the servicemember is subject to substantial deprivation of liberty and property, along with a host of possible collateral consequences, such as the loss of the rights to vote and to possess firearms and registration as a sex offender, if applicable.

Although there are good reasons for why certain procedural rules, including the composition of the tribunal, differ depending on the forum, the same is not true for a

different required concurrence by the tribunal before the individual is convicted of a serious offense. The Defense acknowledges there are some differences in the goals of the military justice system as a whole, but those differences are not at play in the determination of the verdict. At that relevant time, the singular purpose is justice; maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not a consideration. As mentioned in the Defense's discussion of *Ortiz v. United States* in its motion, the Supreme Court found that the military justice system's essential character is "judicial." 138 S. Ct. 2165, 2174 (2018). "The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Id*. The American scheme of justice does not tolerate making it easier to convict a Soldier at a court-martial for the purposes of efficiency in the military establishment.

3. An accused has a statutory right to a court-martial panel; and, once Congress granted that statutory right to a court-martial panel, it must be implemented in a manner that complies with the Due Process Clause of the Fifth Amendment.

An accused has a statutory right to a court-martial panel, under Article 16 of the Uniform Code of Military Justice (UCMJ). However, once Congress grants a statutory right related to the procedures by which courts-martial are conducted, that right must be implemented in a manner consistent with fundamental notions of procedural fairness. By analogy, the Court of Military Appeals (CMA) recognized that the right to appeal certain courts-martial is a statutory right; but, once it is granted, it is protected by the

safeguards of constitutional due process. *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) ("[A] military criminal appeal is a creature … solely of statutory origin, conferred neither by the Constitution nor the common law. However, once granted, the right of appeal must be attended with safeguards of constitutional due process[.]") (internal citations and quotations omitted). The Supreme Court has also provided Due Process protection to statutory appellate rights that states granted in their discretion. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). In other words, Congress could not create a court-martial panel system in which the panel decides guilt or innocence on the flip of a coin. Although that is an extreme example, it highlights the significance of the determination of guilt or innocence.

4. Court-martial panels and juries serve the same function, and unanimity of verdicts is a critical aspect of that function.

The purpose of military justice differs in important respects from civilian criminal justice. "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MANUAL FOR COURTS-MARTIAL, pt. I, para. 3. However, the aims of the military justice system and the criminal justice system are separate and distinct from the roles and responsibilities of court-martial members and jurors.

The function of the court-martial panel during deliberations differs depending on

whether it is for findings or the sentence. While deliberating on findings, the court members' sole purpose is justice, and maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not considerations. The sole purpose at that time is to adjudicate the merits in the interest of justice. The military judge instructs the court members as follows: "As court members, it is your duty to hear the evidence and to determine whether the accused is guilty or not guilty and, if required, to adjudge an appropriate sentence." Dep't of Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 2, § V, para. 2-5 (2020). The military judge also instructs the members on the presumption of innocence and the burden of proof, in accordance with Article 51(c) of the UCMJ.

The Defense acknowledges that, during deliberations on the sentence, there is an additional purpose of promoting good order and discipline in the armed forces. Article 56(c)(1). Deliberations on sentence are not at issue in this motion. Focusing on the relevant moment of determining guilt or innocence demonstrates that the function served by court-martial panel members and jurors is identical – presuming innocence and determining whether the prosecution proved each element beyond a reasonable doubt.

The unanimity of the verdict is a critical aspect of the determination of guilt or innocence, affecting the accuracy and reliability of verdicts. In *Ramos*, Justice Gorsuch quoted Justice Story's explanation of unanimity of verdict as "indispensable." *Ramos*, 140 S. Ct. at 1396 ("Justice Story explained in his Commentaries on the Constitution that 'in common cases, the law not only presumes every man innocent, until he is proved guilty, but unanimity in the verdict of the jury is indispensable.'").

fallibility of human beings, it is beyond cavil that unanimity decreases the dangers of wrongful convictions. Each member's perception of the evidence and personal experiences add to the collective wisdom of the court-martial panel, but that benefit is fully realized only with unanimity of the verdict. In her dissenting opinion in a case about the retroactivity of the new unanimity rule from *Ramos*, Justice Kagan explained how the unanimity rule "is central to the Nation's idea of a fair and reliable guilty verdict" and "only then is the jury's finding of guilt certain enough – secure enough, mistake-proof enough – to take away the person's freedom." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1576 (2021) (holding that the *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review) (Kagan, J., dissenting). Such concerns about the fairness and reliability of a non-unanimous verdict are even greater with a court-martial panel. With the convening authority selecting the best qualified court members by reason of age, education, training, experience, length of service, and judicial temperament, in accordance with Article 25, a reasonable doubt in the mind of a member of such a blue-ribbon panel casts uncertainty on the accuracy and reliability of a verdict of guilty. The American scheme of justice cannot tolerate such uncertainty with a conviction for a serious offense at a court-martial.

5. In *Ramos v. Louisiana*, the Supreme Court found that unanimity is a critical aspect of "impartiality," and such a meaning would be the same in the context of court-martial panel impartiality.

In *Ramos*, the Supreme Court was emphatic in its novel recognition that a unanimous guilty verdict is an indispensable feature of an impartial jury. "If the term 'trial

by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Ramos*, 140 S. Ct. at 1396. The Supreme Court has recently had the opportunity to discuss its holding in *Ramos*, when it addressed the retroactivity of the new rule requiring unanimity for conviction of serious offenses. In the majority opinion for *Edwards v. Vannoy*, Justice Kavanaugh acknowledged that the *Ramos* holding that "a state jury must be unanimous to convict a defendant of a serious offense" was a new rule. 141 S. Ct. at 1555. Dissenting from the majority's conclusion that it did not meet the legal standard for the narrow exception for a new procedural rule to be retroactive, Justice Kagan summarized how the Court described the unanimity rule in *Ramos*. "Citing centuries of history, the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital', 'essential,' 'indispensable,' and 'fundamental' to the American legal system." *Id*. at 1573 (Kagan, J., dissenting).

The critical aspect of impartiality involving unanimity has the same meaning in the context of court-martial panels. A long line of CAAF decisions recognizes constitutional rights to an impartial and fair decision. "Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the fact." *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964); *see also United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice."). That right to an impartial court-martial panel has more recently been found not only in the Due Process Clause of the Fifth Amendment but also in the Sixth Amendment itself. *See*, *e.g.*, *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection

of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations."). As demonstrated by the cases cited on pages 8 through 9 of the Defense's Motion for Appropriate Relief: Unanimous Verdict, this is not the only Sixth Amendment protection that applies to an accused at a court-martial. Also, in *United States v. Castellano*, 72 M.J. 217 (C.A.A.F. 2013), CAAF held that the military judge violated "Appellant's due process rights under the Fifth and Sixth Amendments" by finding a *Marcum* factor himself rather than presenting it to the court members. *Id*. at 219.

As shown above, the Accused has a right to a unanimous guilty verdict as part of his right to an impartial panel under the Sixth Amendment. He also has a right to a unanimous guilty verdict as part of this right to due process under the Fifth Amendment. "Impartial court-members are a *sine qua non* for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995). In addition, CMA stated that, when a right applies by virtue of due process, "it applies to courts-martial, just as it does to civilian juries." *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court's decision in *Batson v. Kentucky* applies to courts-martial).

6. Congress does not have any plausible reason for allowing a conviction on a non-unanimous verdict, other than the impermissible reason of making a conviction and deprivation of liberty and property easier at a court-martial.

The Government's response states that the unanimity right from *Ramos* is not so extraordinarily weighty as to overcome the balance struck by Congress. However, there was no discussion of the interests on either side of the scales during the balancing. If

there was a valid reason for denying servicemembers this fundamental right concerning the determination of guilt, it is curious that it was not included in the Government's response. Instead the Government relied on citing to cases that predated the Supreme Court's new rule that, under the Fourteenth Amendment, states must require unanimity before conviction of a serious offense. The Government's response fails to appreciate the newly elevated status of this fundamental right.

In addition, the military justice system has evolved from the Founding-era in both scope and due process. Courts-martial can now convict individuals for offenses with no service connection. *Solorio v. United States*, 483 U.S. 435 (1987). Also, courts-martial can convict individuals who are not servicemembers on active duty. *See, e.g.*, *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021) (holding that a retired servicemember in the Navy's Fleet Reserve was subject to court-martial jurisdiction); *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012) (holding that Article 2(a)(10)'s extension of jurisdiction to persons serving with or accompanying an armed force in the field in time of a contingency operation did not violate the Constitution). With this expansion of the scope of court-martial jurisdiction, far more due process has been required over time. The Government's best reason for preserving non-unanimity is the historical practice, but that is inconsistent with all of the ways in which courts-martial have evolved from the rough form of justice criticized by the Supreme Court in *Toth v. Quarles*, 350 M.J. 11 (1955) to the judicial system the Supreme Court approved of in *Ortiz*.

The Government may argue that military necessity requires making it easier to convict at courts-martial and having guilty verdicts with less certainty and reliability, regardless of the concerns expressed by Justice Kagan. However, the Government has

other reasonable courses of action for any rare cases in which conducting another trial would have a significant impact on the military mission. After *Ramos*, adhering to the status quo of non-unanimous guilty verdicts at courts-martial cannot be tolerated in the American scheme of justice.

7. Although a unanimous verdict of guilty is required for courts-martial, a unanimous verdict of acquittal is not required.

The Defense is not arguing that all verdicts in a court-martial must be unanimous but only that convictions require unanimity. The right to a unanimous verdict is an individual right held by an accused, so it is not required that acquittals be unanimous. The Oregon Supreme Court came to this same logical conclusion after *Ramos*. "*Ramos* does not imply that the Sixth Amendment prohibits acquittals based on non-unanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals." *State v Ross*, 367 Ore. 560, 573, 481 P.3d 1286, 1293 (2021). Even if Article 52(a)(3) of the UCMJ is unconstitutional to the extent it authorizes less than unanimous guilty verdicts, it is constitutional to the extent that failing to obtain the concurrence of at least three-fourths of the members present results in a finding of not guilty.

This interpretation alleviates any concerns about unlawful command influence. An acquittal could be the result of anywhere from zero to five out of eight votes of guilty. Although a conviction would effectively reveal the vote of every member, just like it does in capital cases, there can be no serious argument that court members would be apprehensive of displeasing the convening authority by voting to convict of a charge or

specification the convening authority referred for trial by court-martial.

CONCLUSION

As the Supreme Court recognized in *Ortiz*, courts-martial have transformed into courts that are judicial in character rather than disciplinary tools of the commander. As such, they must adhere to the American scheme of justice. The Supreme Court's recent holding in *Ramos* that the unanimity requirement applies to the states because it is fundamental to the American scheme of justice, requires this Court to conduct a fresh analysis and come to the conclusion that the United States Constitution requires a unanimous verdict for the conviction of a serious offense at a court-martial. This conclusion is unmistakable, whether the right exists by virtue of the Sixth Amendment, Due Process under the Fifth Amendment, or Equal Protection under the Fifth Amendment.

Robert Mihail
ROBERT MIHAIL
CPT, JA
Trial Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have served an electronic copy of the above on the court and trial counsel on 31 December 2021.

Robert Mihail
ROBERT MIHAIL
CPT, JA
Trial Defense Counsel

Government Appellate Exhibit

7

United States Army Trial Judiciary
Fifth Judicial Circuit, Kaiserslautern, Germany

U N I T E D S T A T E S	)	
	)	
v.	)	**FINDINGS AND CONCLUSIONS RE: DEFENSE MOTION FOR APPROPRIATE RELIEF (UNANIMOUS VERDICT)**
DIAL, Andrew J. **LTC, U.S. Army** **A Co., Allied Forces North Bn.** **United States Army NATO Bde.** **APO AE 09752**	)	**3 JANUARY 2022**

The Defense filed a motion requesting the Court to impose a requirement on the court-martial panel in this case to reach any guilty finding by unanimous vote. If the Court denies the request for a unanimous verdict, the Defense requests the Court require the president of the court-martial panel to announce whether the findings were unanimous or non-unanimous. The Government opposes the request. Neither party requested oral argument. The Court thereafter directed both parties to file briefs addressing specific issues identified by the Court. Both parties filed the directed briefs.

I. Issues Presented.

A. Does the Sixth Amendment jury trial right include the requirement for a unanimous verdict of guilty in a military court-martial in light of the Supreme Court's holding in Ramos v. Louisiana, 140 S. Ct. 1390 (2020)?

B. Does the Fifth Amendment Due Process clause require a unanimous verdict of guilty to meet the prosecution's burden of proving guilt beyond a reasonable doubt?

C. Does the Fifth Amendment Equal Protection guarantee require a unanimous verdict of guilty in a military court-martial given that every state and the Federal government (except for the U.S. military) requires a unanimous verdict to secure a criminal conviction?

II. Summary. This Court answers the first two issues in the negative and answers the third issue in the positive.

III. Facts.

The Court adopts the facts set forth in the Facts section of the Defense motion, to which the Government stipulated.

IV. Law.

A. Burden of Proof.

The burden of proof and persuasion rests with the Defense as the moving party. Rules for Courts-Martial (R.C.M.) 905(c)(1) and (c)(2)(A), Manual for Courts-Martial (2019).

"[J]udicial deference…is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Solorio v. United States, 483 U.S. 435, 447 (1987). This principle applies even when the constitutional rights of a service member are implicated by a statute enacted by Congress. Id. at 448. Accord United States v. Easton, 71 M.J. 168, 180 n.12 (C.A.A.F. 2012) (citing United States v. Weiss, 36 M.J. 224, 226 (C.M.A. 1992)).

With regard to Due Process challenges to Congressional enactments regulating the armed forces, the Supreme Court of the United States imposes upon the Defense the heavy burden to demonstrate that "the factors militating in favor of [the accused's interest] are so extraordinarily weighty as to overcome the balance struck by Congress." See Middendorf v. Henry, 425 U.S. 25, 44 (1976); Weiss v. United States, 510 U.S. 163, 177 (1994).

B. Constitutional Overview.

The Constitution gives Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8, cl. 14.

While Article III provides for the right to jury trials in the civilian system, the foundation of the military court-martial system arises in Article I, which grants Congress the authority to make rules for governing and regulating the land and naval forces. Compare U.S. Const., art. 1, § 8, with U.S. Const., art. 3, § 2.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

C. Military Courts-Martial.

In Dynes v. Hoover, the Supreme Court confirmed the constitutionality of military courts-martial. See 61 U.S. 65 (1857).

The Supreme Court has "long recognized that the military is, by necessity, a specialized society separate from civilian society…. The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" Parker v. Levy, 417 U.S. 733, 743 (1974) (citing United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

"[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." Quarles, 350 U.S. at 17.

Just as military society has been a society apart from civilian society, so 'military law … is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" Parker, 417 U.S. at 743 (citing Burns v. Wilson, 346 U.S. 137 (1953)). While the Parker Court said the UCMJ "cannot be equated to a civilian criminal code," id. at 749, the Supreme Court in Ortiz v. United States. 138 S. Ct. 2165 (2018), recognized how similar they are. Id. at 2174-75.

Under the "Military Deference Doctrine," courts defer to Congress' exercise of its powers under Article I, Section 8, Clause 14, to regulate the military justice system. The Courts have noted, "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." Solorio v. United

States, 483 U.S. 435, 447 (1987). In fact, the Supreme Court has described Congress' authority as "plenary" in this area. Chappell v. Wallace, 462 U.S. 296, 301 (1983).

Expounding on this deference, the Court in Parker stated, "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." 417 U.S. at 756; Loving v. United States, 517 U.S. 748, 759, 768 (1996).

D. Sixth Amendment.

In Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Supreme Court held the rules in Louisiana and Oregon that permit non-unanimous jury verdicts in criminal cases violate the Sixth Amendment as incorporated against the States through the Fourteenth Amendment.

In the armed forces, "there is no Sixth Amendment right to trial by jury in courts-martial." Easton, 71 M.J. at 175 (citing Ex Parte Quirin, 317 U.S. 1, 39 (1942)); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)). See also Reid v. Covert, 354 U.S. 1, 37 n.68 (1957) ("The exception in the Fifth Amendment…has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.").

In Quirin, the Supreme Court addressed the constitutional history behind the creation of military tribunals, addressing both the authority to try enemy combatants for law of war violations as well as the application of the Bills of Rights to military courts-martial. 317 U.S. 1 (1942). The Court held that military tribunals were exempted from the Sixth Amendment requirement for a jury trial and this deliberate exception, which dated back to the Continental Congress of 21 August 1776, was to extend that exception "to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law." Id. at 43.

E. Fifth Amendment Due Process.

In Weiss v. United States, 510 U.S. 163 (1994), the Supreme Court addressed the requirements of the Due Process Clause when Congress legislates in military affairs: "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings. But in determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8.' Weiss v. United States, 510 U.S. 163, 176-177 (1994). To evaluate a Due Process challenge, the Court evaluated "whether the factors militating in favor of" the claimed right "are so extraordinarily weighty as to overcome the balance struck by Congress." Id. at 177-78.

Military and civilian courts have repeatedly affirmed that the Weiss standard applies to courts-martial due process claims challenging Congress' exercise of its Article I authority. See e.g., United States v. Vazquez, 72 M.J. 13, 19 (C.A.A.F. 2013); United States v. Gray, 51 M.J. 1, 50 (C.A.A.F. 1999); see also, United States v. Easton, 71 M.J. 168, 174-76 (C.A.A.F. 2012) (holding Article 44(c), UCMJ, is constitutional as applied to trials by court members when Congress appropriately exercised its Article I power).

In Johnson v. Louisiana, 406 U.S. 356 (1972), the Supreme Court stated that a non-unanimous jury verdict of guilty does not indicate that the prosecution failed its burden to prove guilt beyond a reasonable doubt. Id. at 360.

In United States v. Bramel, 32 M.J. 3 (C.M.A. 1990), the Court of Military Appeals granted review of the issue whether the appellant was denied a fundamentally fair criminal trial as guaranteed by the Fifth and Sixth Amendments where the findings of guilty were announced by less than a unanimous verdict of eight members. The Court summarily affirmed the findings of guilt and published no opinion. Id.

R.C.M. 922(e) prohibits polling panel members; however, M.R.E. 606 allows the military judge to conduct an inquiry into the validity of the findings or sentence, so long as the deliberative process is not invaded.

F. Fifth Amendment Equal Protection. In court-martial jurisprudence, any right to equal protection is based on the Fifth Amendment Due Process clause. United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021). Under the Fifth Amendment, an "equal protection violation" is "discrimination that is so unjustifiable as to violate due process." United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015) (quoting United States v. Rodriguez-Amy, 19 M.J. 177, 178 (C.M.A. 1985)).

"This question of unjustifiable discrimination in violation of due process is not raised, however, unless the Government makes distinctions using 'constitutionally suspect classifications' such as 'race, religion, or national origin…or unless there is an encroachment on fundamental constitutional rights like freedom of speech or…assembly.'" Rodriguez-Amy, 19 M.J. at 178. Otherwise, a rational basis suffices for treating similarly situated people differently. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 80 (1981) (asking whether the disparate treatment is "not only sufficiently but also closely related" to Congress' purpose in legislating); Akbar, 74 M.J. at 406 ("equal protection is not denied when there is a reasonable basis for a difference in treatment") (internal citation omitted); but see United States v. Hennis, 77 M.J. 7, 10 (C.A.A.F. 2017) (suggesting that when there is interference with a fundamental constitutional right, something more than a rational basis for the disparate treatment is necessary). Under a rational basis test, the burden is on the appellant to demonstrate that there is

no rational basis for the rule he is challenging. The proponent of the classification "has no obligation to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320 (1993). "As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." Id.; United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).

The initial question is whether the groups are similarly situated, that is, are they "in all relevant respects alike." Begani, 81 M.J. at 280 (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

While civilians have a constitutional right to a jury trial, service members have a statutory right to its military equivalent. Article 25(c)(2), UCMJ; 10 U.S.C. § 825(c)(2). Service members also have a constitutional right to have a panel that is impartial: "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (emphasis added); United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020); United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000); United States v. Riesbeck, 77 M.J 154, 163 (C.A.A.F. 2018); see also, Rodriguez-Amy, 19 M.J. at 178 (stating that once Congress grants a statutory court-martial right to service members, that right "must be attended with safeguards of constitutional due process").

Prior to 2019, a two-thirds concurrence of court-martial panel members was required to convict and sentence an accused in a trial with members; if a sentence included confinement for more than 10 years, a three-fourths concurrence was required. A sentence of death required the unanimous concurrence of all members. 10 U.S.C. § 852 (Article 52, UCMJ) (2016). As a result of the Military Justice Act of 2016, a three-fourths concurrence of court-martial panel members is now required to convict and sentence an accused in a trial with members. A sentence of death requires the unanimous concurrence of all members. 10 U.S.C. § 852 (Article 52, UCMJ) (2019).

G. Stare Decisis.

Stare decisis encompasses two distinct concepts: (1) vertical *stare decisis* – the principal that courts "must strictly follow the decisions handed down by higher courts," and (2) horizontal *stare decisis* – the principal that "an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018).

Lower courts should not assume that a new higher court decision implicitly overrules precedent. Instead, lower courts should follow the precedent that directly controls, and leave overruling precedent to the higher court that created the precedent. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

V. Analysis and Conclusions.

A. Sixth Amendment.

Ramos v. Louisiana neither explicitly nor implicitly overruled prior Supreme Court precedent regarding the inapplicability of the Sixth Amendment jury trial right to courts-martial. The Defense acknowledges this Court is bound by precedent regarding the applicability of the Sixth Amendment right to a jury trial but argues prior court decisions are incorrect and should not be followed.

Under the doctrine of *stare decisis*, this Court is required to uphold the precedent established by its superior courts. Absent explicit holdings by CAAF and the Supreme Court regarding the scope of their own precedents, this Court cannot and will not depart from binding precedent holding the right to a jury trial inapplicable to military courts-martial.

B. The Fifth Amendment: Due Process. The Supreme Court squarely addressed the question whether the due process requirement of proving guilt beyond a reasonable doubt is satisfied by a non-unanimous guilty verdict in Johnson v. Louisiana in 1972. The Court concluded it was. Although the Ramos Court called the Johnson and Apodaca opinions "badly fractured,"[1] it only addressed the Sixth Amendment question resolved in Apodaca (and overruled it). It did not address the Fifth Amendment question resolved in Johnson which remains binding precedent.[2] Under the doctrine of *stare decisis*, this Court is required to uphold the precedent.

[1] 140 S. Ct. at 1397.

[2] In its response to the Court's Order to brief this issue, the Government stated that Ramos overruled this portion of the Johnson opinion. However, the Government offered no analysis or law to support its position. The Defense asserted that Ramos did not overrule this portion of the Johnson opinion. If the Government is correct and Ramos did overrule Johnson, this Court would find that the due process requirement of proving guilt beyond a reasonable doubt requires a unanimous guilty verdict and that this Fifth Amendment right is so extraordinarily weighty a right that it overcomes "the balance struck by Congress" in determining what constitutional rights service members would be permitted in light of countervailing interests of military necessity. Weiss v. United States, 510 U.S. 163 (1994). For the reasons set forth in section V.C.4., below, it is clear that Congress did not conduct such a balancing and that there is no plausible reason for Congress to authorize a non-unanimous guilty verdict in courts-martial. The Johnson analysis of the interplay between unanimity and the reasonable doubt standard was based on a logical fallacy (that a single vote of not guilty would automatically equate to a hung jury rather than an acquittal) and inconsistent with Supreme Court precedent regarding the nature of the jury (the Johnson Court treated the jury as a single, objective entity, but the Court in In re Winship, 397 U.S. 358 (1970), stated that the jury is subjective in nature, id. at 364). However, because of this Court's determination that Ramos did not overrule Johnson and the Government offered no law or analysis to support their position, a full analysis of the underlying Fifth Amendment due process/burden of proof/unanimity issue is omitted.

C. The Fifth Amendment: Equal Protection. There is no rational basis for Congress' different treatment of U.S. service members and civilians regarding voting requirements for convictions.

1. Congress treats U.S. service members and civilians differently with respect to this aspect of criminal trials. Civilians may only be convicted by a unanimous verdict. FED. R. CRIM. P. 31(a) (2021). Service members need only be convicted by a three-fourths vote. Art. 52(a)(3), UCMJ; 10 U.S.C. § 852(a)(3) (2019).

2. Service members and civilians are similarly situated groups for the purpose of criminal trials. They are "in all relevant aspects alike." Although the military is a "specialized society," there is very little difference between civilian criminal trials and military courts-martial—in subject matter jurisdiction, in procedure, in rights afforded the accused, and in the consequences of conviction.

a. Service members are subject to prosecution for a wider array of crimes than civilians. Not only do the punitive articles of the UCMJ include the typical gamut of civilian crimes, they also include military-specific crimes, all Federal crimes in Title 18 of the U.S. Code, and any state crime when committed on a Federal installation in that state (by virtue of Article 134, UCMJ, and 18 U.S.C. § 13). The Supreme Court recognized the expansive nature of court-martial subject matter jurisdiction in Ortiz v. United States. 138 S. Ct. 2165, 2170, 2174 (2018) (characterizing military subject matter jurisdiction as including "a vast swath of offenses, including garden-variety crimes unrelated to military service").

b. The Rules for Courts-Martial reflect criminal procedure almost identical to the Federal Rules of Criminal Procedure. They depart from the Federal Rules in those instances where the Constitution has exempted the military: grand jury indictment and trial by jury. Even where the rules diverge, Congress has narrowed that gap in almost every instance: the Article 32 preliminary hearing serves the same purpose as a grand jury[3]; and the court-martial panel serves the same purpose as a jury.[4] Even the court-martial panel and jury have similar characteristics: while the jury is selected from the state and district in which the accused resides, the panel is typically selected from the accused's unit (albeit from outside the accused's company-level unit) and normally from the accused's duty station; and while an accused's "peers" on a jury are randomly selected from eligible adults in the community, the court-martial panel is selected from the best qualified service members in the accused's military community. Article 25, UCMJ; 10 U.S.C. § 25 (2019). The only instance where Congress has not narrowed the

[3] Compare United States v. Mara, 410 U.S. 19, 48 (1973) ("the very purpose of the grand jury process is to ascertain probable cause") with Article 32(a)(2)(B), UCMJ, 10 U.S.C. § 832(a)(2)(B) (the purpose of the preliminary hearing includes determining whether probable cause exists).
[4] See section V.C.3., infra.

gap between civilian and military procedural protections is in the voting requirement for the court-martial panel's findings.

c. In all respects other than grand jury indictment and trial by jury, service members have the same constitutional rights as civilians, including the 5th Amendment rights to due process, to protection against self-incrimination, and to protection from double-jeopardy, and all 6th Amendment rights except jury trial—to speedy trial (United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014)); to a public trial (United States v. Hershey, 20 M.J. 433, 435 (CMA 1985)); to be informed of the nature and cause of the accusation (United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011)); to confrontation (United States v. Blazier, 69 M.J. 218, 222 (C.A.A.F. 2010)); to compulsory process (United States v. Bess, 75 M.J. 70, 75 (C.A.A.F. 2016)); and to counsel (United States v. Wattenbarger, 21 M.J. 41, 43 (CMA 1985)). While civilians have a right to a jury trial, service members have a statutory right to its military equivalent. Like the civilian right to a jury that is "impartial," service members have a constitutional right to a court-martial panel that is impartial. United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000); United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001). The Supreme Court has recognized the virtual parity between constitutional protections for service members and for civilians. Ortiz, 138 S. Ct. at 2174 ("The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal").

d. The consequences of conviction at a special or general court-martial are no less serious than for civilian criminal convictions. A convicted service member has a lifetime Federal conviction that results in the same loss of voting and gun rights that a civilian conviction brings. If the conviction is for a sex offense, a service member has the same sex offender registration requirements and restrictions that result from a civilian conviction. Convicted service members are subject to sentences that can include confinement for a term of years or for life, with or without parole, and death. In addition to those punishments that are similar in nature and severity to civilian punishments, service members can also lose their pay and lose their jobs with a punitive discharge that can stigmatize them for life and prevent them from attaining future employment or receiving any benefits from the Department of Veterans' Affairs for which they would otherwise have been eligible.

e. The only distinction between service members and civilians highlighted by the Government is in the purposes of the entities prosecuting both.[5] For civilians, a State or

[5] Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 3. The Government stated that "it is well established" that the military and civilian societies are different. This is no more than a Parker platitude that poorly masks a lack of analysis on the issue. To take the Government's apparent position to its logical conclusion, Congress could dispense entirely with the court-martial simply because the military is a specialized society. The question the Government did not answer is: "how are service members different than civilians for the purpose of voting

the Federal government has justice as its primary concern; for service members, the military has warfighting (and readiness and preparation for the same) as its primary function. The military must be able to conduct courts-martial anywhere in the world, including during military contingencies and war, in an expeditious manner that ensures it does not lose its ability to conduct its mission. But this is a distinction without a difference in the context of voting requirements on guilt; a non-unanimous verdict does not further the military mission and a unanimous verdict requirement would not hinder it. See para. V.C.4.(d)(2), infra.

2. U.S. service members are not a suspect classification.

3. Congress encroaches on service members' fundamental 5th Amendment due process right to an impartial panel by authorizing the panel to find guilt by a non-unanimous vote. While an accused's right to a court-martial panel is grounded in statute, an accused's right to have the panel be impartial is grounded in the Due Process clause of the Constitution. Rodriguez-Amy, 19 M.J. at 178. The Supreme Court said that the requirement for unanimity in voting is an essential feature of the jury. Ramos, 140 S. Ct. at 1396. The unanimity requirement is not merely a function of history or popularity[6]; rather, it was integrally woven into the function of the jury—that of "safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." Batson v. Kentucky, 476 U.S. 79, 86 (1986) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). In order for the jury to do this, every member of it must confirm the truth of every accusation. Ramos, 140 S. Ct. at 1395; Williams v. Florida, 399 U.S. 78, 100 (1970) (tying the unanimity requirement to the purpose of the jury in interposing "between the accused and his accuser … the commonsense judgment of a group of laymen"); see also, Winship, 397 U.S. at 364 (stating the jury makes a subjective determination of the facts). The court-martial panel serves the same purpose as a jury—to safeguard service members accused of crime against the arbitrary exercise of power by the commander.[7] In order for the court-martial

---

requirements on guilt?" The Defense brief on this issue correctly narrows the focus to "relevant" differences and says that the differences between service members and civilians must be analyzed "at the relevant time" of rendering the verdict. This Court agrees with that analysis.

[6] The Ramos Court noted the historical underpinnings and wide acceptance of the unanimous verdict. 140 S. Ct. at 1395-96.

[7] In response to the Court's Order to brief this issue, the Government conceded that "the specific role of the panel and jury are the same between the two systems …." Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 7. However, the Government also asserted that the broader purposes of the military and civilian justice systems are distinct—the former promotes good order and discipline while the latter does not. Id. While true to an extent, the court-martial panel itself does not further good order and discipline in its role as a factfinder. As the Defense pointed out in its brief on this issue, "While deliberating on findings, the court members' sole purpose is justice, and maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not considerations…", but "during deliberations on the sentence, there is an additional purpose of promoting good order and discipline in the

panel to serve that same purpose, it must also be unanimous in voting for guilt.[8] Impartiality of the panel members means more than freedom from biases and prejudices for or against the counsel, the accused, the command, the witnesses, or the judge's instructions on the law. It must also mean the ability to independently decide free from the biases and prejudices (firmly fixed views and determinations) of other panel members. This is inherent in the subjective determination discussed by the Winship Court and is required for individual panel members to fulfill their purpose. Where a panel member votes not guilty but the accused is convicted by a non-unanimous verdict, that panel member necessarily submits to the biases and prejudices of other panel members and is, essentially, discarded as an independent, impartial member. That panel member continues to serve on the panel as a tool of the guilty-voting members and may be required to sentence an accused for a crime the panel member does not believe the Government proved beyond a reasonable doubt.

There is no equal protection precedent regarding this issue. The Supreme Court said in Johnson that Louisiana's different voting requirements (some unanimous, some non-unanimous) for offenses of differing severity did not violate the Equal Protection Clause of the Fourteenth Amendment. 406 U.S. at 363. The Court concluded that Louisiana had a rational basis for the different voting requirements: to "facilitate, expedite, and reduce expense in the administration of criminal justice…" Id. at 364. However, the Court focused not on unanimity as a critical aspect of the jury but on reasonable doubt; it said that whether the verdict is unanimous or not, a guilty verdict still meets the beyond a reasonable doubt standard. Id. Johnson is not precedential on the issue before this Court for three reasons. First, the question presented in Johnson was different than the one presented here—whether unanimity is tied to the purpose of the jury and the court-martial panel. Second, the decision was based on Louisiana's specific rationale for the statutory scheme, so the decision was limited to the facts of that case. Third, the reasoning has been mooted by the Ramos Court's decision that unanimity is a constitutional function of the jury.

The Court of Appeals for the Armed Forces rejected a Fifth Amendment challenge to non-unanimous verdicts in courts-martial. Bramel, 32 M.J. at 3. However, the Court issued no opinion, so there is no development of the law or reasoning from which this

---

armed forces." Defense Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 8. In other words, the court-martial itself is one of a commander's disciplinary tools to achieve good order and discipline, but the court-martial panel as factfinder does not further that end; in fact, a faster way to discipline would be to dispense with the panel.

[8] In response to the Court's Order to brief this issue, the Government acknowledged that impartiality and unanimity are complementary requisites for a jury verdict but stated impartiality does not require unanimity for a court-martial verdict simply because the Supreme Court discussed impartiality in the context of the Sixth Amendment jury trial which does not apply to the military. The Government provided no reason why court-martial panel impartiality should mean anything different than jury impartiality. Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, pp. 8-9.

Court can take guidance. It is not clear why that Court reached the result it did or upon what legal basis. Consequently, Bramel cannot be controlling law. See, e.g., United States v. Clifton, 35 M.J. 79, 81-82, 89, (C.M.A. 1992) (referring to several internal rules of other courts indicating that decisions without opinion have no precedential value).

4. There is no apparent or logical reason for the disparate treatment. The Government, in its response to the Defense motion seeking a unanimous verdict, offered no reason why Congress would have chosen to implement a non-unanimous verdict requirement. However, in its response to the Court's Order to brief this issue, the Government offered two reasons: finality of verdicts, and unlawful command influence (UCI). The Government, however, did not assert that Congress actually considered either of those reasons when authorizing or re-authorizing the non-unanimous verdict in the military. That is likely because Congress never provided a reason for doing so.

(a) It appears that the non-unanimous verdict in courts-martial simply slipped into congressional legislation pertaining to military justice without much thought. The original Articles of War were adopted from the British articles by George Washington. Hearing before the Committee on the Armed Forces, House of Representatives, 62d Congress, 2d Session, on H.R. 23638, Being a Project for the Revision of the Articles of War, p. 4 (1912) [hereafter 1912 Hearing], available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearing_comm.pdf; see also A Study of the Proposed Legislation to Amend the Articles of War (H. R. 2575) and to Amend the Articles for the Government of the Navy (H. R. 3687; S. 1338), p. 2 (January 20, 1948) available at https://www.loc.gov/rr/frd/Military_Law/pdf/CM-Legislation.pdf. The non-unanimous court-martial verdict was one of the features borrowed from the British. 1912 Hearing at 46. When Congress considered revising the Articles of War in 1912, the Judge Advocate General, Major General Enoch H. Crowder, recommended increasing the required majority vote to a two-thirds vote in order to convict on a death-eligible offense. Representative Kahn asked MG Crowder, "Is it not your experience in the examination of the laws of the States for the infliction of the death penalty, that the jury must bring in a unanimous verdict?" Major General Crowder responded, "Yes, sir; but that has never been a characteristic of our military law." Id. at 46. He said further that a unanimous verdict requirement would "[impair] the success of the field operations of an army", but he did not explain why that was the case. Id. at 47. This purported "impairment" was apparently unfounded, because Congress has since required a unanimous guilty verdict in capital courts-martial. Art. 52(b)(2), UCMJ; 10 U.S.C. § 852(b)(2) (2019). No further explanation was apparently needed, however, for Congress to justify continuation of the non-unanimous verdict in courts-martial. This adoption of past practice without addressing a specific military need or balancing that need against the due process rights of service members has apparently continued to the present day.

(b) When Congress was contemplating the proposed Uniform Code of Military Justice in 1949, a report to the House Armed Services Committee gave the following explanation for the proposed Article 52 regarding number of votes required: "This article is derived from [Article of War] 43." H.R. Rept. No. 491, p. 26 (April 28, 1949), available at https://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf. The Senate Armed Services Committee Report said the same thing. S. Rpt. No. 486, p. 23 (June 10, 1949) available at https://www.loc.gov/rr/frd/Military_Law/pdf/report_02.pdf. Between 1912 and 1948, Article of War 43 required a majority vote for conviction for all offenses except death-eligible ones (which required a two-thirds vote). H.R. Rept. No. 491, p. 49. Congress amended Article of War 43 in the 1948 Elston Act to require a two-thirds vote for all offenses other than death-eligible ones, but the Articles for the Government of the Navy maintained a majority vote. Compare H.R. Rept. No. 1034, p. 18 (July 22, 1947), available at https://www.loc.gov/rr/frd/Military_Law/pdf/amend_articles.pdf, with H.R. Rept. No. 491, p. 74. In the Elston Act hearings, Brigadier General Hubert Hoover, Assistant Judge Advocate General, testified that, "An appeal was taken to the United States Circuit Court of Appeals, where it was decided that the article [43] provided that any finding of guilty, except for an offense for which the death penalty is made mandatory, might be reached by a two-thirds vote." He followed that by saying, "The changes that are now proposed in the article [43] are intended to clarify the wording of the article, but not to change the sense of it." Hearings before the Committee on the Armed Services on Sundry Legislation Affecting the Naval and Military Establishment, Eightieth Congress, First Session, Vol. I, p. 2056 (1947), available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No125.pdf. The proposed Article 52 of the UCMJ equalized the Articles of War and the Articles for the Government of the Navy at the higher, two-thirds vote requirement. H.R. Rept. No. 491, p. 93. In the Congressional hearings on the proposed UCMJ, Professor Edmund Morgan, the Chair of the Special Committee to Draft the UCMJ, made the following comment on the proposed Article 52: "In article 52, you will notice that the number of votes required for both conviction and sentence have been made uniform for all the services." Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-First Congress, First Session, On H. R. 2498, p. 43 (March 7 – April 4, 1949), available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf. He said the same thing in the Senate hearings. Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, Eighty-First Congress, First Session, on S. 857 and H. R. 4080, pp. 36, 50 (April 27 – May 27, 1949).

(c) Although Congress revisited the voting requirements for findings in the Military Justice Act of 2016 and increased the votes required in non-capital cases from two-thirds to three-fourths, the only apparent reason it did so was to "eliminate inconsistencies and uncertainties in court-martial voting requirements by standardizing the requirements for each type of court-martial." Report of the Military Justice Review Group, p. 457 (Dec. 22, 2015), available at https://ogc.osd.mil/Links/Military-Justice-Review-Group/. The Department of Defense General Counsel tasked the Military

Justice Review Group to analyze the UCMJ and make recommendations for legislative changes to Congress, and the Group made the vote-change recommendation. It said the change would eliminate the "anomaly [of the] varying … percentage required for a conviction based upon the happenstance of the number of members who remain on the panel after challenges and excusals." Id. at p. 220. Congress said little on the subject. The House Report on the proposed bill merely said, "this would standardize the percentage of votes required." House Report 114-537 (part 1), section 6613 (May 4, 2016). The Senate Report said nothing. See Senate Report 114-255, section 5235 (May 18, 2016). The historical public record indicates that Congress has never offered a reason for authorizing a non-unanimous vote for guilt. This is not a case where "[t]he issue was considered at great length, and Congress clearly expressed its purpose and intent"; rather, it seems to be "an accidental by-product of a traditional way of thinking." Rostker, 453 U.S. at 75.

(d) However, this Court's inquiry does not end there, because the Government is not required to produce evidence of Congress' reasoning and "[a]s long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." Heller, 509 U.S. at 320. The public record provides no reason for Congress' original enactment of the non-unanimous verdict in the military other than a military officer's assertion that that was just the way it had always been done and that to do otherwise would impair the military mission. The former is no reason at all, and the latter was unsupported and has been proven unfounded (as indicated by Congress later requiring a unanimous verdict in capital cases). Aside from the public record, this Court will consider all possible reasons including those offered by the Government, those identified by the Army Court of Criminal Appeals in United States v. Mayo, 2017 CCA LEXIS 239 (A.C.C.A. 2017) (unpub.), and others. None of the reasons are plausible.

(1) First, the Army Court said that a non-unanimous verdict protects against UCI by shrouding the individual votes in secrecy, thereby preventing external potential influencers from knowing a panel member's vote. Id. at 20.[9] The announcement of a unanimous guilty verdict surely reveals that every member of the panel voted for guilt. However, while there is a constitutional requirement for a unanimous guilty verdict, there is no countervailing constitutional requirement for a unanimous acquittal verdict. See, e.g., State v Ross, 367 Ore. 560, 573 (2021) (Oregon Supreme Court stated Ramos does not require unanimous not guilty verdicts). A non-unanimous acquittal verdict does not reveal the votes. Such a verdict could mean that one member, half the panel, or every member voted to acquit; the votes would not be revealed. Additionally, knowing that every member voted to convict does not present a concern of UCI. UCI is

[9] While the Court implied that Congress legislated non-unanimous verdicts because it was concerned about UCI, the public record provides no support for that implication. A connection between the two was never mentioned in any preserved Congressional report or hearing.

generally concerned with those who would manipulate the court-martial process to unlawfully obtain a guilty verdict.

Second, the Army Court said that a non-unanimous verdict permits freedom of expression through secret balloting and prevents a senior ranking member from pressuring a junior member to "get on board" for a unanimous vote. Id. A requirement for a unanimous vote for guilt is not inconsistent with secret balloting. Absent a statutory requirement for a unanimous vote for acquittal, there will be no hung jury or re-voting. If one member secretly votes for a not-guilty finding, the result the panel must announce is a not-guilty finding. Unless a member requests reconsideration of the vote, the decision is final when the votes are cast. This continues to mean that no member knows the vote of any other member (although they may have suspicions from the discussion before voting) and cannot pressure others to join a majority for a unanimous vote of guilty. Further, the military judge instructs the members that, "The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment." Dep't Army Pam. 27-9, Military Judges' Benchbook, para. 2-5-14 (10 January 2020 unofficial update).

The prohibition of UCI protects the court-martial process which protects the accused. To say that one protection for an accused service member is a reason to diminish another protection is a non-sequitur. In fact, the Court of Appeals for the Armed Forces said, "Where the vote is unanimous, [the] concerns about command influence would appear to be unfounded." United States v. Loving, 41 M.J. 213, 296 (C.A.A.F. 1994).

(2) Congress could have been concerned with speedy justice in contingency operating environments—the Government's "finality of verdicts" argument[10]. It could have believed that a non-unanimous guilty verdict requirement would prevent the re-voting and hung juries the Mayo Court highlighted in its reasoning; this expediency would allow commanders to dispose of a court-martial quickly and get back to warfighting. The problem with this speculation about Congress' intent is that re-voting and hung juries are only issues if either the Constitution or congressional legislation requires a unanimous vote to acquit. The former does not, and Congress need not choose to legislate the latter. In fact, it is highly unlikely that Congress entertained this as a reason for authorizing non-unanimous verdicts. Such reasoning would have to proceed thusly: we (Congress) are concerned about hung juries and concomitant retrials in the military; one way to prevent them is to authorize a unanimous guilty verdict but not a unanimous not-guilty verdict and ensure secrecy of voting; another way to prevent them is to authorize a non-unanimous guilty verdict; both choices achieve the objective and take the same amount of time; one choice ensures a more-certain verdict

[10] Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 9.

(unanimity) while the other choice ensures a less-certain verdict (non-unanimity); so we choose less-certain verdicts that provide less protection to service members. Such reasoning is illogical and certainly not plausible.

(3) Congress could also have been concerned that providing a military accused a right to a jury trial would unduly burden military justice by requiring the military to choose jurors from the accused's state of residence, randomly selecting them, and ensuring 12 jurors for every trial—that is, importing one aspect of the jury would require importing all aspects of the jury. The latter two aspects of the jury are not grounded in the Constitution.[11] The former aspect—a requirement to choose jurors from a service member's state of residence—would be unworkable, but it has nothing to do with the separate aspect of unanimity. Further, Congress legislated parity for accused service members on the "of peers" aspect of the jury by creating a panel of military peers from the accused's military community and giving the accused some power to shape that venire. Article 25, UCMJ; 10 U.S.C. § 825 (2019). That aspect of the court-martial panel is not at issue here and is not inextricably tied to the aspect of unanimity; each aspect serves a different purpose.

5. By permitting the accused to be convicted by a non-unanimous vote, Article 52(a)(3), UCMJ, violates the accused's constitutional due process rights by denying him equal protection of the law.

VI. Ruling. ACCORDINGLY, the Defense Motion is GRANTED. The Court will instruct the panel that any finding of guilty must be by unanimous vote, and the Court will ask the panel president before announcement of findings if each guilty finding was the result of a unanimous vote.

PRITCHARD.CHARLES.LESTER.JR.1064023086

Digitally signed by PRITCHARD.CHARLES.LESTER.JR.1064023086
Date: 2022.01.03 09:44:39 +01'00'

CHARLES L. PRITCHARD, JR.
COL, JA
Military Judge

[11] "The due process clause does not itself guarantee a defendant a randomly selected jury, but simply a jury drawn from a fair cross section of the community." United States v. Kennedy, 548 F.2d 608, 614 (5th Cir. 1977). "In criminal cases due process of law is not denied by a state law which dispenses with … the necessity of a jury of twelve …." Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Johnson, 406 U.S. at 359; Williams v. Florida, 399 U.S. 78, 100 (1970) ("the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment").

Government Appellate Exhibit

8

IN A GENERAL COURT MARTIAL
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY

UNITED STATES **v.** **Dial, Andrew J.** **Lieutenant Colonel (O-5), U.S. ARMY** **Alpha Company,** **Allied Forces North Battalion,** **United States Army North Atlantic Treaty Organization Brigade,** **APO AE 09752**	))))))))))	**NOTICE OF PLEAS AND FORUM** **6 December 2021**

LTC Andrew J. Dial, by and through his counsel provides notice as follows:

1. Forum selection: Panel and sentencing by panel members in lieu of sentencing by military judge pursuant to Article 25(d)(1), UCMJ.

2. Notice of Pleas: To all Charges and Specifications, Not Guilty.

Respectfully Submitted

For Patrick Mclain:

MIHAIL.ROBERT.VALERIAN.1521101063 Digitally signed by MIHAIL.ROBERT.VALERIAN.1521101063 Date: 2021.12.06 09:36:49 +01'00'
ROBERT MIHAIL
CPT, JA
Military Defense Counsel

MIHAIL.ROBERT.VALERIAN.1521101063 Digitally signed by MIHAIL.ROBERT.VALERIAN.1521101063 Date: 2021.12.06 09:37:36 +01'00'
ROBERT MIHAIL
CPT, JA
Military Defense Counsel

CERTIFICATE OF SERVICE

Served on trial counsel and Court via electronic mail on 6 December 2021.

MIHAIL.ROBERT.VALERIAN.1521101063
Digitally signed by MIHAIL.ROBERT.VALERIAN.1521101063
Date: 2021.12.06 09:38:04 +01'00'

ROBERT MIHAIL
CPT, JA
Military Defense Counsel

APPENDIX

United States v. Albarda

United States Air Force Court of Criminal Appeals

July 7, 2021, Decided

No. ACM 39734 (f rev)

Reporter

2021 CCA LEXIS 347 *; 2021 WL 2843821

UNITED STATES, Appellee v. Danber S. ALBARDA, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Upon Further Review. Military Judge: W. Shane Cohen. Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1. Sentence adjudged on 8 March 2019 by GCM convened at Fort George G. Meade, Maryland.

United States v. Albarda, 2021 CCA LEXIS 75, 2021 WL 682160 (A.F.C.C.A., Feb. 22, 2021)

Counsel: For Appellant: Major Alexander A. Navarro, USAF.

For Appellee: Major Jessica L. Delaney, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, KEY, and ANNEXSTAD, Appellate Military Judges.

Opinion

PER CURIAM:

This case was originally submitted for our review with Appellant alleging multiple assignments of error. On 22 February 2021, we issued our opinion in Appellant's case and concluded that the approved findings and sentence were 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, we affirmed the findings and sentence. *United States v. Albarda*, ***No. ACM 39734***, 2021 CCA LEXIS 75, at *32 (A.F. Ct. Crim. App. 22 Feb. 2021) (unpub. op.). However, we also concluded that both the action and the court-martial order erroneously failed to report the deferral of the reduction in grade. Therefore, we returned the record of trial to the Judge Advocate General for remand to the convening authority to withdraw the incomplete action, substitute a corrected **[*2]** action, and issue a corrected court-martial order. Further, we ordered that the record of trial be returned to this court for completion of appellate review under Article 66, UCMJ. *Id.*

On 12 March 2021, both a corrected action and court-martial order were completed by the convening authority. Subsequently, the record of trial was returned to this court. We have reviewed the convening authority's corrected action and court-martial order. We find that the corrections comply with our order. On 17 May 2021, Appellant filed a brief with this court and raised one additional issue for our consideration: whether Appellant's court-martial conviction, which had no unanimity requirement, is invalid in light of the United States Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), that the Sixth

Amendment[1] requires unanimous verdicts for federal and state criminal trials.[2] We have carefully considered Appellant's contention and find it does not require further discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).[3]

Upon further review, the approved findings and sentence are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

---

[1] U.S. CONST. amend. VI.

[2] Appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] "[T]here is no Sixth Amendment right to trial by jury in courts-martial." *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citations omitted); *see also Ex parte Quirin*, 317 U.S. 1, 45, 63 S. Ct. 2, 87 L. Ed. 3 (1942); *Ex parte Milligan*, 71 U.S. 2, 123, 18 L. Ed. 281 (1866); *United States v. McClain*, 22 M.J. 124, 130 (C.M.A. 1986). Therefore, there can be no requirement for a unanimous jury verdict at courts-martial under that amendment.

United States v. Garrett

United States Navy-Marine Corps Court of Criminal Appeals

March 30, 2021, Decided

No. 202000028

Reporter

2021 CCA LEXIS 135 *; 2021 WL 1197611

UNITED STATES, Appellee v. Andrew M. GARRETT, Master-at-Arms Second Class (E-5) U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Subsequent History: Petition for review filed by United States v. Garrett, 2021 CAAF LEXIS 465, 2021 WL 2432440 (C.A.A.F., May 18, 2021)

Motion granted by United States v. Garrett, 2021 CAAF LEXIS 479, 2021 WL 2411316 (C.A.A.F., May 19, 2021)

Review denied by United States v. Garrett, 2021 CAAF LEXIS 767 (C.A.A.F., Aug. 23, 2021)

Prior History: **[*1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Michael D. Libretto. Sentence adjudged 25 October 2019 by a general court-martial convened at Naval Air Station Jacksonville, Florida, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 2 years, forfeiture of all pay and allowances, and a dishonorable discharge.

Counsel: For Appellant: Robert Feldmeier, Esq., Lieutenant Clifton E. Morgan III, JAGC, USN.

For Appellee: Lieutenant Gregory A. Rustico, JAGC, USN; Lieutenant Joshua C. Fiveson, JAGC, USN.

Judges: Before HOLIFIELD, STEWART, and DEERWESTER, Appellate Military Judges. Senior Judge HOLIFIELD delivered the opinion of the Court, in which Judges STEWART and DEERWESTER joined. Judges STEWART and DEERWESTER concur.

Opinion by: HOLIFIELD

Opinion

HOLIFIELD, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification of sexual assault by causing bodily harm, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920 (2012).[1]

Appellant asserts seven assignments of error [AOEs]: (1) that the evidence is factually insufficient to support his conviction; (2) that the military judge erred in instructing the **[*2]** panel that it could convict based on an uncharged theory of criminal liability; (3) that trial defense counsel [TDC] was ineffective in failing to object to improper expert opinion and for failing to move to strike the victim's testimony under Rule for Courts-Martial [R.C.M.] 914; (4) that the military judge erred in admitting a hearsay statement as a prior consistent

[1] Appellant was acquitted of one specification of sexual assault when he knew or should have known the victim was asleep.

statement; (5) that TDC was ineffective for failing to move to suppress the victim's pretext phone call with Appellant; (6) that a non-unanimous verdict violated Appellant's Sixth Amendment rights; and (7) that the evidence was factually insufficient due to the victim's motive to fabricate.[2] Merging the last AOE with the first and considering but summarily rejecting the fifth and sixth as being without merit,[3] we address the remaining AOEs in order. After doing so, we find no prejudicial error and affirm.

I. Background

Appellant and the victim, Master-at-Arms Third Class (E-4) [MA3] Golf,[4] were co-workers in the Security Department at Naval Submarine Base Kings Bay, Georgia. Throughout their close working relationship, MA3 Golf never expressed a romantic interest in Appellant. In August 2018, both attended a party at Appellant's off-base apartment, **[*3]** where MA3 Golf consumed several alcoholic drinks and played a game in which players attempted to catch airborne whipped cream in their mouths. After consuming an unknown amount of alcohol and whipped cream, MA3 Golf became sick, vomiting in Appellant's bathroom. As Appellant helped MA3 Golf return to the living room, he attempted to steer her into his bedroom. She very clearly refused, instead choosing to sleep on Appellant's living room couch. Later that night, MA3 Golf awoke to find Appellant penetrating her vagina with his penis. She reacted by pretending to still be asleep.

The following morning, MA3 Golf returned to her nearby apartment and then met with a friend and co-worker, MA3 Sierra. MA3 Golf told MA3 Sierra what had happened the previous night, and the latter advised her that she needed to report the incident to law enforcement.

Soon thereafter, at the local Naval Criminal Investigative Service [NCIS] field office, Special Agent [SA] Charlie directed MA3 Golf to call Appellant under the pretext of wanting to discuss the event in question. During the recorded call, Appellant consistently claimed that the sexual encounter was consensual and that MA3 Golf was a willing and active **[*4]** participant. Appellant later repeated this claim in his own statement to NCIS. At the time SA Charlie met with MA3 Golf, he learned that texts MA3 Golf had exchanged with MA3 Sierra that morning were on MA3 Golf's phone. While SA Charlie did not seize the phone or otherwise capture the text conversation, he did direct MA3 Golf not to delete the texts. But between that day and the trial, the texts were lost.

The victim also met with a nurse, Lieutenant Commander [LCDR] Victor, who performed a sexual assault forensic examination. LCDR Victor described MA3 Golf's demeanor during their meeting as "flat . . . [meaning] blunted emotion, not making eye contact, common with people who have experienced trauma."[5]

Appellant's TC's strategy was to challenge the veracity of the victim's description of events. To this end, the Defense highlighted memory gaps and discrepancies in MA3 Golf's various statements, suggested motives to fabricate, and presented expert testimony regarding blackouts and how internal and external influences can

[2] Assignments of Error 5-7 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] *See United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

[4] All names used in this opinion, except those of Appellant, judges, and counsel, are pseudonyms.

[5] R. at 484-85.

affect memory.

Additional facts necessary to resolve the AOEs are addressed below.

II. Discussion

A. The Evidence Admitted at Trial Was Factually Sufficient to Support Appellant's [*5] Conviction

1. Standard of Review

The test for factual sufficiency is whether "after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt." *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) and Art. 66(c), UCMJ). In doing so, 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. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

To sustain a conviction for sexual assault by causing bodily harm, we must be convinced the Prosecution proved beyond a reasonable doubt that: (1) Appellant committed a sexual act upon MA3 Golf by causing penetration of her vulva by his penis; and (2) Appellant did so by causing bodily harm to MA3 Golf—that is, penetrating her vulva with his penis without her consent. UCMJ art. 120(b)(1)(B), (g)(3).

2. Analysis

Appellant argues that the lack of corroborating evidence, gaps in MA3 Golf's memory, the impact of both internal and external influences on her ability to fill [*6] those gaps, and potential motives for her to fabricate create reasonable doubt as to his guilt. Appellant's counsel attacked MA3 Golf's credibility throughout the trial, taking a two-pronged approach. The Defense first laid a foundation to argue that MA3 Golf had suffered an alcohol-induced blackout, unconsciously filling the gaps in her memory to accord with her expressed lack of interest in Appellant and the comments by her friend, MA3 Sierra, that she had been assaulted and needed to report the incident. At the same time, Appellant's counsel attempted to show that MA3 Golf could not have been experiencing a blackout, based on witnesses' testimony that she did not appear drunk at the party. Finally, they claimed that MA3 Golf's veracity was undermined by her knowledge that an unrestricted report of sexual assault might allow her to transfer duty stations, something she had months earlier expressed a desire to do.

We find these and other questions regarding MA3 Golf's credibility are completely outweighed by the facts on which both MA3 Golf and Appellant agree. First, MA3 Golf had never shown romantic interest in Appellant, including during the party that night. Second, MA3 Golf—whether [*7] due to overindulgence in alcohol, whipped cream, or both—was vomiting in Appellant's bathroom shortly before the sexual act occurred. Third, MA3 Golf made very clear to Appellant she did not want to go into his bedroom when Appellant attempted to steer her into it as they left the bathroom minutes after she was sick—a fact that evidences their respective intentions.

Additionally, MA3 Golf reported the sexual assault within hours of leaving Appellant's apartment. She initially declined an expedited transfer when offered. The depth of MA3 Golf's relationship with MA3 Sierra was neither developed at trial nor even mentioned in TDC's

argument on findings. And Appellant's description of the sexual act—that he ejaculated on the floor—is contradicted by DNA evidence.

We recognize that we did not personally observe MA3 Golf testify at trial, but the record establishes that her testimony was credible and compelling. Reviewing the entire record, we find the evidence factually sufficient to prove Appellant's guilt beyond a reasonable doubt.

B. The Military Judge Did Not Err in His Instructions Regarding the Elements of Sexual Assault by Bodily Harm

1. Standard of Review

We review de novo whether a **[*8]** military judge properly instructed the members. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). A "military judge's denial of a requested instruction is reviewed for abuse of discretion." *United States v. Carruthers*, 64 M.J. 340, 345-46 (C.A.A.F. 2007). In reviewing this denial, we look to whether the requested instruction is correct, whether it is substantially covered by other instructions, and whether the failure to give it deprived Appellant of a defense or seriously impaired his ability to present that defense. *Id.*

2. Analysis

Appellant's TDC requested, in part, that the military judge instruct the members that:

> [T]here is no allegation that MA3 [Golf] was too intoxicated to consent to sex. You are not permitted to consider whether she was too intoxicated to consent to sex. That is not an issue before you, and as a matter of law, a determination has already been made in this case that MA3 [Golf] was not too intoxicated to consent to sex.[6]

Instead, the military judge provided the following instructions relevant here to bodily harm and consent:

> [For sexual assault by bodily harm], the elements are as follows:
>
> One, that . . . the accused committed a sexual act upon [MA3 Golf] by penetrating her vulva with his penis;
>
> Two, that the accused did so by causing bodily harm to MA3 [Golf], to wit: penetrating **[*9]** her vulva with his penis; and
>
> Three, that the accused did so without the consent of MA3 [Golf].
>
> . . . .
>
> [T]he term "bodily harm" means any offensive touching of another, however slight, including any nonconsensual sex act.
>
> The evidence has raised the issue of whether [MA3 Golf] consented to the sexual conduct . . . . All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven each of the elements . . . beyond a reasonable doubt. . . .
>
> "Consent" means a freely-given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. . . .

[6] R. at 647. Appellant's TDC conceded that the remainder of the requested instruction was covered by the main instructions. R. at 648. Also, the military judge noted TDC's concession that the Defense was on notice that capacity to consent would be raised by the evidence, and had prepared accordingly. R. at 650.

Further, a sleeping, unconscious or incompetent person cannot consent.

Lack of consent may be inferred from the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

A competent person **[*10]** is a person who possesses the physical and mental ability to consent. An incompetent person is a person who lacks either the mental or physical ability to consent because he or she is:

One, asleep or unconscious;

Two, impaired by a drug, intoxicant or other similar substance; or

Three, suffering from a mental disease or defect, or a physical disability.

To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.

The mere fact that MA3 [Golf] consumed alcohol does not render her incompetent and incapable of consenting. . . . You may, however, consider that MA3 [Golf] may have consumed alcohol and the amount of alcohol she may have consumed along with all other evidence relevant to the issue in determining whether MA3 [Golf] consented to the conduct at issue and whether she possessed the cognitive ability to appreciate the nature of the conduct and lacked the physical and mental ability to consent. The government has the burden of proof to establish that MA3 [Golf] did not consent **[*11]** and/or was incompetent to consent to the sexual conduct in question . . . .[7]

The military judge properly found the quoted portion of the TDC's proposed instruction to be an inaccurate statement of the law, citing *United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167 (N-M. Ct. Crim. App. Apr. 4, 2018) (unpublished). Here, as in *Gomez*, we find that because the Article 120, UCMJ, definition of "bodily harm" includes "any nonconsensual sexual act," and "consent" means "a freely given agreement to the conduct at issue by a competent person," the offense with which Appellant was charged necessarily implicated the victim's competence. Accordingly, MA3 Golf's ability to consent was an issue squarely before the members, making the proposed instruction incorrect and unable to satisfy the first prong of the *Caruthers* test. The military judge's refusal to give the proposed instruction was not error.

On appeal, Appellant also claims that the instruction that the military judge did give regarding consent renders sexual assault by bodily injury (Article 120(b)(1)(B)) multiplicious with sexual assault upon an incapacitated person (Article 120(b)(3)). We disagree. "A charge is multiplicious if the proof of such charge also proves every element of another **[*12]** charge." R.C.M. 907(b)(3)(B). In comparing two statutes for a determination of multiplicity, we are "limited to consideration of the statutory elements of the involved crimes," rather than the pleadings and proof at trial. *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993).

Sexual assault through incapacitation requires that the Government prove, inter alia, that the victim was *incapable* of consenting and that the accused knew or should have known of said incapacity. UCMJ art. 120(b)(3). Neither of these elements is required to prove sexual assault by bodily harm. For that offense, the

[7] R. at 658-62.

Government must prove only (1) the commission of a sexual act and (2) that said act was done by causing bodily harm, *i.e.*, "an offensive touching of another, however slight, including any nonconsensual sexual act . . . ." UCMJ art. 120(g)(3). And, as our superior court has specifically found, proving a victim's "*legal inability to consent* [i]s not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact consent*." *United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016) (finding on that basis that assault consummated by battery is not a lesser-included offense of sexual assault or abusive sexual contact by placing the other person in fear) (emphasis in original).

The **[*13]** military judge's instructions did not alter the fact that each of the two offenses in question demands proof of an element not required by the other. We therefore reject Appellant's multiplicity argument.

C. The TDC Was Not Ineffective in Failing to Object to LCDR Victor's Opinion Testimony or Failing to Move to Strike the Victim's Testimony Under Rule for Courts-Martial 914

1. Standard of Review

We review claims of ineffective assistance of counsel de novo. *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016). To prevail on an ineffective assistance claim, Appellant bears the burden of proving that the performance of defense counsel was deficient and that Appellant was prejudiced by the error. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "We need not apply the *Strickland* test in any particular order; rather, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.' " *Id.* (quoting *Strickland*, 466 U.S. at 697) (alterations in original). "The test for prejudice when a conviction is challenged on the basis of actual ineffectiveness of counsel 'is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.' " *United States v. Scott*, 24 M.J. 186, 189 (C.M.A. 1987) (quoting *Strickland*, 466 U.S. at 695).

2. Analysis

Appellant first avers that his counsel **[*14]** was ineffective for failing to object to LCDR Victor's statement that the affect she observed in MA3 Golf—"flat," "blunted emotion, not making eye contact"—was "common with people who have experienced trauma."[8] Appellant claims the comment was improper expert opinion, as the record shows LCDR Victor testified as a lay factual witness, not an expert. But, even assuming the testimony was improper, we fail to find prejudice. The main thrust of Appellant's defense at trial was that MA3 Golf suffered a blackout, and that internal and external influences led her to manufacture memories to fill the gaps and convince herself she had been sexually assaulted. Thus, the fact she may have been acting in a manner consistent with "people who have experienced trauma" actually fit with TDC's theory.

We next examine whether TDC was ineffective by neither requesting, once MA3 Golf testified, any prior statements of MA3 Golf, or moving to strike MA3 Golf's testimony as a remedy for the Government's presumed inability to provide the lost texts between MA3 Golf and MA3 Sierra as required by R.C.M. 914. Again, we start and end with the second prong of the *Strickland* test, and, again, we find no prejudice. For witnesses **[*15]** called by trial counsel (as was MA3 Golf), the obligations of R.C.M. 914 apply only to statements "in

[8] R. at 484-85.

the possession of the United States." Assuming, arguendo, that the texts between MA3 Golf and MA3 Sierra were "statements" within the Rule, they were never in the possession of the United States. The record indicates only that SA Charlie knew of the statements; there was no evidence indicating that he read the texts or at any time possessed MA3 Golf's phone. So Appellant points to the phone's owner, claiming: (1) MA3 Golf's participation in the pretext phone call at SA Charlie's direction made her a government agent; and (2) since MA3 Golf possessed the phone, the texts were in the possession of the United States. Appellant cites no authority for this conclusion, and we find none.[9] Looking to the facts of this case, we find no violation of R.C.M. 914 and, therefore, no prejudice from TDC's failure to claim that there was.

As Appellant has not demonstrated a reasonable probability that, absent either of these alleged errors, the members would have had a reasonable doubt regarding his guilt, we **[*16]** find the claim of ineffective assistance without merit.

D. Admitting the Victim's Prior Statement Through MA3 Sierra Was Not Plain Error

1. Standard of Review

We review a military judge's admission or exclusion of evidence for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020). "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. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citation and internal quotation marks omitted). "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).

2. Analysis

Hearsay is generally not admissible. Mil. R. Evid. 802. A prior consistent statement is not hearsay if: the declarant of the statement testifies and is subject to cross-examination about the statement; the statement is consistent with the declarant's testimony; and the statement is offered either "(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying," or "(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground." Mil. R. Evid. 801(d)(1)(B). "Another ground" **[*17]** as used in subparagraph (ii) of the Rule, refers to attacks on credibility other than allegations of recent fabrication or improper influence or motive addressed by subparagraph (i). *Finch*, 79 M.J. at 395. Charges of faulty memory are one such ground. *Id.* (citing *Manual for Courts-Martial, United States*, app. 22, Analysis of the Military Rules of Evidence at A22-61 (2016 ed.)). For a prior statement to be admissible under Military Rule of Evidence 801(d)(1)(B)(ii), its proponent must show that "the prior consistent statement [is] relevant to rehabilitate the witness's credibility on the basis on

---

[9] Appellant does cite *United States v. Bosier*, 12 M.J. 1010 (A.C.M.R. 1982), as authority for treating a government informer's notes as "in the possession of the United States." But we are not persuaded that *investigative notes* in that case, taken by an informer during a *seven-month relationship* with law enforcement, *during the course of the investigation* and *pertaining to the informer's role* in that investigation, are analogous to brief texts made before—and independent of—an investigation, by a victim whose sole role in the investigation was a pretext phone call with her alleged attacker. We decline to ascribe Government possession for the purposes of R.C.M. 914 under the circumstances here.

which he or she was attacked." *Id.* at 396.

During its case-in-chief, the Government sought to elicit testimony from MA3 Sierra recalling what MA3 Golf told him the morning after the assault. The Government argued that the statements were admissible under Military Rule of Evidence 801(d)(1)(B)(ii). Objecting, TDC explained that the Defense had not attacked MA3 Golf's credibility by implying she was lying. Rather, the Defense "just exposed . . . potential issues in perception and ability to recall," and that, due to MA3 Golf's blackout state, "this memory was never recorded, and that she would, essentially, be filling in the blanks for a memory that never actually occurred."[10] Finding no connection between the **[*18]** statements to MA3 Sierra and the way in which MA3 Golf's credibility was attacked, such that the statements would not rehabilitate MA3 Golf's credibility, the military judge sustained the Defense's objection, precluding the Government from eliciting the statements.

The Defense subsequently called an expert witness, Dr. Hotel, who explained how memories are recorded and how internal and external influences, or "schema," can cause a person to fill in the gaps in memory caused by an alcohol-induced blackout. One external influence Dr. Hotel discussed was MA3 Sierra's comments to MA3 Golf, explaining how his telling her that "'you need to go to report this,' kind of inferring that this is a reportable event, and you need to go and report this as a sexual assault[,] . . . that could potentially be influencing and have an impact on how one comes to characterize or recall an event."[11]

After Dr. Hotel testified, the assistant trial counsel [ATC] asked the military judge to revisit his earlier ruling regarding MA3 Sierra's testimony. The ATC argued that the Defense had opened the door to the statements' admission by Dr. Hotel's testimony and attack on MA3 Golf's credibility. The military judge **[*19]** agreed, pointing to Dr. Hotel's "specific example referencing the influence that MA3 [Sierra] might have had on the memory of [MA3 Golf]."[12] He also cited the Defense "calling into question and attacking the witness' credibility on another ground, specifically lack of memory or contamination of that memory."[13] Accordingly, the military judge changed his earlier ruling, finding MA3 Golf's statements to MA2 Sierra were admissible under Military Rule of Evidence 801(d)(1)(B)(ii).

On appeal, Appellant avers that "the allegation was one of contamination," and, since MA3 Sierra's statements to MA3 Golf occurred before she told him of the assault, any subsequent statements by MA3 Golf were "contaminated."[14] Therefore, he reasons, the prior consistent statements in question are not relevant to rehabilitate MA3 Golf's credibility.

We disagree. When the Defense asked Dr. Hotel about external influences, the expert discussed how what MA3 Sierra said to MA3 Golf could have influenced how the latter came to remember the event. The reference to MA3 Sierra's potential influence, as the military judge rightly found, made the conversation's contents relevant. In fact, the military judge's ruling was ultimately supported by MA3 Sierra's testimony, **[*20]** which provided faint evidence for the conclusion that MA3 Sierra was somehow able to influence MA3 Golf's memory before she told him what happened. MA3

[10] R. at 404, 409.

[11] R. at 609-10.

[12] R. at 630.

[13] *Id.*

[14] Appellant's Br. at 35.

Sierra's testimony contains only a slight, vague description of his meeting with MA3 Golf. After MA3 Golf texted him and asked to meet, he picked her up. She was "quiet for a minute, just like an ominous—like, there's definitely something that needed to be said type of feeling."[15] Based on how MA3 Golf was acting, MA3 Sierra "had an idea where she was going," and stopped her before she said anything.[16] The record does not indicate what was said next, or by whom. Clearly, at some point, MA3 Golf described the sexual assault, and MA3 Sierra asked her if she wanted to report the assault. But the *order* in which this conversation occurred—a key element of Appellant's claim of contamination—is missing. Thus, the details of the conversation bore directly on the utility of Dr. Hotel's opinion concerning the potential influence of MA3 Sierra's words on MA3 Golf's memory.

We also disagree with Appellant's narrow portrayal of the Defense's attack. The allegation of contamination by MA3 Sierra was simply part of a broader attack alleging that MA3 Golf **[*21]** had little or no accurate memories of the event. A fresh report, such as MA3 Golf describing the assault to MA3 Sierra only hours after the event, can serve to rebut such a charge and here provides additional support for our conclusion that MA3 Golf's statements to MA3 Sierra were properly admitted under Military Rule of Evidence 801(d)(1)(B)(ii).

While it would have been better had the military judge provided a more detailed explanation of his ruling, his brief comments show that he understood and correctly applied Military Rule of Evidence 801(d)(1)(B)(ii). And we see nothing in the record that indicates he abused his discretion in finding that the prior statements would rehabilitate MA3 Golf's credibility regarding alleged lack or contamination of memory. Accordingly, we find no error.

III. Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the finding and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred. UCMJ arts. 59, 66. Accordingly, the finding and sentence are **AFFIRMED**.

Judges STEWART and DEERWESTER concur.

End of Document

[15] R. at 633.

[16] R. at 640-41.

United States v. Grimes

United States Navy-Marine Corps Court of Criminal Appeals

January 28, 2000, Decided

NMCM 98 00955

Reporter

2000 CCA LEXIS 9 *; 2000 WL 122390

UNITED STATES v. Dana L. GRIMES Operations Specialist First Class (E-6), U.S. Navy

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

Prior History: Sentence adjudged 17 November 1997. Military Judge: J.D. Rockwell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

Disposition: Affirmed.

Counsel: LT MARI-RAE SOPPER, JAGC, USNR, Appellate Defense Counsel.

LT JAMES E. GRIMES, JAGC, USNR, Appellate Government Counsel.

LT RUSSELL J.E. VERBY, JAGC, USNR, Appellate Government Division.

Capt KENT N. STONE, JAGC, USNR, Appellate Government Division.

Judges: BEFORE R.B. LEO, D.A. ANDERSON, JOHN W. ROLPH. Judge ANDERSON and Judge ROLPH concur.

Opinion by: R.B. LEO

Opinion

LEO, Senior Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial before officer and enlisted members of attempted aggravated arson, attempted burning with intent to defraud, two specifications of conspiracy to commit aggravated arson, two specifications of conspiracy to commit a burning with the intent to defraud, aggravated arson, and burning with the intent to defraud, in violation of Articles 80, 81, 126, and 134, Uniform Code of Military Justice, 10 U.S.C. " 880, 881, 926, and 934 (1994). **[*2]** He was awarded a dishonorable discharge, confinement for 5 years, total forfeitures, a fine of $ 15,000, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the assignments of error, [1] and the Government's response. 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.

I. MOTION FOR MISTRIAL

The appellant contends that the military judge erred by denying a motion for a mistrial after the Government's main witness, Mr. Jernigan, testified that he had failed a polygraph question concerning the appellant's

[1] See Appendix A for list of assignments of error.

involvement in the arson.

Prior to that testimony, the following exchange occurred between the appellant's civilian counsel and Jernigan during cross-examination:

> Q. All right. In fact, you never admitted having any knowledge of the [*3] fire until September 5th, 1997, when you were interviewed with a [sic] certain Sergeant Balm of the Virginia Police Department; isn't that right?
> A. It was '95.
> Q. The polygraph expert?
> A. Right. That is correct.
> Q. Okay. Now, in fact, you told Sergeant Balm a number of things before you admitted to Sergeant Balm that you were lying to him; isn't that true? That-you don't understand the question. I can see by your expression.
> A. No, sir. I don't-I don't understand. I can't--
> Q. All right. Did you not make a number of statements to Sergeant Balm concerning your knowledge of the fire?
> A. I told him that I had-I had no knowledge of it, yes, I did.
> * * * * *
> Q. You not-you lied a number of times to Sergeant Balm?
> A. I told him that I had no knowledge of the fire, yes, several times.
> Q. Okay. In response to the question posed to you by Sergeant Balm as follows: "Did you conspire to commit arson of Petty Officer Grimes' home?" did you answer no?
> A. Yes, I did.
> Q. In response to the question by Sergeant Balm, . . . "Did you attempt to set fire to Petty Officer Grimes' home?" your answer was no?
> A. Yes, it was.
> Q. And that was a lie?
> A. Yes, it was.
> Q. Okay. And in response [*4] to the question by Sergeant Balm, "Do you know for sure who attempted to set fire to Petty Officer Grimes' home?" that was a lie, too, when you said no?
> A. Yes, it was.
> Q. All right. Is it true that you didn't admit that you had any part in these fires until *Sergeant Balm told you that you had failed that polygraph examination*
> A. I never admitted it to Sergeant Balm.
> Q. All right. You admitted it after *Sergeant Balm told you that you failed the polygraph examination*; isn't that right?
> A. Yes, that is correct.

Record at 672-73 (emphasis added).

On redirect examination, the following colloquy occurred between the assistant trial counsel and Jernigan:

> Q. Did Sergeant Balm tell you that one of the reasons-or one of the questions you failed on the polygraph examination was whether you conspired with this man, Petty Officer Grimes, to set that fire?
> A. Yes, he did.
> Q. One of those questions. That's what you failed, isn't it?
> A. Yes.
> Q. And you later told the truth?
> A. Yes.

Record at 707-08.

The appellant's civilian counsel objected and was granted an Article 39(a), UCMJ, session. During that session, the military judge asked the assistant trial counsel [*5] if she elicited testimony as to the results of the polygraph exam. She responded that the defense had opened door by asking the witness if he had been told that he had failed the polygraph. The military judge indicated that he had allowed the references to the

polygraph on cross-examination "only because it was pertinent to the question of [Jernigan] finally confessing." Record at 711. He added that "nobody's made a foundation offer as to the admissibility of the examination itself . . . " *Id*. Civilian counsel asked for a mistrial based upon the assistant trial counsel's misstatement of the evidence in her question, as well as the witness' response. The military judge denied the request, stating that he would first instruct and then poll the members to determine if the problem could be remedied. The military judge recalled the members and instructed them to disregard the "last" question of counsel and "the response, if any, from the witness." Record at 715. He then polled them to confirm that they could disregard the "question." *Id*. Civilian counsel did not object to this procedure. Record at 713, 715-16.

Before we can determine whether the denial of the motion for mistrial **[*6]** was error, we first must find that trial counsel's questions regarding the polygraph results were improper. Although the military judge held that the questions were improper, we are not precluded from examining the effect of his underlying finding on the charges that are now before the court. *United States v. Hall*, 50 M.J. 247, 249 (1999); *United States v. Morris*, 49 M.J. 227, 229 (1998). "An appellate court may consider the propriety of a trial ruling excluding evidence to the extent that the ruling affects other evidence which was not excluded[.]" *Morris,* 49 M.J. at 230 (quoting *United States v. Starr*, 1 M.J. 186, 190 (C.M.A. 1975)). In doing so, an appellate court does not violate the "law of the case" doctrine. [2] *Id*. Based upon the cross-examination of Mr. Jernigan by the appellant's civilian counsel concerning the results of the polygraph examination, we find that the trial counsel's questions on redirect examination as to the polygraph results were not improper.

[*7] The underlying issue is whether the assistant trial counsel violated Military Rule of Evidence 707(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), which states that "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Our *de novo* review of this issue takes into account the context in which the questions were asked. *Morris*, 49 M.J. at 230.

During the cross-examination of Jernigan, the appellant's civilian counsel was the one who first introduced evidence concerning the results of a polygraph examination in order to attack Jernigan's' credibility. The civilian counsel had gotten Jernigan to admit that he had lied to Sergeant Balm, the polygraph examiner, a number of times concerning his knowledge of and involvement in the fires at the appellant's home. At that point, the impeachment was complete, and the door was not yet opened for any inquiry by the Government into the results of the polygraph examination. However, the civilian counsel elected to press the matter further and solicited additional evidence--which **[*8]** was cumulative anyway--on the matter of Jernigan's character for truthfulness. He asked specifically if Jernigan had lied when asked by Sergeant Balm whether he had conspired to commit arson on the appellant's house and if he had not, in fact, denied his involvement until he was told by Balm that he had failed the polygraph examination. Record at 672-73.

The clear implication of the civilian counsel's cross-examination was that the questions to which Jernigan had responded untruthfully were part of the polygraph examination itself. *See* Record at 709 (civilian counsel

[2] "Under the 'law of the case' doctrine, an unchallenged ruling 'constitutes the law of the case and binds the parties.'" *Morris*, 49 M.J. at 230 (quoting *United States v. Grooters*, 39 M.J. 269, 273 (C.M.A. 1994)).

indicating outside presence of members that he had taken questions from tape of actual polygraph examination). Jernigan had already testified on direct examination that he *conspired* with the appellant--and no one else--to burn down the appellant's house. Although avoiding any direct reference to the appellant, the civilian counsel--particularly when he asked if Jernigan had conspired to commit arson--could only have been referring to the appellant. The civilian counsel thereby invited the assistant trial counsel to clarify what had already been elicited by the defense. *See United States v. Eggen*, 51 M.J. 159, 162 (1999) **[*9]** (concluding that actions of defense counsel opened door on redirect examination for prosecutor to elicit testimony from Government psychiatrist regarding truthfulness of victim).

The appellant attempts to argue that his counsel's questions to Jernigan omitted any specific reference to the appellant and that the assistant trial counsel's question misstated the evidence. This contrived argument over semantics is unpersuasive. The appellant cannot offer the factfinder only a portion of the evidence--evidence that should not have been admitted in the first instance--while denying the opposing party a fair opportunity to present the rest of the evidence, if it is relevant to what has preceded it. The military judge, therefore, erred in finding that the assistant trial counsel's question was not admissible. After the door was opened by the civilian counsel, the assistant trial counsel's question was relevant in explaining how Jernigan came to confess to the arsons and implicated his co-conspirator in the process. The remaining issue as to the military judge's defective instruction to disregard is moot, since it was based upon an erroneous finding by the military judge as to the challenged **[*10]** questions and responses. Prejudice would not result even if the members did consider the evidence that they had been instructed to disregard. Accordingly, the appellant has failed to show that a mistrial was manifestly necessary to preserve the ends of justice or to dispel any substantial doubt about the fairness of the proceeding. R.C.M. 915(a). We, therefore, find that the military judge did not err in denying the appellant's motion for a mistrial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The appellant next contends that he was denied effective assistance of counsel when his civilian counsel failed to elicit from the Government's main witness, Mr. Jernigan, crucial discrepancies and contradictions in his testimony.

As a general rule, trial defense counsel enjoys a strong presumption in law that he was competent, that he rendered adequate assistance at trial, and that he made all significant decisions in the exercise of reasonable professional judgment. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant thus bears a very heavy burden in overcoming the presumption of effectiveness. The appellant must demonstrate: (1) the defense counsel's performance **[*11]** was so deficient that he was not functioning as "counsel" within the meaning of the Sixth Amendment; and (2) the defense counsel's performance rendered the results of the trial unreliable or the trial itself fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *United States v. Ingham*, 42 M.J. 218, 223 (1995). *See also Lockhart v. Fretwell*, 506 U.S. 364, 372, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993)("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.").

> The test of counsel's performance is not that he lost; and, it is not that some number of options were not pursued or could have been pursued differently . . . The benchmark for judging any claim of

> ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

United States v. Clark, 45 M.J. 613, 616 (Army Ct.Crim.App. 1997)(citing *Strickland* and *Lockhart*), rev'd on other grounds, 49 M.J. 98 (1998).

The **[*12]** appellant asserts three bases in support of this claim: (1) his civilian counsel failed to elicit, during cross-examination, certain inconsistencies between Mr. Jernigan's testimony at trial and his earlier testimony at the Article 32, UCMJ, pretrial investigation; (2) his civilian counsel failed to obtain a handwriting exemplar from Jernigan to determine whether he actually wrote the note found at the scene of the second fire, as he testified that he did; and (3) his civilian counsel did not move to bar Jernigan's testimony after the Government failed to provide timely, written notification of Jernigan's grants of immunity, as required by Mil. R. Evid. 301(c)(2).

With respect to the first two bases, none of these omissions were sufficient, in our estimation, to undermine the reliability of the results of trial. It is true that Mr. Jernigan was the key witness in the Government's case. His credibility and ability to recall were vigorously attacked by the appellant's civilian counsel during cross-examination. However, the sum of Jernigan's testimony was far more expansive in laying out his involvement with the appellant in the arsons than is reflected by the appellant in this assignment **[*13]** of error. The specific areas highlighted by the appellant were not at the heart of the Government's case; at best, they revealed minor discrepancies that did not significantly affect the substance of Jernigan's testimony. After reviewing the record, we find that the performance of the appellant's civilian counsel in cross-examining Mr. Jernigan was more than adequate to dispel any claim of deficiency.

As for the final basis of the appellant's claim, the appellant asserts that he received notification of the grant of immunity from the State of Virginia only three days before Jernigan testified and notification of the federal grant of immunity on the very day of testimony. Appellant's Brief of 28 May 1999 at 10. First of all, it is highly unlikely that the military judge would have prohibited Mr. Jernigan from testifying, even if the appellant's civilian counsel had objected. The obvious remedy would have been to grant the appellant a short continuance to allow him additional time to prepare his case. Second, it is clear from the cross-examination of Jernigan that the appellant's civilian counsel was not stymied or limited in any way by the timing of these notifications. He immediately **[*14]** went after Jernigan on the immunity issue when he commenced his cross-examination. *See* Record at 664.

In short, the appellant has failed to show either that his civilian counsel's performance was deficient within the meaning of *Strickland* or that his counsel's performance compromised the fairness or reliability of the findings in this case.

III. SUFFICIENCY OF THE EVIDENCE

The appellant next contends that the evidence is insufficient to support his conviction on these charges. The essential elements of his argument are that the Government's main witness, Mr. Jernigan, was not a credible witness and that the appellant had no motive to burn down his own home.

> The test for [legal sufficiency] is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having

> personally observed the witnesses, the members of the [service appellate court] are themselves convinced of the accused's guilt beyond a reasonable doubt.

[*15] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)).

The record effectively establishes Mr. Jernigan as an untrustworthy individual with a track record for dishonesty. However, it also paints a picture of a witness who knew too many details about the appellant's home to have committed the arsons alone without the appellant's assistance. Additionally, the circumstantial evidence tended to support Jernigan's testimony; e.g., unexplained money that came into his possession when he was normally broke; his burned hand; the absence of a motive (other than as the appellant's arsonist-for-hire) to commit the arsons; his possession of the appellant's television and video cassette recorder; and the appellant's frequent calls to Jernigan's apartment during the timeframe in which fires were set. The appellant's contention that he had no motive to burn down his house is unconvincing. Of all the principals in this case, he was the one who had the strongest motive to commit the arsons; he wanted the insurance money. Afterwards, the appellant did, in fact, file claims **[*16]** with his insurance company for arson damage and the loss of personal property.

We have considered all of the evidence in the record with a critical eye, especially the testimonies of Mr. Jernigan and the appellant. We are convinced that the evidence is legally and factually sufficient to support the findings of guilty in this case. The evidence shows that the appellant had the means, motive, and opportunity to commit the offenses, and the circumstantial evidence supports Jernigan's version of the events far more strongly than it does the appellant's.

IV. GOVERNMENT'S FAILURE TO PROVIDE TIMELY DISCOVERY

The appellant next contends that the military judge abused his discretion when he allowed Mr. Jernigan to testify over defense objection after the Government violated R.C.M. 701 by failing to disclose information that Jernigan had engaged in other criminal misconduct, which violated the terms of probation from his state court conviction for arson of the appellant's home, until the day before his testimony.

This information was relevant to the credibility of this key Government witness and his motive to testify against the appellant. Accordingly, the Government should have provided **[*17]** this information to the appellant in a more timely manner. R.C.M. 701(a)(2)(A). However, we find no material prejudice to the substantial rights of the appellant. Art. 59(a), UCMJ.

At trial, the military judge indicated his willingness to entertain a request from the defense to have the Article 32, UCMJ, pretrial investigation reopened, to have a new Article 34, UCMJ, staff judge advocate's advice prepared, or to have the convening authority reconsider his referral of these charges in light of this new information. Record at 487-88, 491. After consulting with the appellant, the civilian counsel declined to submit such a request and instead asked that the case be dismissed or, alternatively, that Jernigan be barred from testifying. Record at 488. However, the civilian counsel also indicated that, even with this late information, he had adequate time to prepare and did not require a continuance before cross-examining Jernigan. Record at 489. The military judge ruled that neither the dismissal of the case nor the barring of Jernigan's testimony was appropriate in light of the fact that the appellant had not been disadvantaged by the late discovery. Record at 490-91. We agree. Accordingly, **[*18]** we find that the military judge's decision was not

unreasonable and that he did not abuse his discretion in permitting Jernigan to testify over defense objection. *United States v. Sullivan*, 42 M.J. 360 (1995).

V. ALTERATION OF DOCUMENT BY GOVERNMENT WITNESS

The appellant next contends that the military judge erred by failing to grant the appellant's motion either to strike the testimony of Captain Foster, a state fire investigator, or to declare a mistrial after it was discovered that Foster altered a document before it was admitted into evidence.

At trial, the Government called Foster to testify about his investigation of the second fire at the appellant's residence. Among the matters discussed was a fire department evidence log. Prior to trial, the Government had given the defense its only copy of this document, which was Defense Exhibit A. On the day of his testimony, Foster provided the trial counsel with another copy of the document, which was Prosecution Exhibit 18. At that point, Foster realized the copy given to the defense had an incomplete case number written on it. In Defense Exhibit A, the evidence log was case number "95-2." Captain Foster corrected **[*19]** the case number on Prosecution Exhibit 18 to "95-22-212." Trial counsel was unaware of this change.

When the alteration of the document came to light, the defense moved to strike Foster's testimony and the exhibits he sponsored or, alternatively, to have the military judge declare a mistrial. The military judge denied the motion, Record at 476, and instead instructed the members of what Foster had done, that it was improper, and that Foster's action could and should be considered in assessing his credibility and the accuracy of his evidence. Record at 494. The military judge concluded that Foster did not alter the document to influence the results of the court-martial, but did so to conform the document to his case file. Record at 476.

We find that the military judge did not err by denying the appellant's motion. The witness's action was improper, but it was no more than a minimal indiscretion that warranted none of the drastic remedies proposed by the appellant at trial. The military judge's cautionary instruction to the members was more than adequate to cure the matter.

VI. SENTENCE APPROPRIATENESS

The appellant next contends that his sentence is inappropriately severe in **[*20]** light of the evidence in extenuation and mitigation offered by him at trial, as compared to the suspended sentence received by Mr. Jernigan (his co-conspirator) for the arsons, the grants of immunity that Jernigan received for other crimes he had committed while on probation, and the honorable discharge that Jernigan received from the Navy despite committing the arson offenses while on active duty.

"Sentence appropriateness involves the individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Sentence comparison is appropriate only in those instances of highly disparate sentences in closely related cases. *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). To be closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). "If two cases are closely related and yet result in widely disparate dispositions or sentences that are unsupported by **[*21]** good and cogent reasons, a Court of Military Review has the discretion to exercise its Article 66, UCMJ, authority to reduce the disparity upon review to erase any unfairness or injustice in the proceedings." *Id*.

We note, first of all, that Mr. Jernigan was tried by state, not military, authorities for his part in the arsons and,

unlike the appellant, he cooperated. Therefore, a comparison of the sentences from two entirely different jurisdictional entities is difficult; it is particularly true, as in this instance, where Jernigan was awarded more confinement (10 years) than the appellant, all of which was suspended. Second, Jernigan received the grants of immunity in order to testify against the appellant in this case; they were not part of his sentence. As for the honorable discharge that he received upon expiration of his enlistment, it is somewhat incongruous that he should have such a discharge while suffering a civil conviction for arson during his enlistment. However, we also note that it was the appellant, a senior petty officer at the time, who recruited a junior Sailor to do the dirty work as he instigated and masterminded the plan to burn down his own house for the **[*22]** insurance money. While we have taken into account the quality of the appellant's record during 15 years of military service, as well as the letters and statements on his behalf, we nonetheless find the disparity in the sentences to be due to good and cogent reasons and see no reason to exercise our discretionary power here. The sentence in this case is severe, but not inappropriately so.

VII. FAILURE TO INFORM ABOUT GRANT OF IMMUNITY

The appellant next contends that it was prejudicial error when the staff judge advocate [SJA] failed to inform the convening authority in his recommendation that Mr. Jernigan testified under a grant of immunity.

We find no prejudicial error arising from the absence of any mention of Jernigan's grant of immunity in the staff judge advocate's recommendation [SJAR]. This is an evidentiary matter that goes to the credibility of a witness. Since the convening authority no longer reviews the record for factual sufficiency, R.C.M. 1107(b)(1), the SJA need not summarize the evidence in his SJAR. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), App. 21, at A21-80. We, therefore, concur with the Government's argument that *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975), **[*23]** is not controlling. Finally, the appellant waived the issue by failing to challenge the omission in the SJAR. R.C.M. 1106(f)(6).

VIII. PRETRIAL CONFINEMENT CREDIT

The appellant next contends that the convening authority erred by failing in his convening order to direct that the appellant receive 106 days of judicially-ordered confinement credit under R.C.M. 305(k), in addition to the 167 days of *Allen* [3] credit for time actually served in pretrial confinement. We agree and will order corrective action in our decretal paragraph. *United States v. Zaptin*, 41 M.J. 877, 881 (N.M.Ct.Crim.App. 1995).

IX. ERRORS IN PROMULGATING ORDER

The appellant next contends that the convening authority's promulgating order contains a number of errors: (1) in Specifications 1 and 2 of Charge I, the year of the offense should be "1995" vice "1997;" (2) in Specifications 3 and 4 of Charge I, the appellant vaguely asserts that the word "nylon" **[*24]** is error; and (3) the appellant's social security number is incorrectly listed as "426-63-3047" instead of "126-56-4868."

With respect to Specifications 1 and 2 of Charge I and the appellant's social security number, we concur and will direct corrective action be taken in our decretal paragraph. With respect to Specifications 3 and 4 of Charge I, we find no error in the use of the word "nylon." However, even if the appellant is correct, we find the error here so minimal as to be harmless.

X. EX POST FACTO

The appellant contends that the 1996 amendments to

---

[3] *United States v. Allen,* 17 M.J. 126 (C.M.A. 1984).

Article 57, UCMJ, and the addition of Article 58b, UCMJ, violate the *ex post facto* clause of the Constitution. Since the appellant's offenses occurred prior to the effective date of these changes, we agree that the appellant is entitled to administrative review of his claim and, if appropriate, restoration of any property illegally taken from him. *United States v. Gorski*, 47 M.J. 370 (1997).

XI. FAILURE TO COMMENT ON LEGAL ERRORS IN SJAR

The appellant next contends that the SJA misled the convening authority and, therefore, committed prejudicial error by failing to comment upon the legal errors raised by **[*25]** the appellant in his letter to the convening authority of 17 December 1997.

In his 17 December 1997 letter, appellant claimed three "legal" errors were committed in his trial, all of which can be found in some part of his other assignments of error: (1) Mr. Jernigan, the Government's main witness, had to be promised immunity after receiving a ten-year suspended sentence in order to give his testimony; (2) the assistant trial counsel "illegally interjected polygraph information during the proceedings;" and (3) the fire investigator "altered documents during trial." Appellant's Clemency Request of 17 December 1997. These allegations of legal error were not addressed in the SJAR. As a matter of fact, the SJAR incorrectly stated that "there is no error noted *nor have any issues of error been raised by the accused or his counsel*." SJAR of 27 March 1998 at 5 (emphasis added).

R.C.M. 1106(d)(4) provides that a SJA must address legal errors raised by an accused in matters submitted under R.C.M. 1105 or when otherwise appropriate; and the SJA must indicate in the SJAR whether he believes corrective action is necessary as to the allegations of legal error raised by the accused. The SJA's **[*26]** failure to do so will generally entitle an accused to a remand of the case for a new SJAR and convening authority's action. *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988). However, a remand is not required if "a defense allegation of legal error would not foreseeably have led to a favorable recommendation by the [SJA] or to corrective action by the convening authority." *Hill*, 27 M.J. at 297.

The appellant's first allegation does not allege a "legal" error, however strongly the appellant might want to characterize it as such. As for the remaining two allegations, we find them to be without merit for the reasons we previously gave in Parts I and V of this opinion and also because there is no basis from this record to infer that "the investigators involved in this case illegally provided Mr. Jernigan with inside information in an effort to obtain a conviction." *See* Appellant's Clemency Request of 17 December 1997. Accordingly, we are "convinced that, under the particular circumstances [of this case], a properly prepared recommendation would have no effect on the convening authority's exercise of his discretion" and that "remand to the **[*27]** convening authority is unnecessary." *Hill*, 27 M.J. at 296.

XII. DISPOSITION

We have reviewed the remaining assignments of error and find them to be without merit. The findings and sentence, as approved on review below, are affirmed. In accordance with R.C.M. 1107(f)(4)(E), the appellant shall receive 106 days of judicially-ordered, pretrial confinement credit, in addition to the 167 days of credit that he receives under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

The record of trial is returned to the Judge Advocate General for appropriate administrative review and remedial action, as may be required, with respect to the automatic forfeitures and reduction in rate. A corrected promulgating order shall be issued by the appropriate

authority noting the 106 days of judicially-ordered credit. The order shall also substitute the correct date for Specifications 1 and 2 of Charge I, as well as the appellant's correct social security number.

Judge ANDERSON and Judge ROLPH concur.

APPENDIX A

I. THE MILITARY JUDGE ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR MISTRIAL AFTER THE GOVERNMENT'S MAIN WITNESS, WILLIAM JERNIGAN, TESTIFIED THAT **[*28]** HE FAILED A POLYGRAPH EXAMINATION QUESTION CONCERNING *APPELLANT'S* INVOLVEMENT IN THE ARSON.

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS CIVILIAN DEFENSE COUNSEL FAILED TO PREPARE FOR HIS CROSS-EXAMINATION OF THE GOVERNMENT'S MAIN WITNESS AND, AS A RESULT, FAILED TO ELICIT CRUCIAL DISCREPANCIES AND CONTRADICTIONS IN HIS TESTIMONY.

III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS.

IV. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED WILLIAM JERNIGAN TO TESTIFY OVER DEFENSE OBJECTION AFTER THE GOVERNMENT VIOLATED R.C.M. 701 BY FAILING TO DISCLOSE TO THE DEFENSE INFORMATION REGARDING JERNIGAN'S CRIMINAL CONDUCT WHILE HE WAS ON PROBATION FOR THE ARSON AND ATTEMPTED ARSON OF APPELLANT'S HOME. THE GOVERNMENT'S VIOLATION OF R.C.M. 701 PREVENTED THIS INFORMATION FROM REACHING THE INVESTIGATING OFFICER OR THE CONVENING AUTHORITY BEFORE THE DECISION TO REFER CHARGES WAS MADE, THEREBY PREJUDICING APPELLANT.

V. THE MILITARY JUDGE ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO EITHER STRIKE EXPERT WITNESS' TESTIMONY AND EXHIBITS OR DECLARE A MISTRIAL AFTER GOVERNMENT EXPERT WITNESS ADMITTED TO ALTERING DOCUMENT WHICH WAS **[*29]** ADMITTED INTO EVIDENCE.

VI. A $ 15,000 FINE, IN ADDITION TO FIVE YEARS CONFINEMENT, REDUCTION IN RATE TO E-1, FORFEITURE OF ALL PAY AND ALLOWANCES, AND A DISHONORABLE DISCHARGE, IS AN INAPPROPRIATELY SEVERE SENTENCE UNDER THE CIRCUMSTANCES OF THIS CASE, WHERE APPELLANT'S CO-CONSPIRATOR RECEIVED A SUSPENDED SENTENCE, FEDERAL AND STATE IMMUNITY FOR CRIMES HE COMMITTED WHILE ON PROBATION FOR THE ARSONS, AND AN HONORABLE DISCHARGE, AND APPELLANT, UNLIKE HIS CO-CONSPIRATOR, SERVED 15 OUTSTANDING YEARS IN THE NAVY, EARNED NUMEROUS AWARDS AND DECORATIONS, DISPLAYED EXEMPLARY CONDUCT DURING HIS 165 DAYS OF PRETRIAL CONFINEMENT, HAD NUMEROUS PEOPLE, INCLUDING CAPT. GEORGE LINZEY, A NAVY CHAPLAIN, TESTIFY AND WRITE LETTERS ON HIS BEHALF, AND HAS TWO CHILDREN TO SUPPORT.

VII. THE CUMULATIVE EFFECT OF ERRORS I AND II, SUPRA, REQUIRES DISAPPROVAL OF THE FINDINGS.

VIII. THIS COURT SHOULD SET ASIDE THE FINDINGS AND SENTENCE IN THIS CASE FOR THE REASONS SET FORTH IN APPENDIX A (MATERIAL SUBMITTED BY APPELLANT PURSUANT TO *UNITED*

STATES V. GROSTEFON, 12 M.J. 431 (C.M.A. 1982)).

IX. THE STAFF JUDGE ADVOCATE'S FAILURE TO INFORM THE CONVENING AUTHORITY IN HIS RECOMMENDATION **[*30]** THAT A KEY PROSECUTION WITNESS, WILLIAM JERNIGAN, TESTIFIED UNDER A GRANT OF IMMUNITY CONSTITUTED PREJUDICIAL ERROR.

X. THE CONVENING AUTHORITY ERRED WHEN HE FAILED TO INCLUDE IN HIS ACTION THE FACT THAT APPELLANT RECEIVED 106 DAYS OF PRETRIAL CONFINEMENT CREDIT IN ACCORDANCE WITH R.C.M. 305(J)(2), IN ADDITION TO HIS 167 DAYS OF ALLEN CREDIT, THEREBY PREJUDICING APPELLANT BECAUSE HE WAS CREDITED 2 LESS DAYS IN ACCORDANCE WITH THE ERRONEOUS RESULTS OF TRIAL.

XI. THE CONVENING AUTHORITY ERRED WHEN HE APPROVED AN INCORRECT SPECIFICATION IN HIS ACTION, RELYING ON AN INCORRECT SJAR, SPECIFICALLY: THE YEAR "1997" IN SPECIFICATIONS 1 AND 2, AND THE WORD "NYLON" IN SPECIFICATIONS 3 AND 4, ALL OF CHARGE I. THE CONVENING AUTHORITY ALSO ERRED IN HIS ACTION WHEN, ALSO RELYING ON THE INCORRECT SJAR, HE LISTED APPELLANT'S SOCIAL SECURITY NUMBER AS "426-63-3047."

XII. THE POSSIBILITY THAT THE APPELLANT WAS CONVICTED BY A NON-UNANIMOUS VOTE OF A SEVEN-MEMBER PANEL IN A GENERAL COURT-MARTIAL VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE EQUAL PROTECTION CLAUSE BECAUSE THE GOVERNMENT CANNOT PROVE THAT A "COMPELLING GOVERNMENTAL INTEREST" EXISTS FOR DENYING MILITARY ACCUSEDS, WHO **[*31]** ARE FACING FEDERAL CRIMINAL CONVICTIONS AND ALL OF THE CONSEQUENCES RESULTING FROM THAT CONVICTION, THE SAME RIGHT TO A UNANIMOUS VERDICT THAT CIVILIANS ENJOY IN OTHER FEDERAL CRIMINAL TRIALS.

XIII. THE APPLICATION OF ARTICLES 57(A) AND 58(A)[SIC] UNIFORM CODE OF MILITARY JUSTICE, VIOLATES THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION.

SUPPLEMENTAL. THE STAFF JUDGE ADVOCATE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE ACCUSED'S MATERIAL RIGHTS BY MISLEADING THE CONVENING AUTHORITY WHEN SHE FAILED TO RESPOND TO THE LEGAL ERRORS RAISED BY APPELLANT IN HIS LETTER TO THE CONVENING AUTHORITY, DATED 17 DECEMBER 1997, AS SHE WAS REQUIRED TO DO UNDER R.C.M. 1106(D)(4). COMPLIANCE WITH THIS RULE WOULD HAVE REQUIRED THE STAFF JUDGE ADVOCATE'S RESPONSE TO MANY OF THE ISSUES WHICH WERE EVENTUALLY RAISED IN APPELLANT'S BRIEF TO THIS COURT, INCLUDING ASSIGNMENT OF ERROR I: THE MILITARY JUDGE'S ERROR IN FAILING TO GRANT A MISTRIAL AFTER THE GOVERNMENT INTRODUCED PATENTLY INADMISSIBLE EVIDENCE OF POLYGRAPH TEST RESULTS OVER DEFENSE OBJECTION AND WITHOUT ANY FOUNDATION.

End of Document

United States v. Lara

United States Army Court of Criminal Appeals

December 27, 2018, Decided

ARMY 20170025

Reporter

2018 CCA LEXIS 604 *

UNITED STATES, Appellee v. Staff Sergeant FRANCISCO C. LARA, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Lara, 78 M.J. 369, 2019 CAAF LEXIS 147 (C.A.A.F., Feb. 26, 2019)

Motion granted by United States v. Lara, 2019 CAAF LEXIS 282 (C.A.A.F., Apr. 17, 2019)

Review denied by United States v. Lara, 2019 CAAF LEXIS 320 (C.A.A.F., May 1, 2019)

Prior History: [*1] Headquarters, I Corps. Sean Mangan, Military Judge (arraignment), Kenneth Shahan, Military Judge (trial), Colonel Randall J. Bagwell, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Christopher D. Carrier, JA (argued); Lieutenant Colonel Christopher D. Carrier, JA; Captain Cody Cheek, JA (on brief); Lieutenant Colonel Christopher D. Carrier, JA (on reply brief).

For Appellee: Captain Jessika M. Newsome, JA (argued); Lieutenant Colonel Eric K. Stafford, JA; Major Hannah E. Kaufman, JA; Captain Jessika M. Newsome, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and SCHASBERGER, Appellate Military Judges.

Opinion by: FEBBO

Opinion

MEMORANDUM OPINION

FEBBO, Judge:

Appellant's court-martial proceeded smoothly enough until, during the presentencing phase of trial, the military judge sua sponte decided to re-instruct the panel and attempted to reopen deliberations on findings. A fiasco ensued. We intervened. *See United States v. Shahan*, 2016 CCA LEXIS 740 (Army Ct. Crim. App. 23 December 2016)[1].

The dust has settled and the case is now again before us under Article 66, UCMJ.[2] As such, we now analyze

---

[1] This court found that Rule for Courts-Martial 924 was clear and that deliberations could not be reopened after announcement of findings in open court. We issued a writ of prohibition and returned the record of trial to the military judge. The military judge denied the appellant's motion for a mistrial and resumed presentencing proceedings.

[2] Contrary to his pleas, before a panel with enlisted representation, appellant was convicted of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920 (2012). The convening authority approved appellant's adjudged sentence of a dishonorable discharge, hard labor without confinement for thirty days, and reduction to the grade of E-1.

the proceedings to determine if the military judge erred in failing to instruct the panel on the voluntary intoxication defense.

BACKGROUND

A. The Assault

[*2] This case began with a training conference in Las Vegas. Appellant and other noncommissioned officers (NCOs) were approved to attend the conference. Sergeant (SGT) SR was a U.S. Army Reserve soldier newly assigned to the unit who also wanted to attend the conference. She did not, however, have a government credit card on which to charge her hotel room. Appellant did not want to give up his hotel room to share with another male soldier. Instead, appellant offered to give up one of his beds and share his room with SGT SR. Appellant was married and SGT SR was engaged to be married. Appellant and SGT SR had no prior relationship and SGT SR had no romantic interest in appellant.

One evening in Las Vegas, SGT SR, Staff Sergeant (SSG) CP, and appellant went out to have dinner, drink alcohol, and gamble. Based on the video footage from security cameras and room key cards used in appellant's hotel, there is a very specific timeline for the evening. The three soldiers went out at 1830 and returned to the hotel room around 0140. Based on the testimony of SGT SR and SSG CP, the evidence established that appellant drank approximately six shots of hard liquor and a twenty-four-ounce mixed drink. Appellant [*3] did not drink any beers. Sergeant SR drank approximately five shots, a twenty-four-ounce mixed drink, and several beers.

When SGT SR and appellant returned to the room, appellant slept on the bed and SGT SR slept on the floor. She wanted to stop "the room from spinning." At around 0300, SGT SR woke up with appellant behind her on the floor. He was inserting his finger in and out of her vagina. Sergeant SR objected and immediately left the room. Sergeant SR reported the sexual assault to hotel security. She also reported the sexual assault to the NCOIC of the group attending the conference.

Around 0530, after making a written report to hotel security, SGT SR made her own arrangements to fly out of Las Vegas and returned home. Her commander took her to the hospital for a sexual assault medical forensic exam. After the assault, appellant told another soldier that he was lying on his bed when SGT SR woke-up, started yelling, and he "didn't know why or what happened." Appellant texted another NCO and stated he was "all sorts of fucked up."

B. The Opposing Theories at Trial

At trial, the government's theory was that SGT SR was drinking alcohol and was drunk earlier in the night. The government [*4] argued that at the time of the sexual assault, the appellant knew or should have known SGT SR was asleep, unconscious, or otherwise unaware. However, she was not blacked out and was awakened by appellant's penetrating her vagina with his finger. Sergeant SR testified appellant was moving his finger in and out of her vagina.

The government presented testimony from other witnesses that SGT SR contacted after the assault. Although she was initially crying heavily after the assault, the government presented evidence that she could clearly recall all the details of the assault. Security guards testified that SGT SR did not appear to be intoxicated when they interacted with her and she completed the written report. Sergeant SR was a very credible witness.

The strongest evidence of appellant's voluntary intoxication was offered by the government, not the defense. At the same time, the government presented evidence that appellant was not so severely intoxicated that he was incapable of forming the specific intent for the sexual act. Video evidence was introduced showing appellant walking back to his room around 0142. Appellant was not stumbling and appeared cognizant of his surroundings. Another **[*5]** guard testified that appellant had red, glassy eyes but did not sway and was able to understand all the guard's directions.

The prosecution offered into evidence a form appellant signed when he was asked to leave the hotel. The prosecution offered the form under the theory that it demonstrated appellant was able to follow instructions and fill out documents in "a neat and orderly way" shortly after the assault. The government explained this "goes to show his ability to formulate intent." Appellant objected to the admission of the form on relevancy grounds.[3] The military judge sustained the defense objection to the admission of the form under Military Rule of Evidence 403.

Around 0500, because appellant had to move to another hotel, one of the NCO's gave appellant the keys to the rental car to drive to the new hotel. Several hours later, appellant went to breakfast with the other NCOs and then attended the conference.

The defense theory was that the sexual assault never occurred and SGT SR was creating false memories based on an alcohol induced blackout. The defense argued that SGT SR was extremely drunk, had a faulty memory, and could not credibly remember what happened in the room. The defense counsel pointed out **[*6]** inconsistencies in SGT SR's statements after the assault. The defense highlighted the lack of DNA or other physical evidence to corroborate SGT SR's testimony. A defense expert testified that alcohol affects memory and SGT SR could have been blacked out at the time she was in the room.[4] Therefore, the defense focused on evidence tending to maximize SGT SR's level of intoxication.

At the same time, the defense also minimized any evidence of appellant's intoxication. The defense counsel never argued about appellant's level of intoxication during opening or closing on the merits. Through cross-examination, the defense counsel elicited testimony from a security guard that when she went to appellant's room shortly after the assault, appellant was cooperative and respectful.

C. Instructions and Voluntary Intoxication

The military judge discussed proposed instructions on findings with trial and defense counsel. The trial counsel suggested an instruction on an Article 128, UCMJ, offense in case the panel found appellant lacked specific intent due to intoxication. The defense objected to any Article 128, UCMJ, instruction and the military judge agreed. The defense counsel did not request a voluntary **[*7]** intoxication instruction. The defense counsel explicitly agreed it was not appropriate to give the panel a mistake of fact instruction on whether appellant was aware SGT SR was asleep. The defense counsel agreed a mistake of fact instruction was not

[3] The government argued this line of questioning was relevant because the government had to establish appellant had the specific intent and "it's a conceivable defense theory that the accused is so intoxicated, he is unable to formulate intent."

[4] Appellant offered expert testimony that an average person processes one drink of alcohol an hour. Applying that formula to the Las Vegas evening, an average person would have metabolized approximately seven drinks between 1830 and 0140.

raised by the evidence. The military judge discussed special defenses and stated he did not think any "actual legal defenses" were raised by the evidence. The defense counsel did not object to the proposed instructions and agreed with the military judge that no instructions on special defenses were raised by the evidence.

The military judge instructed the panel and again asked if the parties had any objections to the instructions. Neither the government nor defense counsel objected or requested additional instructions.

During deliberations, the panel had one question: "If the assailant of sexual assault is unaware of what he or she is doing, is the incident still considered a wrongful offense?" The military judge and counsel discussed the response to the question. The military judge suggested re-reading the definition of a sexual act and that an accused had to have the intent to abuse, humiliate, harass, or degrade any person or to arouse **[*8]** and gratify the sexual desires of any person. The military judge asked counsel if they agreed and whether any other explanation was necessary or appropriate. Both counsel agreed with the response to the panel's question and both counsel responded that no further explanation was necessary or appropriate.

The military judge answered the panel's question by repeating the definition of "sexual act." After repeating the definition of "sexual act," the military judge further addressed the members as follows: "So, in other words there is an intent requirement embedded in that definition [of 'sexual act']. Does everybody understand that?" All the members answered affirmatively. The military judge then asked the panel president: "Does that answer your question?" The president responded that it did answer the panel's question.

Appellant was found guilty of one specification of sexual assault for penetrating SGT SR's vulva with his finger when appellant knew or reasonably should have known she was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

D. Appellant's Unsworn Statement During Sentencing

During the sentencing phase of trial, appellant made an unsworn statement **[*9]** in the form of questions and answers from his defense counsel. Appellant explained to the panel that he considered testifying in his own defense on the merits. He did not, however, because he drank so much alcohol, he did not have memories of the night. Appellant explained he would only have been able to testify that he could not remember anything.

He was surprised by SGT SR's testimony and apologized for hurting her. According to appellant, however, he did not have enough memory to state if the assault actually occurred. At the same time, he could say he never intended anything to have happened and any actions were out of character. Appellant explained he is not a big drinker and had never drank that much in his life.

After the appellant's unsworn statement, the defense rested. The court recessed for the evening and scheduled deliberations for the next morning.

E. The Military Judge Attempts to Reopen Findings

The next morning, the military judge informed the government and defense counsel that he should have given an instruction on voluntary intoxication. In his opinion, he committed "plain error."[5] The military judge

[5] The military judge later came to the opposite conclusion and stated he did not commit "plain error." The military judge reasoned he would have given the instruction as a "matter of caution," but the instruction was not triggered as a "matter of

gave the defense counsel two options. First, appellant could request [*10] a mistrial. The second option was for the military judge to reinstruct the panel on voluntary intoxication and have them return for deliberations on findings. Defense counsel chose reinstructing the panel and new deliberations on findings.

The military judge further stated a mistrial was not warranted. The military judge stated that the defense theory was not that appellant lacked the requisite specific intent to commit the offense. Instead, the defense was that appellant never committed the physical acts alleged and that SGT SR had false memories from an alcohol-induced blackout. The military judge stated it was highly unlikely the panel would find appellant penetrated SGT SR's vulva with his fingers without the intent to abuse, humiliate, harass, or degrade SGT SR or to arouse or gratify the sexual desires of any person. However, the military judge wanted to reinstruct them on voluntary intoxication to resolve any questions the panel had about appellant's intoxication.

The government objected and argued that the defense theory had never been that appellant was incapable of forming intent. Only during his unsworn statement after findings, did appellant explain why he did not testify [*11] and informed that panel that he could not remember any part of the evening due to alcohol. The government also argued that the defense waived the voluntary intoxication instruction during the discussions with the defense counsel about appellant's level of intoxication and the discussions about instructions during Rule for Courts-Martial (R.C.M.) 802 sessions.

Since the panel had already announced findings in open session and the military judge's second course of action violated R.C.M. 924, the government counsel filed a petition with this court seeking a writ of prohibition against the military judge reopening findings. The government asked for a few hours recess to determine if this court was going to grant a stay. The military judge denied the request for a recess and reinstructed the panel on voluntary intoxication.

The military judge offered the defense counsel the opportunity to reargue voluntary intoxication but they decided to not argue the issue. The military judge understood the decision of the defense not to reargue voluntary instruction because it would completely contradict the theory of their case-in-chief. The military judge also informed the government he would not allow them to argue against the voluntary intoxication [*12] defense. The military judge prohibited the government argument since "the government could have basically driven a nail in the coffin of that defense."

Approximately ten minutes after the military judge denied the government's request for a recess, this court issued a stay. After oral argument on the writ of prohibition, this court ruled that R.C.M. 924 prohibited reopening deliberations after announcement of the findings in open session. We therefore issued a writ of prohibition against the military judge reopening the findings. Appellant's court-martial continued with the presentencing phase of trial.

LAW AND DISCUSSION

Appellant's sole assignment of error argues the military judge committed plain error by not sua sponte instructing the panel on voluntary intoxication as it related to appellant's ability to form specific intent.

---

law" by the evidence. These confusing and contradictory conclusions highlight the fact that trial judges should not conduct their own appellate-style review of their rulings. Whether plain error occurred is determined by appellate courts. A military judge may reconsider his or her prior rulings in a case, but does not apply appellate standards of review when doing so.

A. The Special Defense of Voluntary Intoxication

Although not listed as a special defense under R.C.M. 916, military courts have treated voluntary intoxication as a special defense applicable to offenses requiring specific intent or knowledge of a fact that voluntary intoxication would negate. *See United States v. Hearn*, 66 M.J. 770, 776 (Army Ct. Crim. App. 2008) (citing *United States v. Watford*, 32 M.J. 176, 178 (C.M.A. 1991). In other words, if an individual is so thoroughly inebriated that he or **[*13]** she literally does not know what he or she is doing, the individual's intoxicated state might be a defense to certain criminal charges.

A military judge has a duty to instruct members on any special defenses placed "in issue." *United States v. Stanley*, 71 M.J. 60, 61 (C.A.A.F. 2012); R.C.M. 920(e)(3). A matter is "in issue" when some evidence, upon which the members might rely if they chose, raises that matter, without regard to its source or credibility. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); *United States v. Watford*, 32 M.J. 176, 178 (C.M.A. 1991). This does not, however, mean that every accused who consumed alcohol prior to committing a specific intent crime is entitled to a panel instruction on voluntary intoxication. *See Watford*. 32 M.J. at 178-79.

As might be expected, ordinary drunkenness typically does not rise to the level of depriving an individual of his or her basic knowledge of reality or prevent that individual from forming intent. "[E]vidence that an accused consumed intoxicants, standing alone, is insufficient to require a voluntary intoxication instruction." *Hearn*, 66 M.J. at 777 (citing *Watford*, 32 M.J. at 179).

"When raising an issue of voluntary intoxication as a defense to a specific-intent offense, 'there must be some evidence that the intoxication *was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent*,' *not just evidence of mere intoxication* ***[*14]*** ." *United States v. Peterson*, 47 M.J. 231, 233-34 (C.A.A.F. 1997) (quoting *United States v. Box*, 28 M.J. 584, 585 (A.C.M.R. 1989) (emphasis added)).

This court has previously adopted a three-pronged test for whether "some evidence" has been admitted of intoxication sufficiently severe as to deprive an individual of the ability to form intent: "(1) the crime charged includes a mental state; (2) there is [evidence of impairment due to the ingestion of alcohol or drugs]; and (3) there is evidence that the [impairment] affected the defendant's ability to form the requisite intent or mental state." *Hearn*, 66 M.J. at 777 (quoting *State v. Kruger*, 685, 116 Wn. App. 685, 67 P.3d 1147, 1149 (Wis. Ct. App. 2003)) (alterations original to *Hearn*).

We do not interpret the rule we adopted in *Hearn* as lowering the threshold our superior court articulated in *Peterson. Hearn's* requirement of evidence that impairment "affected the defendant's ability to form the requisite intent or mental state," must be read in light of *Peterson's* requirement for evidence that any "intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent." We do not purport to lower the evidentiary thresholds established by our superior court.

B. Plain Error Analysis

"'Whether a panel was properly instructed is a question of law' we review *de novo." United States v. Mott*, 72 M.J. 319, 325 (C.A.A.F. 2013) (quoting *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F. 2013)). "Failure to object to an **[*15]** instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error." R.C.M. 920(f). In order to warrant reversal as plain error, appellant "has the burden of demonstrating that: (1) there was error; (2)

the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the [appellant]." *Mott*, 72 M.J. at 325 (quoting *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014)). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).[6]

1. Error

The first prong of the *Hearn* test is satisfied because the charge of sexual assault included a specific *mens rea*. The second prong of *Hearn* is satisfied because there is also some evidence appellant was impaired due to alcohol. Appellant consumed alcohol that evening in Las Vegas. The question of error then turns on the third prong of *Hearn*, namely, whether there is "some evidence" that appellant was not just impaired, but so impaired that he could not form specific intent. See *Hearn*, 66 M.J. at 777.

The best evidence to support appellant's claim was the testimony of a soldier who stated that after the assault, SGT SR told him that appellant "didn't realize what he was doing at that time." Whether this speculative, second-hand statement—in the context **[*16]** of the testimony about appellant's alcohol consumption—is enough to support an instruction on voluntary intoxication is a close question. We need not resolve that close question in this case. Even assuming the military judge committed error by not instructing the panel on voluntary intoxication, such error was not plain and obvious, and no such error materially prejudiced appellant's substantial rights. We discuss these second and third prongs of plain error review below.

2. No Error was Plain or Obvious

Assuming the balance of the evidence before the military judge crossed the threshold of "some evidence" that appellant was so intoxicated he could not form the specific intent to arouse or gratify his sexual desire, it was neither plain nor obvious that threshold had been crossed. It is significant, though not dispositive, that appellant did not request such an instruction, even when the military judge specifically asked about instructions on special defenses. The defense counsel did not discuss appellant's level of intoxication during opening or closing statements. During the government and defense cases-in-chief, defense counsel did not present evidence of appellant's intoxication. **[*17]** Defense counsel did not place appellant's state of mind at issue or argue appellant's lack of ability to form specific intent. To the contrary, defense counsel minimized his level of intoxication and objected to introduction of some government evidence that would potentially support appellant's lack of intoxication. During the motion for a mistrial, the civilian defense counsel stated he could not point to any testimony directly on point that appellant was so intoxicated that he could not form specific intent.

[6] As the appellant did not object to the lack of any instructions on special defenses and did not request any instructions on special defenses, we apply plain error analysis to the military judge's instructions in this case. *See United States v. Guardado*, 77 M.J. 90, 93 (C.A.A.F. 2017). We note, however, there is a strong argument appellant's counsel affirmatively waived any instruction on voluntary intoxication because: (1) the defense counsel informed the military judge they agreed no instructions on defenses were warranted; and (2) when the panel asked a question about appellant's *mens rea*, the defense counsel informed the military judge they did not request any additional instructions and explicitly agreed to the military judge repeating the definition of a "sexual act" to the panel. An instruction suggesting there was evidence that even if appellant committed the charged acts it was without the requisite specific intent would have been inconsistent with appellant's theory of the case. Appellant's theory was that he never committed the physical acts SGT SR claimed he did.

At the time of instructing the panel on findings, the balance of the evidence pointed to the conclusion that appellant was lucid and competent at the time of the charged misconduct. Under these circumstances, we simply cannot say it was plain or obvious the military judge should have given an instruction on a special defense that was contrary to appellant's theory of the case and the weight of the evidence presented. Had the appellant testified on the merits in his own defense to the same facts he offered in his presentencing unsworn statement, it would have been proper for the military judge to consider his testimony for the question of whether the voluntary intoxication instruction **[*18]** was required. We evaluate the military judge's instructions on findings, however, in light of the evidence before the military judge at the time the instructions are given, not in light of evidence later offered for presentencing purposes.

3. No Error Materially Prejudiced Appellant's Substantial Rights

We also conclude the omission of any instruction on voluntary intoxication did not materially prejudice appellant's substantial rights. There was ample evidence in the record that would have negated the voluntary intoxication defense, had it been raised. The videos of appellant walking to the hotel room did not show him to be obviously impaired. When appellant and SGT SR got to the hotel room, they both prepared to go to sleep and SGT SR testified he did not appear visibly intoxicated. In order to sexually assault SGT SR, appellant had to leave his bed, get behind SGT SR on the floor, and place his hand under her shorts and insert his finger in and out of in her vagina.

Very shortly after the assault, appellant was sending grammatically correct texts to other soldiers explaining what happened or did not happen in the room. Appellant also interacted with several hotel security guards that **[*19]** observed he was not intoxicated. They described him as cooperative and respectful and testified he understood their instructions. A fellow NCO gave appellant the keys to a rental car for him to drive to another hotel. The NCO was not concerned that appellant was too impaired by alcohol to operate the vehicle. Appellant drove to the other hotel and checked-in. Appellant went to breakfast early the next morning with the other NCOs and attended the conference.

The totality of the evidence offered on the merits was such that any reasonable factfinder would have concluded appellant was capable of forming specific intent at the time of the assault. Thus, even if the military judge had instructed the panel on voluntary intoxication, it would have made no difference to the outcome of appellant's court-martial.

CONCLUSION

The findings and sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge SCHASBERGER concur.

End of Document

United States v. Mayo

United States Army Court of Criminal Appeals

April 7, 2017, Decided

ARMY 20140901

Reporter

2017 CCA LEXIS 239 *

UNITED STATES, Appellee v. Sergeant MONTRELL L. MAYO United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Reconsideration denied by United States v. Mayo, 2017 CCA LEXIS 412 (A.C.C.A., June 16, 2017)

Motion granted by United States v. Mayo, 2017 CAAF LEXIS 896 (C.A.A.F., Aug. 16, 2017)

Motion granted by United States v. Mayo, 2017 CAAF LEXIS 861 (C.A.A.F., Sept. 1, 2017)

Review denied by United States v. Mayo, 2017 CAAF LEXIS 1018 (C.A.A.F., Oct. 23, 2017)

Prior History: **[*1]** Headquarters, Fort Carson. Douglas K. Watkins, Military Judge. Lieutenant Colonel Stephanie D. Sanderson, Staff Judge Advocate (pretrial). Colonel Paul J. Perrone, Jr., Staff Judge Advocate (post-trial).

Counsel: For Appellant: Captain Joshua G. Grubaugh, JA (argued), Lieutenant Colonel Charles D. Lozano, JA; Captain Heather L. Tregle, JA; Captain Joshua G. Grubaugh, JA (on brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Joshua G. Grubaugh, JA (on reply brief).

For Appellee: Captain John Gardella, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Cormac M. Smith, JA; Captain John Gardella, JA (on brief).

Judges: Before RISCH, FEBBO, and WOLFE Appellate Military Judges. Chief Judge RISCH and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

Appellant pleaded not guilty to the murder of his fiancée, Sergeant (SGT) KW. However, the fact appellant killed SGT KW was not seriously contested at trial. The opening statement of appellant's defense counsel included the following concession: "Members, there is *no doubt* that either through a combination of Sergeant Mayo's actions or his inactions, that he killed Sergeant [KW]." (emphasis added). **[*2]** The evidence (which included forensic evidence and appellant's multiple confessions) overwhelmingly demonstrated appellant struck SGT KW over the head with an object and then caused her death through strangulation or suffocation.

Instead, the defense's focus at trial was to minimize appellant's *mens rea* and avoid the mandatory minimum sentence that accompanies a conviction for premeditated murder. Appellant was ultimately unsuccessful, and a panel of officers convicted

appellant, contrary to his pleas, of one specification of premeditated murder and one specification of assault consummated by a battery in violation of Articles 118 and 128, Uniform Code of Military Justice, 10 U.S.C. § 918, 928 (2012) [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, appellant raises two assignments of error. We address in depth appellant's argument the military judge erred when he denied appellant's challenge for cause of Major (MAJ) MC and also address appellant's claim that the lack of requirement of unanimity in panel verdicts **[*3]** violates the Constitution.

BACKGROUND

On Valentine's Day 2013 appellant planned a romantic getaway with his fiancée and fellow soldier, SGT KW. He rented a room at the Plaza Hotel, littered the floor with rose petals, bought multiple presents and chocolate treats, and prepared other romantic amenities. Appellant's romantic preparations, however, did not dissuade SGT KW from her plans to end the relationship.

When SGT KW told appellant she wanted to break up with him, he struck her on the head with a drinking glass several times. The blows caused lacerations to SGT KW's scalp, resulted in severe bleeding, and may have rendered her unconscious. However, the blows to the head were not fatal. Appellant would later tell other noncommissioned officers that he "thinks he killed his girlfriend," and he "strangled" her after she "threatened his career."

At trial, the parties presented and argued the evidence in support of their respective positions. The government attempted to string out the timeline in order to support its theory that appellant deliberated before deciding to finally kill SGT KW by suffocation. The defense, in contrast, attempted to shorten the timeline to support its theory that **[*4]** appellant was guilty of only un-premeditated murder or possibly manslaughter.

DISCUSSION

A. The Challenge for Cause of Major MC

On appeal, appellant asserts four reasons that either individually or together demonstrate that the military judge abused his discretion in denying appellant's challenge for cause to MAJ MC. However, only two of the bases asserted on appeal were preserved at trial.

1. Unpreserved Bases for Challenge for Cause

During individual voir dire the trial counsel elicited that she and MAJ MC had worked in the same building for about three months, MAJ MC had deployed with the trial counsel's father, and MAJ MC was aware she had been working on "a murder trial." The trial counsel further elicited she and MAJ MC would run into each other about once a week, and would have passing conversations about ". . . how are you doing? How was your weekend? That kind of thing." Major MC stated that he knew "nothing" about the case she had been working on, and nothing about their acquaintance would affect his impartiality.[1]

While being questioned by the trial counsel, MAJ MC volunteered that his wife's uncle had been murdered

[1] It is possible, even likely, the "murder case" the trial counsel had been working on was the case at bar. However, it was never clarified. The defense counsel did not ask any questions regarding MAJ MC's relationship with the trial counsel.

"several years ago." Major MC stated he was not close with this **[*5]** uncle-in-law, and his knowledge of the case was based on what his wife's family had told him. He stated the murderer admitted his crime to a "healthcare professional," but the prosecutor could not move forward with a case because the confession was privileged.

When asked how this result made him feel, MAJ MC was quite circumspect and stated, "It's a process and the way our Constitution is written, you know certain things about due process have to be adhered to no matter what. Sometimes you can't do anything about certain things." When asked if he felt frustrated by the prosecutor's inability to use the confession he stated, "I understood why. I mean, I've got several different professional folks in my family." When asked if "there was anything about this experience that would make it difficult for you to sit on this panel?" he stated, "No."

Appellant did not challenge MAJ MC based on his prior relationship with the trial counsel or assert that he was biased based on his wife's uncle's murder.

In *United States v. McFadden*, our superior court made clear that the burden of establishing a legal and factual basis to support a challenge for cause is on the party making the challenge. 74 M.J. 87 (C.A.A.F. 2015). The **[*6]** Court of Appeals for the Armed Forces (CAAF) specifically stated that while a military judge may remove a member for cause sua sponte, he has no duty to do so. *Id.* at 90.

More recently, the CAAF reaffirmed this framework in the case of *United States v. Dockery*, 76 MJ __, 76 M.J. 91, 2017 CAAF LEXIS 108 (C.A.A.F. 2017). In that case, the government challenged a panel member only for actual bias. The military judge removed the member because of his concerns for implied bias. The CAAF described the military judge's actions as being "sua sponte." 2017 CAAF LEXIS 108, [WL] at *2 and *8 n.3. That is, consistent with *McFadden*, as the government's challenge was only to actual bias the military judge's removal of the member for implied bias was a sua sponte act and not a grant of the government's challenge.

Accordingly, the rules require "[t]he party making a challenge *shall* state the grounds for it" and "[t]he burden of establishing that grounds for challenge exist is upon the party making the challenge." Rule for Courts-Martial [hereinafter R.C.M.] 912(f)(3) (emphasis added). If the military judge had a duty to sua sponte exclude a member for reasons not asserted, then the burden would no longer be upon the moving party to establish the basis for a challenge. "[T]he burden of establishing grounds for a challenge for cause rests upon the party making **[*7]** the challenge." *United States v. Wiesen*, 57 M.J. 48, 49 (C.A.A.F. 2002); *United States v. Hennis*, 75 M.J. 796, 830 (Army Ct. Crim. App. 2016).

There is wisdom in this framework. At the voir dire stage of a court-martial, a military judge is poorly positioned to know what the significant issues in the case will be and must rely on the parties to develop the record and make an appropriate challenge. Here, for example, MAJ MC stated that he was not "close" to his wife's uncle. Perhaps they never met. Perhaps they had met numerous times but in MAJ MC's eyes were not "close." Similarly, what were the motives and circumstances surrounding the murder? Was it grossly similar or dissimilar to this case? These are the unanswered questions the parties could have developed at trial to support their respective positions.

Placing a sua sponte duty on the military judge to remove a panel member for cause for reasons unstated by counsel would necessarily create a duty for the military judge to inquire, at least on the margin, to try to answer these questions. If the military judge has a duty

to remove a panel member because of a basis that the challenging party does not assert, the military judge will have a concomitant duty to probe into all unanswered questions. As is often the case, a military judge during voir dire **[*8]** knows little about the case, the evidence, or the parties' theories at trial, which makes a judge poorly positioned to determine whether any one issue is important to the case.

Consider in this case, shortly after the conclusion of voir dire, appellant's counsel would concede in his opening that statement appellant caused SGT KW's death (although, obviously, without conceding guilt to premeditated murder). Thus, the substantive issues the panel was required to resolve were substantially different than in a case where, for example, identity of the assailant or the applicability of self-defense is the key question for the members. Given the defense's theory of the case, which at the time of voir dire was perhaps known only to them, it was the defense who was best-positioned to determine whether MAJ MC's wife's uncle's murder was a valid basis for a challenge for cause—or not.[2]

Accordingly, as appellant did not challenge MAJ MC for cause based on his prior relationship with the trial counsel or the murder of his wife's uncle several years prior, we find that the military judge did not err in failing to grant the challenge on grounds never raised. Additionally, even when a military judge **[*9]** does sua sponte remove a member for cause, our superior court has described this remedy as "drastic." *McFadden*, 74 M.J. at 90. Based on the undeveloped record such a remedy was not required.

2. Preserved Bases for Challenge for Cause

"This [c]ourt's standard of review on a challenge for cause premised on implied bias is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (internal quotation marks omitted) (citations omitted). Under this standard, "[w]e do not expect record dissertations but, rather, a clear signal that the military judge applied the right law." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). Indeed, "where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted." *Id.*

As the CAAF has previously made clear, however, "[w]e will afford a military judge less deference if an analysis of the implied bias challenge on the record is not provided." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). In cases where less deference is accorded, the analysis logically moves more toward a de novo standard of review.

In short, we review an implied bias challenge for cause on a sliding scale of deference that depends on how thoroughly the military judge placed his findings on the record. Recently, the CAAF reaffirmed **[*10]** the standard of review in cases involving allegations of implied bias. *United States v. Woods*, 74 M.J. 238, 243 n.1 (C.A.A.F. 2015).

"The core of the implied bias test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." *United*

[2] We note while appellant asserted issues of ineffective assistance of counsel, both as an assigned error and pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant does not claim that his counsel was deficient in failing to either sufficiently voir dire MAJ MC or adequately state a challenge for cause. The assigned error of ineffective assistance of counsel (which concerned advice on post-conviction parole) was withdrawn prior to the completion of this appellate review. We determine the issues personally submitted by appellant do not merit relief.

States v. Rogers, 75 M.J. 270, 271 (C.A.A.F. 2016) (internal citations omitted).

Appellant limited his challenge for cause of MAJ MC to an implied bias challenge based on two theories.[3] The first involved MAJ MC's allegedly close relationship to law enforcement. The second focused on MAJ MC's "sensitivity" to issues of domestic violence based on his wife's experience with her ex-husband. The military judge denied the challenge. In doing so, he made an extensive ruling regarding MAJ MC's sensitivity to domestic violence but did not address in any detail why he denied the challenge for cause with regards to MAJ MC's relationship to law enforcement. Accordingly, while we review the "totality of the circumstances" we give more deference to the military judge's assessment of MAJ MC's "sensitivity" to domestic violence and review nearly de novo the challenge based on his relationship with law enforcement.[4]

a. Law Enforcement

Major MC informed the parties that he had some law enforcement training. He explained **[*11]** that he worked for the Kentucky Labor Department investigating "wages and hours" violations by employers. He did this job for about eighteen months and received training in investigative techniques. Specifically, he received training on interviewing the employer and gathering evidence such as "time cards." He also investigated working conditions and child labor practices. He described his work as "administrative," not criminal, and the investigative techniques were "basic common sense. . . . What would a reasonable person do sort of procedures." He also stated his father had served as a Fish and Game officer and a corrections officer while he was growing up, and his brother served in the Army Reserve as a Lieutenant Colonel in the Military Police. He clarified his brother had not "really worked a lot [sic] law enforcement," and "[m]ost of his stuff has been military command related and UCMJ-type things that nonjudicial punishments for different folks in his organization and so on." Major MC's explanation of his brother's duties is consistent with our understanding of the duties of a commissioned officer in the Military Police.

As the military judge did not explain his reason for denying the **[*12]** challenge, we review the denial of the challenge on this ground nearly de novo. Nonetheless, we find no error. Major MC's connection to law enforcement is tenuous and does not appear to be recent. To the extent that these issues were developed at trial—which is to say not much—they would not undermine the public's perception of fairness in having MAJ MC sit as a member of appellant's court-martial. Assisting the Kentucky Department of Labor in administrative investigations into labor law violations would not cause a reasonable member of the public to question the fitness of MAJ MC. Likewise, MAJ MC's father's service as a Fish and Game and corrections officer, and his brother's service as a Military Police officer (but not one conducting criminal investigations) would not call into question the appearance of fairness in the military justice system. We likewise find nothing to support that MAJ MC held actual bias against appellant based on his experience with law enforcement.

---

[3] The military judge considered the challenge on the basis of both actual bias (though not specifically asserted) and implied bias, and stated that he considered the mandate to liberally grant defense challenges for cause.

[4] We address the two grounds for challenge separately because they are factually unrelated and because of the military judge's different treatment of the two issues. Nonetheless, we also consider the totality of the circumstances and their combined effect. *See United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007).

b. Sensitivity to Domestic Violence

In response to a question by the defense regarding "interactions with domestic violence," MAJ MC stated that his wife's "ex-husband had pushed her around a bit so that's some experience **[*13]** there[, a]s far as personal, no." When asked whether his wife's background "shaped or contributed to your attitudes at all about domestic violence," MAJ MC responded, "Somewhat, yes." When asked for further explanation, he told the military judge the following:

> I mean, it's a, I guess, a relationship in many cases can be a very emotional and for some people it's a very volatile experience especially in this particular--I--my wife's case her ex-husband was an alcoholic and when he would drink is when he would get physical and he only got physical with her a couple of times according to her, but it was enough for her to report it to his command at the time. So, I'm very sensitive to it.

The trial counsel rehabilitated MAJ MC by asking whether there was "anything about your sensitivity that would make it difficult for you to fairly listen to the evidence in this case and make a determination based on just the facts in this case?" Major MC responded, "No."

Appellant then challenged MAJ MC for cause, stating:

> [T]he defense would challenge [MAJ MC] on the basis of implied bias. Given . . . his wife's experience with domestic violence. While he did state that he would not let that affect his judgment **[*14]** in this case, he did state he was sensitive to it, that his wife would still be emotional about that particular aspect of her previous relationship and it's asking too much.

As we explain below, although the challenge was one only of implied bias, the defense counsel's argument raised both actual bias and implied bias. When MAJ MC stated he was sensitive to issues of domestic violence, this comment raised more the issue of actual bias. When MAJ MC explained his wife's prior experience regarding domestic violence, it raised more the issue of implied bias. The government objected to the challenge. The military judge properly considered the challenge as raising both actual and implied bias. "[A] challenge for cause . . . encompasses both actual and implied bias" as they are "separate legal tests, not separate grounds for challenge." *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000).[5] The military judge denied the challenge for cause as follows:

> Now I've considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges. That challenge is denied because of the reasons stated by the government and I'll also note that having observed MAJ [MC's] demeanor he was very

[5] As discussed above, the CAAF's recent decision in *Dockery* appears to contradict this holding in *Armstrong* but without specifically overruling it. In *Dockery*, the challenge for cause was only based on *actual* bias but the military judge granted the challenge for *implied* bias. *Dockery*, 75 M.J. at *7, 2017 CAAF LEXIS 108. The *Dockery* court repeatedly described this as a sua sponte removal of a member and perhaps implied the military judge was not required to consider the challenge for implied bias. 2017 CAAF LEXIS 108, [WL] at *2 and *9. Under *Armstrong*, presented with a challenge for cause, the military judge would be required to consider a challenge for cause for both actual and implied bias, and the removal for cause would not be sua sponte. However, in any event, resolving the assigned error in this case does not turn on interpreting *Armstrong* in light of *Dockery*. As the military judge here considered the challenge as raising both actual and implied bias, whether it was required or discretionary consideration of both actual and implied bias is of no importance.

> emphatic **[*15]** that the issues in his wife's life that occurred in the 1990s would not affect him in this case. He was very open to the idea that domestic violence issues can be caused by either party and I interpreted that to mean gender. And very emphatic that he would only judge this case on the basis of the facts presented in this case. The fact that his wife would become sensitive to a domestic violence or sensitive and emotional if her domestic violence case was raised to her, it really has no impact on Major MC. He was very clear that he can decide this case fairly and impartially and that this issue won't affect him. So that challenge is denied.

As the test for implied bias and actual bias is substantially different—they are "separate legal tests" under *Armstrong* —on appeal we will attempt to parse the facts and law and address them separately.

Our superior court recently reiterated that where "actual bias is found, a finding of implied bias would not be unusual, but where there is no finding of actual bias, implied bias must be independently established." *Dockery*, 75 M.J. at *18 n.6, 2017 CAAF LEXIS 108 (C.A.A.F. 2017) (citing *Clay*, 64 M.J. at 277).

On appeal, appellant conflates the issues of actual and implied **[*16]** bias and argues MAJ MC's statement he is "very sensitive" to domestic violence is the basis for an implied bias challenge. Based on our understanding of the CAAF's case law on the matter, we disagree. We see the implied bias test as looking at how "most people" (i.e., an objective member of the public) would view the bias of someone in MAJ MC's shoes, "regardless" of MAJ MC's claims about how he actually feels. That is the difference between a test for actual bias and implied bias. Under appellant's view, the subjective impressions of a panel member could alone be the basis for an implied bias challenge. This view ignores the clear guidance the implied bias test looks from the perspective of an objective member of the public without regard to the personal feelings of the member, and the CAAF's requirement when "there is no finding of actual bias, implied bias must be independently established." *Clay*, 64 M.J. at 277. Moreover, under appellant's reasoning any test for actual bias would always be subsumed by the test for implied bias.

With that framework established, we understand the questions before for us on appeal to be as follows:

i. Is Major MC Actually Biased?

Major MC's statement he is "very sensitive" **[*17]** to issues of domestic violence raises the issue of actual bias. That is, is MAJ MC actually biased against persons accused of domestic violence? In reviewing questions of actual bias on appeal we are required to give deference to the military judge's assessment of MAJ MC's fitness and candor. *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) ("Because a challenge based on actual bias is essentially one of credibility, and because the military judge has an opportunity to observe the demeanor of court members and assess their credibility on voir dire, a military judge's ruling on actual bias is afforded deference) (internal citations and quotations omitted).

"[A] member is not per se disqualified because [the member] or a close relative has been a victim of a similar crime." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (citations omitted). Affording the military judge the deference due, and noting his specific findings regarding MAJ MC's demeanor, we find that the military judge did not abuse his discretion in finding no actual bias on the part of MAJ MC.[6]

[6] There was little or no prior history of domestic violence

ii. Is Major MC Impliedly Biased?

Major MC's statement his wife was "pushed around" a "couple of times" by her ex-husband in the mid-1990s also raises the question of implied bias. That is, "regardless of an individual member's **[*18]** disclaimer of bias," would an objective member of the public find that "most people in the same position would be prejudiced [that is, biased]." *United States v. Briggs*, 64 M.J. 285 (CAAF 2007); *see also United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000). Here, we look less at MAJ MC's statements and focus on how a member of the general public would objectively perceive MAJ MC's statements. "The test for implied bias in the military has considered the public's perception of fairness since the earliest days [of the Court of Military Appeals.]" *Woods*, 74 M.J. at 243. "The question before us, therefore, is 'whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.'" *Id.* at 243-44 (internal citations omitted).

Again, we do not find that the military judge abused his discretion. An objective member of the public is unlikely to question the fitness of a panel member because, well over a decade ago, his wife was "pushed" around a "couple" of times by her then husband. In *Terry*, a panel member's participation in a rape trial did not create implied bias, despite that member's spouse having been sexually assaulted "at least ten, and perhaps as many as twenty years" before the court-martial. 64 M.J. at 304. While we find that the military judge's ruling is **[*19]** likely due some deference under our superior court's sliding scale standard of review for issues of implied bias, it does not much matter. The passage of time and the dissimilarities in the degree of violence both weigh heavily against finding any implied bias. Major MC did not personally witness any domestic violence, the instances of domestic violence were very remote in time, and the conduct in question was "pushing" rather than being strangled or suffocated to death. On top of these facts, and to the extent we may consider it, we have the military judge's specific findings on MAJ MC's demeanor in answering questions.[7]

---

between appellant and SGT KW. In objecting to the challenge, the trial counsel proffered as much to the military judge. Except for the trial counsel's rehabilitation efforts, no one developed at trial what MAJ MC meant when he said he was very sensitive to domestic violence. If he meant only that he thinks domestic violence is wrong, such a view would unlikely be a basis for challenge under either actual or implied bias. And, since murder was the case at bar, it is likely every panel member was, in that sense, sensitive to the issue of murder.

[7] In *Woods*, the court clarified what had long been a somewhat open question: when determining a question of implied bias may a military judge consider the panel member's demeanor when answering questions. 74 M.J. at 243. Put differently, when considering a question of implied bias, is the objective test conducted from the viewpoint of a hypothetical member of the public sitting in the gallery (and seeing and hearing the panel member)? Or, is the objective member of the public reading a cold transcript? If the former, the member of the public has the same information as the military judge and the military judge's assessment of demeanor may, on the margin, make the difference between granting and denying the challenge for implied bias. If the latter, the military judge's assessment of demeanor is likely irrelevant. The CAAF appears to have answered this question when it stated that "resolving claims of implied bias involves questions of fact *and demeanor*, not just law." *Id.* (emphasis added); *see also United States v. Hines*, 75 M.J. 734 (Army Ct. Crim. App. 2016). In this regard, the military judge ruled consistently on defense challenges. With regards to appellant's challenge for cause of Lieutenant Colonel (LTC) CK, the panel member's demeanor caused the military judge to *grant* the defense challenge for bias. Specifically, the defense argued LTC CK expected the defense to tell their side of the story and "would make the proceedings when looked from the outside in look unfair and impartial." The military judge's assessment of LTC

B. Non-unanimous Panel

Appellant assigns as error his rights under the Fifth, Sixth, and Eighth Amendments were violated when he was convicted and sentenced to life without the possibility of parole by a court-martial panel that was not obligated to return a unanimous verdict. Appellant dutifully noted contrary case law.

The decision to allow non-unanimous verdicts was a policy decision made by Congress during the crafting of the UCMJ. In those post-World War II years a preeminent concern was the danger posed by unlawful command influence. *See* House Armed Services **[*20]** Committee Report, H.R. Doc. No. 491, 81st Cong., 1st Session (1949) at 606 (statement of Prof. Edmund M. Morgan). A requirement for a unanimous panel decision, while having obvious advantages in truth-determination, would also undercut several protections against unlawful command influence that exist under current military justice practice. As these may be non-obvious considerations, we address them briefly.

First, a requirement for a unanimous panel verdict would necessarily require the public disclosure of each panel member's vote. Panel members are not anonymous; most obviously to the convening authority who detailed them to the court-martial. Currently, regardless of the verdict, an individual panel member's vote cannot be determined.[8] The non-unanimous vote allows a panel member to cast what they might perceive to be an unpopular vote. In a system of unanimous panel verdicts, each panel member's superior, subordinate, and peer would know exactly how each panel member voted in each case. Consider the current oath taken by a panel member requires them not to divulge the vote or opinion of any member—an oath which would become pointless when the unanimous verdict is read in open court. *See* R.C.M. 807(b)(2) discussion.

Second, unanimous verdicts in the civilian system require repeated voting until a unanimous decision is reached or the jury is "hung." Currently, absent the relatively rare request to reconsider a finding, a panel member's formal vote is conducted by a single secret written ballot. By contrast, unanimity requires re-voting and—when there is sharp disagreement between two panel members—one panel member's views usually must yield to the other. When deliberations must continue until there is unanimity, secret ballots would only frustrate the goal of deliberating until all panel members are in agreement. As a result, a requirement to keep deliberating until all members agree poses special concerns when one panel member outranks the other.

Military life and custom may condition a panel member to be wary of questioning the reasoning of senior members, or a senior panel member may be unaccustomed to having his or her reasoning or decisions questioned. It is unlikely that the lessons learned during a lifetime of service in a rigid hierarchical system can always be briefly suspended during deliberations. The current practice of a single secret written ballot, collected and counted by the junior **[*22]** member of the panel, allows a panel member to more

---

CK's demeanor (that he was too emphatic) caused him to grant the defense's challenge.

[8] The only exception is when, in a capital case, the panel *convicts* the accused and when the panel sentences such an accused to death. UCMJ art. 25a; UCMJ art. 52. In this one instance, the required unanimity requires the effective public disclosure of every panel member's vote. However, a panel member's vote *against* **[*21]** conviction or a death sentence cannot be determined. If the public disclosure of a panel member's unanimous vote causes hesitation in casting a vote in favor of death, that hesitation can only inure to the benefit of the capital defendant.

freely vote his or her conscience. By contrast, unanimity requires continued debate until all agree. While we might presume that panel members could deliberate a case fairly without the influence of rank or position in most cases, such deliberations would proceed without the current protections provided by single a secret written ballot. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 2-5-14 (10 Sept. 2014)

In short, current practice helps reduce the possibility of impermissible influences on panel members both inside and outside the deliberation room. These pernicious concerns of improper influence will be most acutely felt when the case involves high stakes, when the case involves infamous acts, or when the personalities involved are less likely to yield to prophylactic instructions. That is, concerns of improper influence are most likely to be a problem in the most problematic of circumstances.

Weighing the costs and benefits of unanimous or non-unanimous verdicts is a policy decision vested in the Congress. The Congress is specifically empowered to regulate the "land and naval **[*23]** forces." U.S. Const. art. I, § 8, cl. 14. Any change to the voting requirements contained in Article 52, UCMJ, will likely have to originate with that branch of government. If anything, the Congress's recent amendment to Article 52, UCMJ, (requiring three-fourths instead of two-thirds to convict) is a recent reaffirmation of the military practice of non-unanimous verdicts. National Defense Authorization Act of Fiscal Year 2017, Pub. L. No. 114-328, § 5235 (2016) (amending UCMJ art. 52). Ultimately, however, the requirement for non-unanimous verdicts in the military justice system is long-standing and well-settled law which we are obligated to follow. *See e.g. United States v. Loving*, 41 M.J. 213, 287 (C.A.A.F. 1994) *cert. denied* 562 U.S. 827, 131 S. Ct. 67, 178 L. Ed. 2d 22 (2010).

CONCLUSION

Finding no error, we AFFIRM the findings of guilty and sentence.

Chief Judge RISCH and Judge FEBBO concur.

End of Document

United States v. Morris

United States Army Court of Criminal Appeals

April 18, 2018, Decided

ARMY MISC 20180088

Reporter

2018 CCA LEXIS 192 *; __ M.J. __; 2018 WL 1864915

UNITED STATES, Petitioner and ST, by and through Captain JOHN C. ALLISON Special Victim Counsel, Petitioner v. Lieutenant Colonel KENNETH SHAHAN, Military Judge United States Army, Respondent and Sergeant COLBY S. MORRIS, United States Army, Real Party in Interest

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Morris, 77 M.J. 427, 2018 CAAF LEXIS 280 (C.A.A.F., May 16, 2018)

Motion granted by United States v. Morris, 77 M.J. 436, 2018 CAAF LEXIS 314 (C.A.A.F., May 30, 2018)

Writ denied by, Without prejudice United States v. Morris, 2018 CAAF LEXIS 402 (C.A.A.F., July 18, 2018)

Prior History: **[*1]** Headquarters, 8th Theater Sustainment Command. Kenneth Shahan, Military Judge. Colonel Ryan B. Dowdy, Staff Judge Advocate.

Counsel: For Petitioner United States: Captain Catharine M. Parnell, JA (on brief); Captain Allison L. Rowley, JA; Captain Catharine M. Parnell, JA (on supplemental brief); Colonel Tania M. Martin, JA; Captain Catharine M. Parnell, JA; Captain Allison L. Rowley, JA (reply brief).

For Petitioner ST: Captain John C. Allison, JA (on brief).

For Real Party in Interest: Lieutenant Colonel Tiffany M. Chapman, JA; Major Brendan R. Cronin, JA; Captain Benjamin A. Accinelli, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS

WOLFE, Judge:

This case is before us pursuant to the All Writs Act, 28 U.S.C. § 1651 and Article 6b, Uniform Code of Military Justice, 10 U.S.C. § 806b [UCMJ]. This petition arises from a ruling by the military judge that the alleged victim's clothing (thong-underwear and a tank top) did not fall within the scope of Military Rule of Evidence [Mil. R. Evid.] 412. As no facts were admitted at the hearing on which to base this ruling, we set **[*2]** aside the decision and return the case to the military judge.

BACKGROUND

On the morning of a contested trial, and just before the panel members were to be assembled, the military judge held a closed hearing to consider a recent defense motion filed under Mil. R. Evid. 412.

Neither side called any substantive witnesses or admitted any evidence. Instead, there was a proffer as to what the testimony would be. The parties, however, did not agree on the proffered facts. As the civilian defense counsel gave a proffer of the alleged victim's testimony ("Ms. ST"), the government stood up and stated, "Your Honor, so this is beyond what we agreed upon. The proffer—this is not what we agreed upon." The parties ended up telling the military judge two stories that were incompatible at key points.

A box containing the alleged victim's clothing was brought into court through a law enforcement agent. The agent was asked one substantive question which was "is this the clothing in that box right there?" The agent agreed. But, the agent did not describe the clothing, nor was the box opened and the clothing examined. The military judge decided not to open the box for two reasons. First, the military judge expressed concerns **[*3]** about breaking the "chain of custody" by opening the sealed box. The civilian defense counsel concurred with this concern.[1] Second, the military judge questioned whether actually viewing the clothing in question was necessary as he was aware of what a thong and tank top looked like without viewing the evidence.

The parties then described to the military judge what the clothing in the box looked like, but again fell into disagreement. Specifically, they disagreed about the length of the tank top and therefore how revealing it would be on the victim. The government asserted that the tank top would fall to the victim's mid-thigh. The defense stated that it was "[s]horter than that, Your Honor. Not mid-thigh; above mid-thigh."

The military judge ruled on the record, but on grounds different than those asserted by the defense. The ruling did not include findings of fact. The military judge determined that the clothing was not prohibited by Mil. R. Evid. 412 because the rule's prohibition on introducing evidence of a victim's mode of dress did not include the clothing she was wearing at the time of the offense.

The government petitioned this court for extraordinary relief.[2] We provided the opportunity for Ms. **[*4]** ST file a separate petition under Article 6b, UCMJ, which she did.[3]

As just noted, almost no evidence or testimony was introduced at the closed Mil. R. Evid. 412 hearing and the military judge made no findings of fact. Ultimately, this is a fatal flaw requiring remedy. Based on this record, we also make no findings of fact. However, in

---

[1] The source of this concern is not explained by the limited record.

[2] The government also moved for this court to consider affidavits from two trial counsel. We denied the motion and we briefly explain our reasoning here. The affidavits recount discussions that occurred during several Rule for Courts-Martial [R.C.M.] 802 sessions. According to the affidavits, the military judge read a draft ruling to the parties and entertained a robust debate in chambers about the correctness of the draft ruling. The affidavits also claim to restate several comments by the military judge for the apparent purpose of indicating incorrect legal reasoning or perhaps bias.

If the government had an objection to the conduct of the R.C.M. 802 conference, or the military judge's summary of the conference, the government was obligated to make those objections part of the record at the time of trial. While R.C.M. 802 and Article 39(b), UCMJ, do not allow the parties to litigate motions in chambers—if that in fact is what happened—in the context of a writ-petition, a party cannot silently acquiesce to an R.C.M. 802 session at trial only to then request relief based on a unilaterally offered supplement to the record on appeal. Or, at least, we in our discretion decline to consider it.

[3] For all relevant purposes the two petitions assert the same issues and therefore we treat them as one.

order to provide some background so the reader can understand the parties' arguments in some context, we offer a partial summary below of their respective positions. While practically no evidence was introduced at the hearing, there was plenty of argument from each party about what they thought the evidence would show.

LAW AND DISCUSSION

A. Standard of Review

A writ of mandamus is an extraordinary writ and is a "drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983). To prevail, a petitioner must show that: "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (2012) (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)).

B. Analysis

The military judge ruled that "my ruling is that what the victim was wearing that night is not evidence that is protected by **[*5]** M.R.E. 412." The military judge further elaborated: "I find that the term 'manner of dress' includes - - contemplates what an alleged victim has been seen wearing on previous occasions, but it is not meant to apply to what an alleged victim is wearing on the evening of the actual alleged assault. . . ."[4]

1. Is an alleged victim's clothing not covered by Mil. R. Evid. 412 as a matter of law?

We interpret the military judge's ruling as stating that an alleged victim's dress at the time of the offense is, *as a matter of law*, not covered by the prohibitions in Mil. R. Evid. 412. We reach this interpretation for two reasons. First, it is the natural reading of the ruling the military judge read into the record. Second, the military judge seemed well aware that the parties could not agree on a proffer, that no substantive witnesses were called, and that he declined to open the box containing the clothing in question. That is, constrained by the failure of the parties to admit actual evidence, the military judge attempted to structure his ruling as one of pure law.

On this issue of law, we disagree. Military Rule of Evidence 412 focuses not on the types of evidence (e.g. clothing) to be admitted, but the purpose for which the evidence sought to be introduced will **[*6]** be offered. The operative language of the rule is as follows:

> The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

Mil. R. Evid. 412(a).

What is clear is that the purpose for which the evidence is offered determines whether the evidence falls within the scope of the rule.[5] The same piece of evidence may be offered for both permissible and impermissible purposes. Certainly, for example, a short skirt offered to

[4] The rule defines the term "sexual predisposition" as "referring to an alleged victim's mode of dress, speech or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder." Mil. R. Evid 412(d).

[5] And, courts are not so naive as to fail to recognize that there are often unstated purposes for introducing evidence.

show that the alleged victim was promiscuous and was therefore likely to consent to sex is prohibited. The same skirt, offered by the defense because it contains DNA from someone other than the accused may be admissible under an exception to the rule if the identity of the assailant is a fact in issue. Mil. R. Evid. 412(b)(1)(B). And again, the same skirt offered for a purpose unrelated to sexual behavior or predisposition, (e.g. as physical evidence when torn or for purposes of identity, "I am the person in the video wearing that skirt") may fall outside the rule entirely.

If the evidence falls within **[*7]** the rule, it "is still subject to challenge under Mil. R. Evid. 403." Mil. R. Evid. 412(c)(3). Evidence may have some probative value, but the weight of the evidence can be marginal (or central) to the offering party's case. The danger of an impermissible inference from the evidence may be slight or grave. For example, evidence of several persons DNA on the alleged victim's clothing may be highly probative when the defense theory is one of identity or alibi. The same evidence, but in a case where the defense's theory is consent, may have its probative value outweighed by the danger that the factfinder improperly infers the alleged victim is promiscuous. Often, the probative value of the evidence will depend on the offering party placing the evidence in context within their theory of the case.

As a matter of law, Mil. R. Evid. 412 does prohibit the introduction of an alleged victim's clothing at the time of an offense when offered for a purpose prohibited by the rule. Thus, we find the military judge's ruling was incorrect. Accordingly, we turn to the next question: for what purpose was the alleged victim's clothing offered.

2. What was the clothing offered to prove in this case?

During the closed hearing the defense argued that the clothing **[*8]** Ms. ST was wearing was evidence of her sexual behavior. Under the defense theory, Ms. ST's choice of dress, among other things, created in the mind of the accused an honest and reasonable belief that she consented to sex. The defense argued that such evidence met the requirements for the constitutional exception under Mil. R. Evid. 412(b)(1)(C).

The military judge and the civilian defense counsel had the following exchange:

> MJ: . . . But, I think your theory is that the fact that she never changed out of that outfit into something more modest would have created a reasonable mistake of fact in your client's mind that she wanted to engage in sex with him.
>
> CDC: Not only that, Your Honor, but in addition to that, the way she presented herself while she was wearing it. And, the Court would have to see how loose-fitting this--the tank top was how she would have been exposing herself to [the accused]. And at that point, Your Honor, I would be pointing out to the Court the mistake of fact and the constitutional right to present evidence like that that would support my mistake of fact.

As the defense argument made clear, the defense saw the clothing as having reflected choices, decisions, and the sexual behavior of the **[*9]** alleged victim.

The government at the closed hearing disagreed. The government argued that what Ms. ST. wore to bed—on a night when she was not expecting visitors—is prohibited sexual predisposition evidence. This is not, goes the government's argument, a case where an alleged victim "slipped into something more comfortable" and such conduct could plausibly be construed as sexual behavior that would fit under an exception to the rule, or could be considered part of the res gestae of the offense. Thus, the government fears a panel, presented with testimony or evidence regarding the clothing, will make an improper inference about the

alleged victim's sexual predisposition.

In this case, it seems clear that the alleged victim's clothing was offered for either the purpose of demonstrating her sexual behavior, as argued by the defense, or her predisposition, as argued by the government. While an alleged victim's clothing, like other evidence collected from the scene of a crime, may be relevant and admissible for reasons that fall outside of Mil. R. Evid. 412, this was not the defense's motion.

We do not resolve whether the alleged victim's clothing was, in this case, evidence of her sexual behavior, her sexual **[*10]** predisposition, or whether or not the evidence fell within an exception to Mil. R. Evid. 412. These are mixed questions of law and fact. And, no facts were introduced at the closed hearing to answer these questions.

While the parties offered the military judge plenty of argument on the motion, they did not present the court with evidence on which he could base a ruling.[6] The parties attempted to, but could not agree on a proffer of Ms. ST's testimony. The parties disagreed in their description of what the clothing looked like, and the military judge declined to open the box to make a factual determination. The parties argued substantively different timelines of the evening in question.

The defense, which had the burden, put on no evidence to support the assertion that the accused had an honest belief regarding consent because of seeing Ms. ST in her clothing or because of the other asserted sexual behavior. "The test for determining whether an affirmative defense of mistake of fact has been raised is whether the record contains some evidence of an *honest* and *reasonable* mistake to which the members could have attached credit if they had so desired." *United States v. Davis*, 76 M.J. 224, 228 (C.A.A.F. 2017) (quoting *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003)) (emphasis added). "[T]he military judge must **[*11]** answer the legal question of whether there is some evidence upon which members could reasonably rely to find that *each* element of the defense has been established." *United States v. Schumacher*, 70 M.J. 387, 389-90 (C.A.A.F. 2011) (emphasis added).

One further example illustrates the importance of evidence in deciding motions. At trial and at this court, the parties raised this panel's decision in *United States v. Gaddy*, 2017 CCA Lexis 179 (Army Ct. Crim. App. 20 Mar. 2017).

In *Gaddy*, we considered whether sexual conduct between the accused and the alleged victim "moments" before the alleged offense was "other sexual behavior" under the rule. *Id.* at *5. In that case, the accused claimed that sexualized dancing was followed immediately by consensual sex. *Id.* When the military judge prohibited the accused from raising this evidence, we described it as requiring the accused to begin his defense mid-sentence. *Id.* That is, contrary to human experience about sexual relations, the accused was required to assert that he had consensual sex with the victim without being able to explain the consensual sexual behavior (in the defense theory) that had happened the moment before the sexual conduct. Key to our ruling was that the sexualized dancing *immediately* preceded the charged sexual conduct without interruption. **[*12]** Accordingly, we did not see the dancing as *other* sexual behavior. *Id.* at *6. We also caveated our ruling by applying it only to offered evidence of sexual behavior, not evidence of sexual

[6] The record submitted to this court by the parties consists of the defense motion, a few emails, and the transcript of the closed hearing. The military judge was not asked to import evidence from other motions.

predisposition.[7] *Id.*

In *United States v. Schelmetty*, we distinguished *Gaddy* when the sexual behavior in question was "temporally and physically separate from the charged offense." 2017 CCA Lexis 445, *5 (Army Ct. Crim. App. 30 Jun. 2017). In that case, the alleged offense occurred in an upstairs bedroom. *Id.* at *4. A second, allegedly consensual, event happened "shortly afterwards" downstairs. *Id.* We determined that the break in time and space distinguished the case from *Gaddy* and that therefore the downstairs conduct was "other sexual behavior." *Id.*

The government argues that this case was unlike *Gaddy* because prior to the assault the victim went to sleep wrapped in a blanket; conduct that was physically and temporally separate from anything that had happened previously. The defense disagreed with both the government's reasoning and, again, did not agree with the government's proffer about the evidence.

Not surprisingly, determining whether sexual behavior that occurs close in time to the offense is part of the res gestae of the offense or **[*13]** is "other sexual behavior" under Mil. R. Evid. 412 is a factual inquiry. We will not attempt to resolve this issue because, among other reasons, there is no factual record on which to rely.

CONCLUSION

Given the absence of facts to support any ruling, we grant the government's writ-petition, but only in part. Given the military judge's erroneous determination that an alleged victim's clothing at the time of the offense falls outside of Mil. R. Evid. 412 as a matter of law, and given the absence of any facts that would support reaching the same effective result for different reasons,[8] we find the government's only means for relief is to set the ruling aside; the right to this relief is clear and indisputable; and the issuance of the writ is necessary and appropriate under the circumstances. While military judges have broad discretion to decide evidentiary issues, and writ-petitions are an extreme measure to correct erroneous rulings, there must be some evidence to support a Mil. R. Evid. 412 ruling to avoid it becoming a shell of a proceeding.

However, we do not go any further. The absence of evidence to support a Mil. R. Evid. 412 motion would normally operate against the moving party. That is, if there is no evidence the moving party loses. However, **[*14]** our decision today does not reach that issue for two reasons.

First, the limited record on appeal may suggest a somewhat rushed proceeding which may have contributed to the limited factual record in front of us. The defense's motion was filed five days before trial was scheduled to begin. The closed hearing was conducted the morning of trial with the panel members standing by to assume their duties. The military judge summarized an R.C.M. 802 conference in which the "timing of this 412 motion" was discussed, but without placing on the record the nature of the issue.

Untimely Mil. R. Evid. 412 motions are prohibited absent good cause. Mil. R. Evid. 412(c)(1)(A). As the motion was allowed to proceed, and the record on appeal

[7] The exceptions in Mil. R. Evid. 412(b)(1)(A) and (B) apply only to sexual behavior evidence, not sexual predisposition evidence. As sexual predisposition evidence is essentially a specific type of character evidence, Mil. R. Evid. 404 may also be applicable.

[8] The "tipsy coachman" doctrine allows an appellate court to affirm a trial court that reaches the right result but for the wrong reasons so long as there is any basis which would support the judgment in the record. *See United States v. Carista*, 76 M.J. 511, 515 (Army Ct. Crim. App. 2017).

contains no objection by the government to the timeliness of the motion, we infer that either the motion was timely, the government forfeited any untimeliness objection, or the military judge found good cause to excuse a late filing.[9] Either way, once a military judge allows a motion to proceed, the parties are entitled to a full proceeding, including the right to "call witnesses . . . and offer relevant evidence." Mil R. Evid. 412(c)(2). While we make no conclusion one way or the other regarding whether the parties were provided sufficient **[*15]** opportunity to litigate the issue, prudence suggests that we leave it to the military judge to determine what steps are necessary to ensure compliance with the rule and to ensure a fair and just court-martial for the accused.

Second, and relatedly, ruling on the admissibility of the clothing (that is, ruling on the substance of the Mil. R. Evid. 412 motion) is not "necessary" to decide this writ-petition. Accordingly, we limit the scope of our ruling to the minimum relief required.

The Mil. R. Evid. 412 ruling is SET ASIDE. Our stay of the proceedings is lifted and the case is returned to the military judge, who in his discretion may direct a new Mil. R. Evid. 412(c) proceeding as he determines may be warranted.

Senior Judge MULLIGAN and Judge FEBBO concur.

End of Document

[9] Military judges should have confidence that they may enforce filing deadlines contained in the Manual for Courts-Marital and their pretrial orders. Punctuality and compliance with rules and court orders should be expected behavior at a military trial.

We would suggest the following framework. As the presiding officer of a court-martial, the military judge has broad authority to control the court-martial. *See* R.C.M. 801(a)(3). Faced with an untimely motion, the military judge is given broad discretion regarding whether to consider the motion or to dismiss it as being untimely, and such a decision will not be lightly second-guessed by the appellate judges of this Court. However, when the judge determines it is necessary to consider a late motion on the eve of trial, then the motion must be fully considered and litigated. Delaying the trial may be necessary. The appropriate decision should reflect the gravity of the issues at stake, and whether there was good cause for the delay.

In that sense, military judges should be guided by the principles contained in R.C.M. 102. The purpose of the rules for courts-martial are to obtain a "just determination" in every proceeding. R.C.M. 102(a). The rules "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." R.C.M. 102(b).

United States v. Reinert

United States Army Court of Criminal Appeals

August 7, 2008, Decided

ARMY MISC 20071195 and ARMY MISC 20071343

Reporter

2008 CCA LEXIS 526 *; 2008 WL 8105416

UNITED STATES, Petitioner v. Colonel PATRICK REINERT, Military Judge, Respondent and Private E1 DARYUS C. GIPSON, Petitioner v. THE UNITED STATES ARMY, Major General WILLIAM H. MCCOY, and Colonel DARIA P. WOLLSCHLAEGER, Respondents

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** U.S. Army Maneuver Support Center and Fort Leonard Wood. Timothy Grammel (arraignment) and Patrick Reinert (trial), Military Judges, Colonel Jerry L. Linn, Staff Judge Advocate (trial), Lieutenant Colonel Francisco A. Vila, Acting Staff Judge Advocate (post-trial recommendation), and Colonel Daria P. Wollschlaeger, Staff Judge Advocate (addendum).

Counsel: For United States, Petitioner: Captain Adam S. Kazin, JA (argued); Colonel John W. Miller II, JA; Lieutenant Colonel Stephen P. Haight, JA; Major Elizabeth G. Marotta, JA; Captain Adam S. Kazin, JA (on brief); Captain Larry W. Downend, JA.

For Reinert, Respondent: Lieutenant Colonel Steven C. Henricks, JA (argued and on brief).

For Gipson, Petitioner: Captain Christopher W. Dempsy, JA (argued); Colonel Christopher J. O'Brien, JA; Major Sean F. Mangan, JA; Captain Christopher W. Dempsy, JA (on brief).

For Other Respondents: Captain Adam S. Kazin, JA (argued); Colonel John W. Miller II, JA; Lieutenant Colonel Stephen P. Haight, JA; Major Elizabeth G. Marotta, JA; Captain Adam S. Kazin, JA (on brief); Captain Larry W. Downend, JA.

Judges: Before GALLUP, ZOLPER, and MAGGS, Appellate Military Judges. Senior Judge ZOLPER and Judge MAGGS concur.

Opinion by: GALLUP

Opinion

MEMORANDUM **[*2]** OPINION ON PETITIONS FOR EXTRAORDINARY RELIEF

GALLUP, Senior Judge:

Colonel (COL) Patrick Reinert, a military judge sitting as a special courtmartial, convicted Private (PVT) Daryus C. Gipson, pursuant to his pleas, of conspiracy to commit housebreaking and larceny, absence without leave (AWOL), disobeying a superior commissioned officer, disobeying a superior noncommissioned officer, larceny, housebreaking, and communicating a threat, in violation of Articles 81, 86, 90, 91, 121, 130, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 890, 891, 921, 930, and 934 [hereinafter UCMJ]. Colonel Reinert sentenced PVT Gipson to a bad-conduct discharge, confinement for seven months, and forfeiture of $ 867.00 pay per month for seven months.

The convening authority has not taken action in the case. This matter is before us as a result of petitions for extraordinary relief filed by the United States and PVT Gipson pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (2000). [1]

As the two petitions are necessarily intertwined, we consider them together. Resolution of Army Miscellaneous 20071195 **[*4]** will remove any impediment to the speedy completion of the very action sought by Army Miscellaneous 20071343; in an exercise of logical and judicial economy the court will discuss and resolve Army Miscellaneous 20071195 first. All the sections below, with the exception the decretal paragraph, address the government's petition for a Writ of Prohibition.

We first address two threshold questions. First, does the UCMJ provide this court jurisdiction under the All Writs Act to review an interlocutory appeal on behalf of the government when Article 62, UCMJ, does not otherwise permit such review? Second, assuming there is jurisdiction, is the subject matter "extraordinary" under the All Writs Act? We then address the substantive question of whether a judge can order confinement credit unrelated to Article 13, UCMJ. [2]

FACTS

After arraignment, but before entering **[*5]** pleas, PVT Gipson filed a motion alleging he was subjected to illegal pretrial punishment in violation of Article 13, UCMJ, and requesting twenty days confinement credit. Private Gipson averred he was publically ridiculed by a number of drill sergeants and noncommissioned officers. On one occasion a drill sergeant told a group of soldiers waiting in line at a dining facility, "You see these 2 privates [(PVT Gipson and another soldier)] . . . you don't want to be like them . . . going to jail . . . looking for a boyfriend. . . . You privates don't want to be like those scumbags." On several other occasions, another drill sergeant, in the presence of other soldiers, referred to PVT Gipson as "big Louie's [a local entertainment establishment] bitch" and said PVT Gipson was "[going] to jail." Another noncommissioned officer, when leaving the supply room where PVT Gibson and two other soldiers remained, made a point to take all of his personal belongings, telling the rest of the soldiers in the room, "I don't want nothin' to be takin . . . you 'all the

---

[1] In a petition for Extraordinary Relief in the Nature of a Writ of Prohibition, the government (petitioner in Army Miscellaneous 20071195) asks this court to prohibit enforcement of an order by COL Reinert **[*3]** to the government, and to prohibit enforcement of COL Reinert's grant of five days confinement credit to PVT Gipson as a sanction for the government's failure to carry out the order. Colonel Reinert is the named respondent in Army Miscellaneous 20071195. In a separate petition arising out of the same court-martial, PVT Gipson (petitioner in Army Miscellaneous 20071343), seeks extraordinary relief in the Nature of a Writ of Mandamus. Private Gipson asks this court to direct the staff judge advocate (SJA) to submit her recommendation pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 1106 and order the convening authority to take initial action in the case. The SJA advised the convening authority not to take action pending resolution of the Writ of Prohibition; the convening authority has not taken action. Private Gipson urges this court to grant a Writ of Mandamus directing the convening authority to take action regardless of the disposition of the Writ of Prohibition. The SJA and the convening authority are the named respondents in Army Miscellaneous 20071343.

[2] Article 13, UCMJ, "Punishment prohibited before trial," provides in pertinent part:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement . . . nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence. . . .

ones who stole it; you're the one with the records." Finally, on at least four occasions, another drill sergeant would sing lyrics from [*6] a song entitled "Locked Up" when he saw PVT Gipson.

Private Gipson filed a second Article 13, UCMJ, motion several days later and requested three additional days of confinement credit claiming a drill sergeant standing with several other drill sergeants told him to "get your hands out of your pockets Jailbird." There were other soldiers present and close enough to hear this comment.

At the Article 39(a), UCMJ, session on the motions, the government conceded the alleged acts occurred and acknowledged they constituted illegal punishment under Article 13, UCMJ. The government agreed PVT Gipson should receive twenty days of confinement credit. Colonel Reinert, while accepting the government's concession there was illegal pretrial punishment, required argument from both parties before determining the remedy for these violations. After hearing the parties' positions, COL Reinert ruled on the motion for illegal pretrial punishment credit as follows:

> All right, in light of the facts that we have here, I'm going to grant the Article 13[, UCMJ,] motion and I'm going to give you some credit. I'm also going to grant some other relief. To a certain extent I agree with trial counsel that the level [*7] of the misconduct isn't as bad as some Article 13[, UCMJ,] motions I've seen. It's not the old Peyote platoon kind of approach, but the thing that is disconcerting to me is the fact that you've got a relatively wide path of misconduct. You've got senior noncommissioned officers, E-7s and E-6s, who in this training environment are charged with building the backbone of the Army, they are charged with instilling the Army values, and they are acting like juvenile school children. In short, they are running amuck.
>
> I am going to grant the accused twenty days credit for the Article 13[, UCMJ,] violations, but credit alone I don't think will solve Article 13[,UCMJ,] issues. I'm also going to direct that the government cause each of these noncommissioned officers named in the defense motion to be taken to a brigade level commander or sergeant major. Each of them will be counseled about Article 13[,UCMJ,] and the need to stop this kind of idiotic behavior.
>
> In addition to that individual counseling, the government shall conduct training, orientation, or guidance to every drill sergeant on this installation to make sure that they understand that when a [s]oldier is accused of misconduct they cannot [*8] go out of their way to punish the accused prior to trial in violation of Article 13[, UCMJ]. Now, whether reaching out to all the drill sergeant on this post is through a training session or through a letter or article in the post newspaper, I will leave that to your discretion. But you need to make sure that everyone understands the need to comply with Article 13[, UCMJ].
>
> In the event that the government fails to follow through with the individual counseling of these [s]oldiers or fails to get the word out generally by either the way of class, newspaper article or some other appropriate means, I will grant an additional 5 days credit.
>
> So, what that means PVT Gipson is that I have granted your motion because of the way you were treated prior to trial here. We are going to give you some credit off of the sentence that is going to be imposed today. I'm going to give you twenty days off that sentence. I have also ordered the government to do something to hopefully correct this situation in the future. In the event that the government refuses to do that, then you will get an

additional 5 days off your sentence.

Colonel Reinert further ordered the government to file a "certificate of compliance [*9] with the court's order" as an appellate exhibit and stated:

> If when I get that record for review and there is no [appellate exhibit to that effect] then that tells me the government has not complied. I will then order a posttrial [Article] 39a[, UCMJ,] session. . . . [I]n the event [the government has] not complied by the time it is time to authenticate the record, then [I] will grant the additional 5 days credit at that point and then I will authenticate the record.

The government eventually certified it complied with all but one part of COL Reinert's order--the order to conduct installation-wide training for all drill sergeants. As a result, on 10 September 2007, PVT Gipson filed a motion for appropriate relief asking COL Reinert to grant him the additional five days confinement credit. On 14 September 2007, the government acknowledged it did not conduct the installation-wide training and asked COL Reinert to reconsider his earlier ruling. The government argued COL Reinert's order exceeded his authority. In light of the government's admissions, COL Reinert, with the agreement of the parties, determined a post-trial Article 39(a), UCMJ, session was unnecessary, finding he possessed [*10] necessary facts to make a ruling.

On 24 September 2007, COL Reinert supplemented his prior ruling on the Article 13, UCMJ, motions and authenticated the record of trial. Asserting it was within his power to "take appropriate actions to enforce judicial orders," he awarded PVT Gipson the additional five days of confinement credit for the Article 13, UCMJ, violations based on the government's failure to comply with his order. He further ordered the government to "take appropriate steps to notify the confinement facility and convening authority of the change in credit."

On 28 September 2007, the convening authority, in accordance with the advice of his acting SJA, decided not to take action on PVT Gipson's case so that the United States could pursue a petition for extraordinary relief with this court.

PROCEDURAL HISTORY

On 26 October 2007, the United States filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition asking this court to find:

> 1. [COL Reinert's] order to conduct mandatory training is outside the authority of the military judge, and therefore, is prohibited from enforcement against the Government.
>
> 2. [COL Reinert's] order awarding PVT Gipson five additional [*11] days of sentence credit as a consequence of the Government's non-compliance with the training order is outside the authority of the military judge, and therefore, is prohibited from enforcement against the convening authority or Government[.]
>
> 3. [COL Reinert's] awarding five days of confinement credit to PVT Gipson shall be treated as a recommendation for clemency . . . . The convening authority is free to award PVT Gipson the additional five days confinement credit as a discretionary act of clemency.

On 6 December 2007, PVT Gipson filed a petition for Extraordinary Relief in the Nature of a Writ of Mandamus asking this court to order the SJA to submit a post-trial recommendation (SJAR) to the convening authority and order the convening authority to take action on his case. On that same day, the acting SJA signed a SJAR pursuant to Rule for Court-Martial [R.C.M.] 1106(d) and provided a copy to PVT Gipson's trial defense counsel pursuant to R.C.M. 1106(f). The acting SJA recommended delaying action in the case

"until the appellate courts resolve the legality of [COL Reinert's] order."

On 10 December 2007, PVT Gipson, through his trial defense counsel, submitted matters to the convening **[*12]** authority under R.C.M. 1105(b) and 1106(f)(4). The accused requested the convening authority consider alternate clemency in taking initial action on the case: either disapproval of the adjudged punitive discharge, or approval of a request for discharge under the provisions of Army Reg. 635-200, Personnel Separations: Enlisted Personnel, ch. 10 [hereinafter Chapter 10] (6 June 2005). The SJA supplemented the SJAR on 17 December 2007 with an addendum pursuant to R.C.M. 1106(f)(7). The SJA recommended, *inter alia*, the convening authority "disapprove the Accused's requests for a Chapter 10 . . . [and] the Accused's request for disapproval of the bad conduct-discharge [sic]." The SJA again recommended deferral of final action until "final decision on the writ."

On 17 December 2007, the convening authority disapproved PVT Gipson's request for discharge under Chapter 10; moreover, he "disapprove[d] the Accused's request for disapproval of the bad conduct discharge," while nevertheless deferring "final action" until disposition of the government's writ. We heard oral argument in both petitions on 19 December 2007.

LAW and DISCUSSION

Government Interlocutory Appeals

The jurisdiction of this court **[*13]** is narrowly prescribed by Congress. *See* Articles 62, 66, 69, and 73, UCMJ. Article 66, UCMJ, affords this court jurisdiction to review "the findings and sentence as approved by the convening authority" in a court-martial. *See* 10 U.S.C. § 866(c). Article 62, UCMJ, allows this court to review certain kinds of interlocutory government appeals. *See id*. § 862(a). Article 69, UCMJ, gives us jurisdiction to review cases in which the Judge Advocate General has taken certain actions. *See id*. at § 869(d). Finally, Article 73, UCMJ, permits this court to review petitions for a new trial for newly discovered evidence or fraud on the court. *See id*. at § 873.

As this is a government interlocutory appeal of a military judge's ruling, arguably the most applicable statutory basis for review is Article 62, UCMJ. [3] That article, however, limits the scope of an appeal to any ruling or order made by a military judge which terminates the proceedings with respect to a charge or specification, excludes evidence that is substantial proof of a fact material in the proceeding, or involves the disclosure of classified information. *See* 10 U.S.C. § 862(a)(1)(A)-(D). In addition, contemporaneous with the enactment **[*14]** of Article 62, UCMJ, the President provided for government interlocutory appeals consistent with the article's mandate and limitations. *See* R.C.M. 908(a) (*Manual for Courts-Martial, United States* (1984 ed.) [hereinafter, *MCM*, 1984]; *see also* Drafters' Analysis of R.C.M. 908, *MCM*, 1984 ("Article 62[, UCMJ,] now provides the Government with a means to seek review of certain rulings or orders of the military judge."). [4]

---

[3] Since 1 August 1984, Article 62, UCMJ, allows an appeal by the United States in any trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged. *See* Military Justice Act of 1983, Pub. L. 98-209 (1983). Article 62, UCMJ, was amended again in 1996 to provide for interlocutory appeals of certain questions relating to classified information. National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, § 1141(a), 110 Stat. 186, 467 (1996).

[4] The current R.C.M. 908 remains relatively unchanged since its inception. *See* R.C.M. 908(c)(3), *Manual for Courts-Martial, United States* (2005 ed.) [hereinafter *MCM*].

While Article 62, UCMJ, limits an appellate court's jurisdiction to those issues indentified within the statute, the article **[*15]** has been interpreted broadly to ensure the government has the same opportunity to appeal adverse trial rulings the prosecution has in federal civilian criminal proceedings. *See United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F. 2008); *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995) ("Article 62 was intended by Congress to be interpreted and applied in the same manner as the [federal] Criminal Appeals Act, 18 U.S.C. § 3731.").

In this case, the government has not petitioned for review under Article 62, UCMJ, nor would this court find jurisdiction under the statutory scheme Congress has prescribed. Colonel Reinert has not issued any orders terminating any charges or specifications, excluded evidence, or addressed disclosure of classified information. *But cf. United States v. True*, 28 M.J. 1, 3 (C.M.A. 1989) (Article 62, UMCJ, is intended to avoid the "technical barriers to government appeals" and should be interpreted broadly). Therefore, it is clear neither the statutory nor procedural prerequisites for a successful Article 62, UCMJ, appeal have been met. *See also* R.C.M. 908.

Government Appeals under the All Writs Act

Since this court concludes it has no jurisdiction **[*16]** under Article 62, UCMJ, the principle jurisdictional question before this court is whether an alternative form of interlocutory appeal exists for the government to seek redress. In particular, the government avers, and COL Reinert concedes, "[t]his court has jurisdiction pursuant to the All Writs Act." Although both parties agree we have jurisdiction under the All Writs Act, 28 U.S.C. § 1651, we question this authority. Accordingly, the immediate question is whether we can issue a writ under this act in a case that does not fall within the specific statutory language of Articles 62, 66, 69, or 73, UCMJ.

The All Writs Act, 28 U.S.C. 1651(a), provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The authority of this court to exercise jurisdiction under the All Writs Act has been recognized by the Supreme Court. *See Noyd v. Bond*, 395 U.S. 683, 695 n.7, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969). In general terms, the military appellate courts can intervene under authority of the All Writs Act in extraordinary cases where the normal review process does not afford an adequate remedy. *See, **[*17]** e.g., ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982); *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

The All Writs Act, however, is not applied without limitation. The Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In *Goldsmith v. Clinton*, 526 U.S. 529, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999), the Supreme Court held the Court of Appeals for the Armed Forces (CAAF) lacked jurisdiction to issue a writ, under 28 U.S.C. § 1651, enjoining the President and various military officials from dropping an officer from the rolls of the Air Force. The officer was convicted at court-martial and sentenced to confinement but was not dismissed. The officer claimed, *inter alia*, an administrative action dropping him from the roles would violate double jeopardy. The CAAF granted the writ under 28 U.S.C. § 1651 and the Supreme Court reversed. The Court ruled:

> [T]he CAAF is accorded jurisdiction by statute (so far as it concerns us here) to "review the record in [specified] cases reviewed by" the service courts of

> criminal appeals, [*18] 10 U.S.C. §§ 867(a)(2), (3), which in turn have jurisdiction to "revie[w] court-martial cases," § 866(a). Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence," § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it.

Id. at 535 (footnote omitted). The Court further explained "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id*. at 534-35 (citations omitted); *see also Loving v. United States*, 62 M.J. 235, 247 (C.A.A.F. 2005) (the All Writs Act authorizes employment of extraordinary writs, but is not generally available to provide alternatives to other adequate remedies at law; a writ may not be used when another method of review will suffice).

If *Goldsmith* was the only case interpreting the All Writs Act, we would conclude there is no jurisdiction because neither Article 62 nor 66, [*19] UMCJ, provide for this court's review of government appeals under the All Writs Act. [5] However, *Goldsmith* is not the only case and our superior court has exercised jurisdiction under the All Writs Act in several instances in which the requirements of Article 62 and 66, UCMJ, were not satisfied. In *United States v. Caprio*, 12 M.J. 30, 30 (C.M.A. 1981), our superior court conceded, "Congress fail[ed] to provide specifically for submission by the Government of petitions for review in extraordinary writ matters"; however, the court ultimately concluded it had jurisdiction to review the government's petition under the All Writs Act. *See also United States v. Redding*, 11 M.J. 100, 104-06 (C.M.A. 1981) (military appellate courts have jurisdiction under the All Writs Act to review government interlocutory petitions); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). *But cf. Carroll v. United States*, 354 U.S. 394, 401, 77 S. Ct. 1332, 1 L. Ed. 2d 1442 (1957) (appeals by the government in criminal cases are permitted only where there is specific statutory authority and only within the narrow limits statutorily granted). Additionally, the legislative history of the Military Justice Act of 1983 suggests Congress saw no existing [*20] statutory means for government interlocutory appeals prior to the enactment of Article 62, UCMJ. [6] *See also True*, 28 M.J. at 4 (Everett, C.J.,

---

[5] The holding of *Goldsmith* has limited application to the factual and procedural posture of this case. As previously noted, *Goldsmith* involved a writ filed after the conviction became final under Article 76, UCMJ, and addressed our superior court's jurisdiction to review such writs under Article 67, UCMJ. *See Goldsmith*, 526 U.S. at 534. While the Supreme Court also rejected a more general jurisdictional basis under the All Writs Act to "oversee all matters" related to military justice, this case does broadly concern an approved "finding or sentence" as cited in *Goldsmith. Id*. at 535 (citation omitted). Moreover, unlike *Goldsmith*, there are no alternative administrative or judicial remedies available for the government to seek redress. *See id*. at 537. Therefore, *Goldsmith* is not controlling precedent in this case. *See generally United States v. Riley*, 55 M.J. 185 (C.A.A.F. 2001), *aff'd* [*21] *after remand*, 62 M.J. 212 (C.A.A.F. 2005) (discussing the precedential authority of Supreme Court cases to the military appellate courts).

[6] *See* S. Rep. No. 98-53, at 23 (1983); *Hearings Before the Subcommittee on Manpower and Personnel of the Committee on Armed Services, United States Senate*, 98th Cong. 33, 46, 48, 52, 97 (1982) (statements of: Honorable William H. Taft IV, Department of Defense General Counsel; Major General Hugh J. Clausen, Judge Advocate General of the Army; Major General Thomas B. Bruton, Judge Advocate General of the Air Force; Rear Admiral John S. Jenkins, Judge Advocate

dissenting) ("Until 1983, the Uniform Code contained no statutory provision whereunder the Government could appeal from an adverse ruling at the trial level.").

Accepting our superior court's premise in *Caprio* that the All Writs Act was available to the government in that case because no statutory authority existed for an interlocutory appeal by the government, the enactment of Article 62, UCMJ, seemingly superseded the government's **[*22]** ability to appeal interlocutory matters under the All Writs Act. *See Lopez De Victoria*, 66 M.J. at 68 ("Thus, Congress' decision to permit appeals from either party in the 1983 Act was not a jurisdictional innovation, but an adaptation of the existing Title 18 statute *to replace* the cumbersome extraordinary writ procedure with a direct appeal procedure." (emphasis added)). As our superior court recently noted, "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act that is controlling." *Loving*, 62 M.J. at 247 (citation omitted).

Given the narrowly prescribed congressional scheme for government interlocutory appeals under Article 62, UCMJ, in the absence of restraint from this court, appellate use of extraordinary writs under the All Writs Act could easily circumvent the carefully crafted jurisdictional and procedural requirements of Article 62, UCMJ, and R.C.M. 908. *See generally United States v Roberts*, 88 F.3d 872, 883 (10th Cir. 1996) (government's petition to issue writ of mandamus was denied, since issuance of **[*23]** writ would expand government's right to bring interlocutory criminal appeals beyond terms of 18 U.S.C. § 3731); *United States v Weinstein*, 511 F.2d 622, 626 (2d Cir. 1975), *cert. denied*, 422 U.S. 1042, 95 S. Ct. 2655, 45 L. Ed. 2d 693 (1975) (citing *Will v. United States*, 389 U.S. 90, 96-97, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)) (use of writ of mandamus as substitute for appeal or as means of circumventing Criminal Appeals Act is barred).

Jurisdictional Precedent and Stare Decisis

While we have significant concerns for the viability of government interlocutory appeals under the All Writs Act, particularly after *Goldsmith*, we are bound to follow precedent established by our superior court and are mindful "of the importance that the doctrine of stare decisis plays in our decision-making." *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003). In particular, stare decisis is "most compelling" where courts undertake statutory and rule construction. *Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197, 205, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991); *see also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis."). Indeed, our superior court **[*24]** cautioned:

> When an intermediate appellate court sets out to discover whether it continues to be bound by precedent of a higher court, which that higher court has not repudiated, it undertakes a risky venture. While negotiating such a path is not inevitably fatal, it is so marked with pitfalls that it should not be undertaken with temerity.

United States v. Kelly, 45 M.J. 259, 262 (C.A.A.F. 1996).

General of the Navy; Honorable Robinson O. Everett, Chief Judge, Court of Military Appeals); *Hearings on S. 974 Before the Military Personnel and Compensation Subcommittee of the Committee on Armed Forces, House of Representatives*, 98th Cong. 38 (1983) (Honorable William H. Taft, IV, Department of Defense General Counsel).

As previously noted, our superior court has asserted jurisdiction to issue writs for government appeals under 28 U.S.C. § 1651 prior to the enactment of Article 62, UCMJ. *See Redding*, 11 M.J. at 104-06; *Dettinger*, 7 M.J. at 218; *Caprio*, 12 M.J. at 30-33. More recently, in *ABC, Inc. v. Powell*, 47 M.J. 363, our superior court issued a writ of mandamus to a convening authority requiring him to open a hearing under Article 32, UCMJ, to the press and public. The case did not fall within the language of Article 67, UCMJ, because it had not been reviewed first by a court of criminal appeals. *See* 10 U.S.C. § 867(a). Our superior court nonetheless granted the writ of mandamus, citing 28 U.S.C. § 1651 as its jurisdictional authority. *See ABC, Inc. v. Powell*, 47 M.J. at 364. [7]

Finally, in *Suzuki* our superior court declared the proper form for government appeals of confinement credit issues is through an extraordinary writ petition. *United States v. Suzuki*, 14 M.J. 491, 492-93 (C.M.A. 1983) (citing *Redding*, 11 M.J. 100; *Dettinger*, 7 M.J. 216). This principle was reinforced more recently by now Chief Judge Effron in his concurring opinion in *United States v. Ruppel*, 49 M.J. 247, 254 (C.A.A.F. 1998) (concurring in part and in the result) ("The only means available for the Government to appeal **[*26]** the sentence credit would be via an extraordinary writ.").

---

[7] Our court similarly has issued **[*25]** writs under 28 U.S.C. § 1651 in cases not strictly within the ambit of Articles 62 and 66, UCMJ. In *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997), we held that we have "supervisory jurisdiction" over Army courts-martial and that we therefore could issue a writ of prohibition under 28 U.S.C. § 1651 against an officer appointed as an Article 32 investigating officer. Likewise, in *Dew v. United States*, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998), we concluded we had supervisory authority to issue a writ concerning actions of the Judge Advocate General even though the case did not fall within the jurisdictional language of Articles 62, 66, 69, or 73, UCMJ.

The Supreme Court has announced the lower courts should not lightly assume its decisions have been overruled:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). We apply this same standard to the decisions of our superior court.

Applying this principle, we conclude that *ABC, Inc. v. Powell, Caprio*, and *Suzuki* remain good law. Not only do the facts of these cases differ significantly from those of *Goldsmith*, but our superior court continues to cite to these cases without suggesting those decisions have any infirmity. *See generally Lopez De Victoria*, 66 M.J. 67; *United States v. Davis*, 64 M.J. 445, 447 (C.A.A.F. 2007); **[*27]** *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989). We thus conclude the All Writs Act empowers us to issue a writ of prohibition in aid of our jurisdiction over a pending court-martial, even if the case does not fall strictly within the jurisdiction conferred by Articles 62, 66, 69, 73, UCMJ.

Petition for an Extraordinary Writ of Prohibition

Although we conclude we may exercise extraordinary writ jurisdiction, we must also determine whether the relief requested fits with the narrow boundaries of an

"extraordinary" matter to justify its use. Under our All Writs Act jurisdiction, a petitioner must present compelling reasons why it is "necessary and appropriate" that we grant relief. *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008) (quoting 28 U.S.C. § 1651(a)). An extraordinary writ constitutes a "drastic instrument which should be invoked only in truly extraordinary situations." *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985) (quoting *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)). Because of their extraordinary nature, writs are issued sparingly, and a petitioner bears an extremely heavy burden to establish a clear and indisputable entitlement to extraordinary **[*28]** relief. With these general principles in mind, we examine what criteria might justify extraordinary relief suggested in this case-a writ of prohibition. *See* Black's Law Dictionary 1228 (7th ed. 1999) ("An extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power.").

The government frames the issue in this case as one pitting the authority and responsibility of a convening authority against that of a military judge. The government argues adequate relief cannot be obtained in any other form than an extraordinary writ and the matter cannot wait for review in the ordinary course of this court's exercise of statutory appellate authority under Article 66, UCMJ. Colonel Reinert rejects the government's argument this is an extraordinary matter; rather, he argues the question of five days' relief for unlawful pretrial punishment is simply *de minimis* and the government had only to take the most minor of communicative steps to comply with his order. As a consequence, COL Reinert contends there really is no tension between the commander's and judge's authority.

First, we find that **[*29]** the subject matter is "in aid of" our jurisdiction and is proper for our consideration under the All Writs Act. Determining the proper exercise of a military judge's authority with respect to remedying illegal pretrial punishment goes directly to the validity and integrity of military justice and so serves in "aid of" our jurisdiction. Moreover, granting a writ of prohibition would serve the interests of our jurisdiction precisely as the Supreme Court has directed, "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943).

Second, we find no authority for COL Reinert's argument that a dispute over five days confinement credit cannot be an extraordinary matter. On the contrary, the government's claim squarely contrasts the respective powers of convening authorities and military judges. Since the subject matter of the writ in this case concerns the fundamental question of judicial authority, and since there is no reportable precedent on point, we are convinced this is an extraordinary matter. That the substance concerns five days of credit **[*30]** for the government's failure to obey COL Reinert's order, or that the government could have avoided the award of five days credit by the simple expedient of a post-wide email, is immaterial to the fundamental nature of the controversy.

Finally, we acknowledge the general proposition that government extraordinary writs will not be considered in criminal cases "which [do] not have the effect of a dismissal [of a charge or termination of a prosecution]." *Will*, 389 U.S. at 98. We are, however, also guided by the clear mandate of our superior court in *Suzuki*, 14 M.J. 491. A convening authority "cannot unilaterally ignore a military judge's ruling, even when believing it to be beyond the military judge's authority; rather, [a convening authority] *must* invoke the extraordinary writ process." *Id.* at 492 (emphasis added).

In this case, we agree with the government there is no way to address the order except through the exercise of our extraordinary powers. As advanced in *Suzuki*, there is simply no other appellate means for the government to contest the military judge's ruling. We, therefore, hold this is a proper situation for the exercise of our extraordinary powers under the All Writs Act.

*The [*31] Scope of a Military Judge's Authority and Merits of the Writ of Prohibition*

We turn now to the final question in this case, whether COL Reinert's order to the convening authority was beyond the scope of his authority. At the outset, we note our superior court faced an almost identical scenario on direct appeal in *United States v. Stringer*, 55 M.J. 92 (C.A.A.F. 2001). [8] The *Stringer* court specified the question of "whether the military judge had authority to order the staff judge advocate to publish the newspaper article"; however, the court ultimately ruled the issue was moot since the government published the article and complied with the military judge's ruling. *Id.* at 93-94. We now address the issue specified but mooted in *Stringer*.

The government agrees PVT Gipson suffered illegal pretrial punishment. As to the additional five days confinement credit, however, the government argues this was not credit for illegal pretrial punishment, but an award for the government's failure to carry out COL Reinert's training order. The government asserts COL Reinert's order was beyond his powers because it was generally intended as a prophylactic measure to prevent future instances of illegal pretrial punishment, instead of specific remedial action to redress PVT Gipson's illegal pretrial punishment.

Conversely, COL Reinert asserts his order was lawful, given the wide latitude judges enjoy to redress illegal pretrial punishment. Moreover, he argues a writ of prohibition is not warranted because the government's entitlement to relief is not clear and indisputable.

We agree with the government that a military judge's orders must relate to the court-martial to which the judge is detailed. This is consistent with the tenor of Article 26, UCMJ, which, *inter alia*, sets forth the detailing, qualifications, and administrative supervision of a military **[*33]** judge, but which only briefly touches on the duties of a military judge. [9] Other UCMJ articles are similar. [10] None of these provide that a military judge exercises plenary authority; they either explicitly confer or imply authority solely in the context of the court-martial to which the military judge has been detailed. Furthermore, the legislative history of the Code also reflects that the military judge's functions and duties

---

[8] In *Stringer*, the military judge found that the accused had suffered illegal pretrial punishment under Article 13, UCMJ, and ordered thirty-one days of credit against confinement. *Id.* at 93. In addition, the military judge directed the government to publish an article in the post newspaper outlining illegal pretrial punishment. Just as here, the military judge in *Stringer* announced that he would award additional confinement credit as a sanction should **[*32]** the government fail to publish the article before the convening authority took action. *Id.*

[9] In pertinent part, Article 26(c), UCMJ, states, "[a] commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General . . . and may perform duties of a judicial nature other than those relating to his primary duty as a military judge . . . when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee."

[10] *See, e.g.*, Article 39, UCMJ, "Sessions"; Article 41, UCMJ, "Challenges"; Article 48, UCMJ, "Contempts"; and Article 51, UCMJ, "Voting and rulings."

are limited to the courtmartial over which the judge presides. [11]

The Rules for Courts-Martial contemplate an equally limited scope. For example, R.C.M. 801(a)(3) provides that "[s]ubject to the code and this Manual, [the military judge shall] exercise reasonable control over *the proceedings* to promote the purposes of these rules and this Manual" (emphasis added). The *MCM* provides for no plenary authority to promote either the purposes of the *MCM* or generally to advance the interests of justice beyond the existing proceeding. [12]

Our interpretation of a military judge's authority is consistent with the analysis of our superior courts. In *United States v. Weiss*, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994), the Supreme Court commented on the military judge's status and authority:

> [T]he position of the military judge is less distinct from other military positions than the office of full-time civilian judges is from other offices in civilian society. As the lead opinion in the Court of Military Appeals noted, *military judges do not have any "inherent judicial authority separate from a court-martial to which they have been detailed*. When they act, they do so as a courtmartial, not as a military judge. Until detailed to a specific court-martial, they have no more authority than any other military officer of the same grade **[*36]** and rank."

Id. at 175 (emphasis added) (quoting *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992); *see also United States v. Chisholm*, 58 M.J. 733, 736 (C.A.A.F. 2003) (citing Articles 38 and 54, UCMJ and R.C.M. 1103) ("Once detailed to a court-martial, a military judge's statutory and regulatory trial responsibilities continue until he completes his "directing" of the preparation of the record of trial and authenticates it); *cf. Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)) ("[T]he judge's authority to sentence derives wholly from the jury's verdict.").

We agree with COL Reinert that a military judge exercises considerable latitude in conducting a court-martial, as the military judge is ultimately responsible for ensuring a fair trial. *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008).

> [He] has broad discretion in carrying out this responsibility, including the authority to call and question witnesses, hold sessions outside the presence of members, govern the order and manner of testimony and argument, control voir dire, rule on the admissibility of evidence and

---

[11] *See Legal and Legislative Basis, MCM, United States*, **[*34]** 1951 at 69 (prepared by the drafters of the 1951 Manual) ("[T]he legislative intent is so clear on this point, the law officer has been charged generally with the responsibility for the fair and orderly conduct of the *proceeding*." (emphasis added); *See also Hearings No. 37 before House Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 607, 671, 754, 772, 774, 820, 824, 1152 (1949); *House of Representatives Report No. 491 on H.R. 4080*, 81st Cong., 1st Sess. 6, 7, 16, 18 (1949); *Hearings before Senate Committee on Armed Services on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. 40, 41, 57, 108, 125, 129, 184, 288, 308 (1949); *Senate Report No. 486 on H.R. 4080*, 81st Cong., 1st Sess. 6, 15, 18, 20, 22 (1949).

[12] The **[*35]** authority of a military judge as prescribed or delegated, and not plenary, is also reflected in service regulations. Army Reg. 27-10, Legal Services: Military Justice para. 8-4d.(3) (16 November 2005), sets out the power and duties of a military judge, and expressly admonishes military judges to "tak[e] care [and] avoid any act that may be a usurpation of the powers, duties, or prerogatives of a convening authority. . . ."

> interlocutory questions, exercise contempt power to control **[*37]** the proceedings, and, in a bench trial, adjudge findings and sentence.

Id., 66 M.J. at 313-314 (quoting *United States v. Quintanilla*, 56 M.J. 37, 41 (C.A.A.F. 2001)). *See also United States v. Tilghman*, 44 M.J. 493 (C.A.A.F. 1996) (appellant received ten-for-one credit for less than twenty-four hours in illegal pretrial confinement).

This discretion also applies to crafting an appropriate remedy for a violation of Article 13, UCMJ, in relation to a particular accused within the framework of a particular case. *See United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001) (A military judge's authority to redress illegal pretrial punishment is extensive and "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." (citation omitted)); *United States v. Stamper*, 39 M.J. 1097, 1099 (A.C.M.R. 1994) (The form of reassessment [for illegal pretrial punishment] is a matter within our discretion."); *see also* R.C.M. 305(k) (a military judge's authority to grant more than day-for-day credit in unusual cases, is now explicitly recognized in the *MCM*).

Notwithstanding this discretion, nothing in Article 13, UCMJ, or any other **[*38]** article of the Code, authorizes a military judge to sanction illegal pretrial punishment outside the bounds of the court-martial over which he presides. A military judge's discretion in fashioning an appropriate remedy for illegal pretrial punishment must relate to and confine itself to the court-martial to which the judge has been detailed. The five days confinement credit awarded to PVT Gipson was not a remedy for the illegal pretrial punishment PVT Gipson suffered. It was an *ultra vires* measure directed at preventing future pretrial punishment in other cases.

CONCLUSION

However well-intentioned his actions in this case, Colonel Reinert lacked authority to order the government to train soldiers on Article 13, UCMJ. The award of five days credit shall not be enforced.

Petitioner's Request in ARMY MISC 20071195 is GRANTED. When taking action in this case, Petitioner is not required to apply the five days credit ordered by COL Reinert.

Given our disposition of ARMY MISC 20071195, we DENY without prejudice ARMY MISC 20071343. Our decision today in ARMY MISC 20071195 removes the only impediment to the convening authority's taking action, thus mooting the relief sought in ARMY MISC 20071343. **[*39]** Should the convening authority not take timely action, nothing within this decision would limit PVT Gipson's ability to resubmit his petition for relief.

Senior Judge ZOLPER and Judge MAGGS concur.

End of Document

United States v. Roblero

United States Air Force Court of Criminal Appeals

February 17, 2017, Decided

No. ACM 38874

Reporter

2017 CCA LEXIS 168 *

UNITED STATES, Appellee v. Daniel V. ROBLERO, Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Roblero, 76 M.J. 266, 2017 CAAF LEXIS 326 (C.A.A.F., Apr. 18, 2017)

Review denied by United States v. Roblero, 2017 CAAF LEXIS 607 (C.A.A.F., June 9, 2017)

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Gregory O. Friedland. Approved sentence: Dishonorable discharge, forfeiture of $1,031.00 pay per month until the execution of the punitive discharge, reduction to E-1, and a reprimand. Sentence adjudged 24 April 2015 by GCM convened at Joint Base Pearl Harbor-Hickam, Hawaii.

Counsel: For Appellant: Captain Patricia Encarnación Miranda, USAF.

For Appellee: Major Meredith L. Steer, USAF; Gerald R. Bruce, Es-quire.

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

Opinion by: DREW

Opinion

DREW, Chief Judge:

At a general court-martial composed of officer and enlisted members, Appellant was convicted, contrary to his pleas, of two specifications of sexual assault by causing bodily harm in violation of Article 120(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(b), and sentenced to a dishonorable discharge, total forfeitures, reduction to E-1, and a reprimand. The convening authority reduced the forfeitures to $1,031.00 pay per month until execution of the punitive discharge and otherwise approved the sentence as adjudged.

Appellant raises several **[*2]** assignments of error on appeal: (1) whether the evidence is factually sufficient; (2) whether the military judge erred in giving the Air Force Trial Judiciary mandated reasonable doubt instruction;[1] (3) whether Appellant's right to due process of law during sentencing was violated when the court-martial considered an unsworn statement from the victim;[2] and (4) whether Appellant's right to due process

---

[1] Consistent with the recently-decided *United States v. McClour*, No. 16-0455, 76 M.J. 23, 2017 CAAF LEXIS 51 (C.A.A.F. 24 Jan. 2017), we find that, absent objection at trial, the instruction did not constitute plain error.

[2] Appellant refers to the victim as the "complaining witness."

of law was violated when he was tried by a panel that was not required to be unanimous in their verdict. Further, Appellant requested this court consider several additional assignments of error, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We combine and discuss three of them below: whether trial defense counsel provided ineffective assistance of counsel. Having considered the remainder, we find they do not merit either relief or further analysis here. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987). While we do find error in the way the military judge handled the victim's unsworn statement, as to all issues, we find no error materially prejudicial to a substantial right of Appellant and thus affirm the findings and sentence.

I. BACKGROUND

Appellant and the victim, Staff Sergeant (SSgt) RC, were both assigned to the 747th Communications Squadron, Joint Base Pearl **[*3]** Harbor-Hickam, Hawaii. Beginning in early July 2014, they began spending off-duty time with each other in group activities and communicated through social media. On Saturday morning, 12 July 2014, SSgt RC drove Appellant, Airman First Class (A1C) JB, and herself to Hanauma Bay, Hawaii, where they went snorkeling and spent some time on the beach. Appellant and SSgt RC eventually began kissing on the beach. They made plans for dinner later in the evening and after lunch SSgt RC drove the three of them back to their respective quarters. While being dropped off at his residence, Appellant asked SSgt RC if he could come over before dinner. She told him that she was planning on taking a nap before dinner, but that she would think about it and let him know. After dropping A1C JB back at the base, SSgt RC contacted Appellant to let him know that he could come over to her apartment, but that she was still planning on taking a nap.

When Appellant arrived at SSgt RC's apartment, she met him at the door in short shorts and a tank top. They sat in her living room for a short time until SSgt RC said that she still wanted to take a nap but offered to watch a movie with Appellant on her bed until she **[*4]** fell asleep. She let Appellant pick out a movie (because she didn't anticipate that she'd be awake for the whole movie) and they went into her bedroom to watch it. They put the movie on and lay down on SSgt RC's California king-size bed.

After a short period of watching the movie, Appellant leaned toward SSgt RC and she leaned toward him and they began consensually kissing. When Appellant started to be more sexually aggressive, SSgt RC asked him to stop and she rolled over to her side and they continued watching the movie. Minutes later they began kissing again, followed by Appellant becoming more sexually forward and once again he backed off when she told him to stop. At one point, Appellant pulled SSgt RC on top of him (which she considered a "smooth move" on his part) and then he reached behind her and unclasped her bra. SSgt RC immediately got up, snapped her bra back together, and announced that her clothes were going to remain on, but she also said that she was still okay with kissing.

They resumed kissing and Appellant eventually slipped his hand down the back of SSgt RC's shorts. She pulled his hand out and reminded him that he would be leaving town in a couple of days for a **[*5]** two-week trip (during which he would see his estranged long-distance girlfriend) and she told him that if their relationship was

---

Article 6b, UCMJ, 10 U.S.C. § 806b, the legal basis for the victim's right to be reasonably heard during the sentencing hearing, uses the term "victim." While we can understand—given his plea and posture on appeal—why Appellant would prefer a less conclusory term, we use the statutory term without intending it to connote any conclusions on our part.

going anywhere he could wait until after he got back. Appellant eventually rolled on top of SSgt RC and put one hand under her buttocks and put his other hand up her shorts and penetrated her vulva with his fingers. Upon penetration, SSgt RC then "froze" and laid lifeless, though she continued to protest verbally with requests to "please stop, please wait." Appellant then put his penis inside her vulva and began having sexual intercourse with her. As he was having sexual intercourse with her, he told her that "it felt so good." SSgt RC started crying. Appellant continued sexual intercourse until he ejaculated, at which point he asked her if she was crying.

SSgt RC slid out from under Appellant and went into the bathroom and remained there for some time while she cleaned herself up with sanitary wipes. When she came out of the bathroom, Appellant was still in her apartment, sitting on the couch. She didn't ask Appellant to leave, but instead put on a video in the living room, which they watched on the couch together. Appellant asked to stay the night, but she **[*6]** said he could only stay another 30 minutes and he eventually left around 8:30 p.m.

As soon as Appellant left, SSgt RC called her wingman, a male platonic friend, and asked if she could come over and stay the night in his guest room (something he had made a standing offer to SSgt RC and some of his other friends). Her wingman agreed and she stayed at his apartment Saturday night and all day Sunday before returning to her apartment. When she got home, SSgt RC made up the futon in her guest room and slept there, because she couldn't bring herself to sleep on her bed. The next day, Monday, she called her supervisor and asked how to contact a chaplain. Concerned for her well-being, her supervisor went over to her apartment with some others in her chain of command and they ultimately took SSgt RC to the hospital where she asked to be tested for pregnancy and any sexually transmitted diseases. The next day, Tuesday, she made a restricted report of sexual assault.

A couple of weeks later, SSgt RC converted her report to unrestricted when she learned that Appellant was going to be moved into her duty section. She broke down crying and eventually told her supervisor (after speaking with her victim **[*7]** advocate) that Appellant had sexually assaulted her and she would not be able to work in the same duty section with him. After she filed her unrestricted report and with AFOSI's assistance, SSgt RC made a pretext phone call to Appellant and engaged in pretext Facebook communications with him. In one of the pretext Facebook communications, SSgt RC texted Appellant "I had a great time that day and even when you got back to the house, but it just seemed like you forced me to be intimate when I wasn't ready yet." Appellant responded, "And i regret that, and if i can erase that part it would have been the best day i've had in years...."

II. Discussion

A. Factual Sufficiency

We review issues of factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

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, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000); *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 [*8] 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." *Washington*, 57 M.J. at 399.

Specification 1 of the Charge alleges Appellant committed sexual assault by causing bodily harm in violation of Article 120(b), UCMJ. To sustain a conviction for this specification of sexual assault, the prosecution was required to prove: (1) that Appellant committed a sexual act upon SSgt RC, to wit: penetrating SSgt RC's vulva with his penis; and (2) that Appellant did so by causing bodily harm to SSgt RC to wit: lying on top of SSgt RC's body while holding her buttocks and penetrating her vulva with his penis without her consent. *See* Department of the Army Pamphlet 27-9 (DA Pam 27-9), Military Judges' Benchbook, ¶ 3-45-14.c. (10 Sep 2014).

Specification 2 of the Charge alleges Appellant committed sexual assault by causing bodily harm in violation of Article 120(b), UCMJ. To sustain a conviction for this specification of sexual assault, the prosecution was required to prove: (1) that Appellant committed a sexual act upon SSgt RC, to wit: penetrating SSgt RC's vulva with his fingers; and (2) that Appellant [*9] did so by causing bodily harm to SSgt RC to wit: lying on top of SSgt RC's body while holding her buttocks and penetrating her vulva with his fingers with an intent to gratify his sexual desire and without her consent.

The Government had the burden to prove beyond a reasonable doubt that SSgt RC did not consent to the sexual act and the military judge provided the following definitions at trial regarding consent:

> "Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.
>
> Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another per-son's actions.

[*10] Similarly, the Government was required to prove beyond a reasonable doubt that Appellant did not have a reasonable mistake of fact defense as to whether SSgt RC consented to the sexual acts. As part of the instruction concerning the defense of mistake of fact, the military judge stated:

> Mistake of fact as to consent is a defense to those charged offenses. "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

The defense of mistake of fact as to consent has both subjective and objective elements. *United States v. Paige*, 67 M.J. 442, 455 (C.A.A.F. 2009) ("[T]he mistake of fact defense requires a **[*11]** subjective, as well as objective, belief that [the victim] consented to the sexual intercourse . . . ."); *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) ("[A] mistake-of-fact defense to a charge of rape requires that a mistake as to consent be both honest and reasonable.") (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)); Rule for Courts-Martial (R.C.M.) 916(j)(1) ("[T]he ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.").

Appellant does not dispute that he engaged in the sexual activity in the specifications. Rather, his position at trial and on appeal is that either SSgt RC consented to the activity or, if she did not, he was reasonably mistaken about her lack of consent. The vast majority of the evidence supporting the convictions of both sexual assault specifications came from SSgt RC's testimony. Her testimony made it clear that she was by no means opposed to some contact with Appellant of a sexual nature. She willingly engaged in kissing him on the beach in the morning and while on her bed later that day. Even after Appellant unclasped her bra in her bedroom, something she did not want, she continued to willingly engage in kissing him after telling him that her clothes were to remain on. However, her willingness to engage in some minor **[*12]** sexual activity does not mean that she necessarily consented to all sexual activity.

SSgt RC's testimony indicated that she was at times sending mixed signals to Appellant that might have caused some confusion in his mind at different times during the evening. Regardless, her testimony also conclusively establishes that she clearly manifested her non-consent to Appellant after he penetrated her vulva with his fingers. Despite this, Appellant continued to penetrate her vulva with his fingers, and then—over her protests—penetrated her vulva with his penis. Notwithstanding the extensive argument by trial defense counsel that SSgt RC actually consented to the sexual intercourse, this case comes down to a determination by the fact-finder as to whether Appellant was reasonably mistaken that SSgt RC was consenting to all of his acts, including his penetrating her vulva with his fingers and penis.

While SSgt RC's actions could have indicated potential willingness to engage in sexual intercourse, her repeated unequivocal verbal statements for Appellant to "stop" and "wait," as well as her crying once Appellant inserted his penis into her vulva clearly negated any reasonable belief that she was **[*13]** consenting to Appellant's actions.

Cases such as these are very difficult for factfinders. However, SSgt RC's testimony was not the only evidence that Appellant was not reasonably mistaken about her lack of consent. His statements during the pretext phone call and pretext Facebook communications corroborate SSgt RC's testimony that she told him she was not consenting and, more importantly, that he knowingly forced her to be intimate.

Having reviewed the entire record of trial and making allowances for not personally observing the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

B. Victim's Unsworn Statement

Appellant asserts his right to due process of law was violated when, over defense objection, the military judge permitted SSgt RC to provide a written and oral unsworn statement to the court members. While we conclude that the military judge abused his discretion in

permitting SSgt RC to make a recommendation for a specific sentence, Appellant was not prejudiced by the error.

At trial, Appellant objected to two aspects of SSgt RC's unsworn statement: that a written copy of the unsworn statement was provided to the court members (in addition to the oral presentation) **[*14]** and to the substance of the statement's final paragraph:

> During the pretext phone call, I had asked him if he would get help, and he told me no, that getting help was stupid. But he needs it. He needs help. Throughout this process, I've learned that there is a 24 month Sex Offender Treatment Programs [sic] offered at some confinement facilities, but only the long term ones. It is my hope that SSgt Roblero will get into one of these programs and get the help he needs. However, I've also learned that because people can get "good time credit" while they are in jail, the only way for him to complete this program is for him to spend a minimum of 3 and a half years in confinement. Anything less than 3 and a half years will not allow him the amount of time needed to finish the treatment program. Without being able to complete this program, I don't believe he would be able to receive the help he needs. . . . I don't want anyone to feel the way I have felt, but I do want to make sure he doesn't do this to anyone else and he gets the help he needs.

The military judge was clearly concerned about the language above and stated as much on the record.[3] However, notwithstanding his expressed belief that **[*15]** information was "completely improper, and I would not allow it," he nevertheless permitted SSgt RC to provide the information to the court members anyway. The military judge erred to the extent that he believed he was powerless to prohibit admission of inadmissible information in the victim's unsworn statement.

The National Defense Authorization Act for Fiscal Year 2014 (FY 2014 NDAA)[4] added Article 6b to the UCMJ, based on the Crime Victims' Rights Act (CVRA), 18 U.S.C § 3771. Article 6b gives a victim the "right to be reasonably heard at . . . [a] sentencing hearing relating to the offense." Article 6b(a)(4)(B), 10 U.S.C. § 806b(a)(4)(B). However, the President did not promulgate R.C.M. 1001A, providing guidance on how to implement Article 6b(a)(4)(B), until after Appellant's trial, on 17 June 2015. R.C.M. 1001A(c) now indicates

---

[3] In his discussion with the Special Victim's Counsel (SVC), the military judge stated:

> Now, I'll ask [SVC], I have read the proposed unsworn statement. I have paid particular attention to the last paragraph. Now, the rules regarding an unsworn statement given by the accused, that says generally it is considered unrestricted. But case law tells us it is not wholly unrestricted. And I know we're venturing into new territory here, in the military courts, and we're relying on the federal courts to give us guidance to follow along. And so the same rules would seem to apply that the victim's unsworn statement is generally considered unrestricted but not wholly unrestricted. And so, the matters in the last paragraph would not be allowed to be testified to by a witness taking the stand. Completely improper, and I would not allow it. Given that fact and the possibility that this last paragraph could cause any reviewing authority in this particular case, because of the change **[*16]** in the law, is going to be an automatic appeal to the Air Force court and possibly up to the Court of Appeals for the Armed Forces, they could look at this and say we're setting aside the sentence because of these comments and then, we're back here all over again and then your client has the option of doing this all over again. I just want to make that clear on the record that that's a possibility by including this paragraph in the unsworn statement.

[4] Pub. L. No. 11333, § 1701(b)(2)(A) (2013).

that the contents of a victim's unsworn statement is limited to victim impact and matters in mitigation. R.C.M. 1001A(e) also now expressly permits a victim to make an unsworn statement orally, in writing, or both.

We review a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse **[*17]** of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)). The admission of evidence in aggravation during sentencing is controlled by R.C.M. 1001(b)(4), which states:

> 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. Evidence in aggravation includes, but is not limited to, 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 . . . .

Furthermore, sentencing evidence is subject to the requirements of Military Rule of Evidence (Mil. R. Evid.) 403. *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001) (citing *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)). When the military judge conducts a proper balancing test under Mil. R. Evid. 403 on the record, the ruling will not be overturned absent a clear abuse of discretion; the ruling of a military judge who fails to do so will receive correspondingly less deference. *Hursey*, 55 M.J. at 36*; Manns*, 54 M.J. at 166. The military judge in this case did not conduct a Mil. R. Evid. 403 balancing test on the record.

We find that the military judge did not abuse his discretion in permitting SSgt RC to provide her unsworn statement both orally and in a writing, a mode now specifically authorized by the President. However, we find that the military judge **[*18]** abused his discretion in permitting SSgt RC to present the final paragraph of her statement (both in its oral and written form). Other than a single sentence omitted from the quotation above, the paragraph was, as the military judge put it, "completely improper." It did not constitute victim impact information and was not otherwise permitted under the Rules for Court-Martial or the Uniform Code of Military Justice.

Article 6b is not a blanket authorization for a victim to state to the sentencing authority whatever he or she might desire. "The right to be reasonably heard at . . . a sentencing hearing" does not transform the sentencing hearing into an open forum to express statements that are not otherwise permissible under R.C.M. 1001. R.C.M. 1001A(c) now limits a victim's unsworn statement to victim impact and matters in mitigation, but it did not apply at the time of Appellant's trial. Prior to the promulgation of R.C.M. 1001A(c), SSgt RC's unsworn statement arguably could have properly gone into other aggravation matters and, with a proper foundation, Appellant's rehabilitative potential. However, there was no foundation provided for SSgt RC to provide an opinion regarding Appellant's need for "help" or suitability for **[*19]** sex offender treatment. Moreover, her recommendation for a particular sentence was clearly improper. *See United States v. Ohrt*, 28 M.J. 301, 303 (C.M.A. 1989).

Having found error, we must determine whether Appellant was prejudiced. The test for prejudice is whether the error substantially influenced the adjudged sentence. *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009); *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005); *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001). Because the erroneously permitted statements advocated for "a minimum of 3 and a half years in con-finement," we are convinced that Appellant, who was sentenced to no confinement, was not prejudiced by the military judge's error.

C. Composition of the Court-Martial

The constitutionality of an act of Congress is a question of law that appellate courts review de novo. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012).

Appellant argues that having a nine[5]-member panel that is not required to produce a unanimous verdict is unconstitutional. In doing so, he acknowledges that the decision by this court of *United States v. Spear*, No. ACM 38537, 2015 CCA LEXIS 310 (A.F. Ct. Crim. App. 30 Jul 2015) (unpub. op.), *pet. denied*, 75 M.J. 50 (C.A.A.F. 2015), addressed this very issue and was decided contrary to Appellant's position. Appellant requests we re-examine this issue.

Appellant's argument in this case focuses on due process under the Fifth Amendment,[6] but cites the Supreme Court decisions in *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978), *Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979), and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), all of which are founded upon the Sixth Amendment.[7] Our superior court has repeatedly **[*20]** held that the Sixth Amendment rights regarding a jury trial do not apply to courts-martial. *See, e.g., United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing *Ex parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942)); *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002); *United States v. Curtis*, 32 M.J. 252, 267-68 (C.M.A. 1991) (rejecting a similar argument to Appellant's within the context of a death penalty case); and *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986).

In addition to arguing that a trial by jury of less than six members violates the Sixth Amendment (even though he was tried by eight court members), Appellant cites no case law supporting his position that this case should be treated differently than every other general court-martial tried since 31 May 1951, when the Uniform Code of Military Justice and the Manual for Courts-Martial went into effect.

As this court opined in *Spear*, "[j]udicial deference is 'at its apogee' when an appellant is challenging the authority of Congress to govern military affairs. It is the appellant's heavy burden to demonstrate that Congress' determinations about panel size and unanimity should not be followed." *Spear*, 2015 CCA LEXIS 310, at *5 (citations omitted). We find the analysis of *Spear* persuasive. As in *Spear*, Appellant here has failed to meet his heavy burden to demonstrate that Congress' determinations should not be followed.

D. Ineffective Assistance of Counsel

Pursuant to *Grostefon*, Appellant asserts that his trial defense counsel provided ineffective assistance **[*21]** of counsel by withdrawing their motion for a mistrial, failing to move to compel production of the victim's journal and text messages, and failing to interview the victim before trial. Appellant's trial defense counsel provided declarations addressing the allegations raised by Appellant in his assignments of error and supporting declaration.

We review claims of ineffective assistance of counsel de novo, applying the two-part test outlined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See*

[5] Appellant's panel initially consisted of nine members, but one was excused during the trial, resulting in eight members participating in determining the court's findings and sentence.

[6] U.S. CONST. amend. V.

[7] U.S. CONST. amend. VI.

also United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007). Under that test, "in order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (citing *Strickland*, 466 U.S. at 687; *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

The deficiency prong requires Appellant to show his counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. To determine whether the presumption of competence has been overcome as alleged by an appellant, we examine whether there is a reasonable explanation for counsel's actions and whether defense counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. **[*22]** *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011).

The prejudice prong requires Appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In doing so, Appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (citing *Strickland*, 466 U.S. at 689). This is because counsel is presumed competent in the performance of his or her representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Moulton*, 47 M.J. at 229).

"[Appellant] bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). The factual basis supporting Appellant's allegations of legal error are uncontroverted. Instead, the resolution of Appellant's claims turn on the reasoning behind the tactical and strategic litigation decisions made by trial defense counsel in this case.

Trial defense counsel's declarations and the record of trial conclusively establish that trial defense counsel made the motion for mistrial during the testimony of SSgt RC when it initially appeared that the Government had failed to produce some of her text messages. **[*23]** While arguing the motion, trial defense counsel realized that the prosecution had never seen the text messages and government investigators were no longer in possession of them. Sensing that the military judge was prepared to order SSgt RC to make them available and fearing that their contents would be more damaging to Appellant's case than to the prosecution's, trial defense counsel made a tactical decision to withdraw the motion. For the same reason, trial defense counsel did not pursue production of SSgt RC's journal, which she had thus far refused to provide to the Government. These decisions, in a case in which Appellant strongly asserted that the victim's account was uncorroborated, was objectively reasonable. Contemporaneous text messages corroborating SSgt RC's trial testimony would have seriously undermined Appellant's trial strategy.

Regarding trial defense counsel not interviewing SSgt RC before trial, they made the tactical decision that nothing would be gained by doing so, other than to prepare her for their lengthy trial cross-examination. This strategic decision was based primarily on the fact that trial defense counsel fully questioned SSgt RC during the Article 32 hearing **[*24]** and was provided a verbatim transcript of her Article 32 testimony. They felt fully armed with all the ammunition they needed to question her in a professional and effective manner at trial. Based on our review of trial defense counsel's

extensive cross-examination of the victim during her day and one-half long trial testimony, we are satisfied that Appellant has failed to overcome the presumption that his trial defense counsel were competent and provided him effective assistance of counsel.

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 the sentence are **AFFIRMED**.

End of Document

United States v. Shahan

United States Army Court of Criminal Appeals

December 23, 2016, Decided

ARMY MISC 20160776

Reporter

2016 CCA LEXIS 740 *

UNITED STATES OF AMERICA, Petitioner v. Lieutenant Colonel KENNETH SHAHAN, Military Judge, Respondent and Staff Sergeant FRANCISCO LARA, United States Army Real Party in Interest

Notice: NOT FOR PUBLICATION

Counsel: **[*1]** For Petitioner: Captain Samuel E. Landes, JA (argued); Captain Samuel E. Landes, JA; Captain Carling M. Dunham, JA (on brief).

For Real Party in Interest: Lieutenant Colonel Christopher Daniel Carrier, JA (argued); Colonel Mary J. Bradley, JA; Lieutenant Colonel Christopher Daniel Carrier, JA; Captain Cody D. Cheek (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF PROHIBITION

WOLFE, Judge:

In this case we wrestle with the issue of whether to grant the United States' petition for a writ of prohibition. Specifically, the government asks this court to prohibit the panel members from redeliberating on findings that have already been announced in open court. We determine that issuance of the writ is necessary and appropriate.

BACKGROUND

As a writ petition, we consider a relatively undeveloped record. However, the material facts do not appear to be in dispute.

The real party in interest (hereinafter the accused) was arraigned on a charge of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012 & Supp. II 2015) [hereinafter **[*2]** UCMJ]. As the offense alleged a sexual act of digital penetration, the specification included the specific intent element that the act was committed "with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." UCMJ art. 120(g)(1)(B).

During trial on the merits, "some evidence" was presented that the accused was intoxicated during the time sexual assault occurred. However, the defense theory at trial was that no sexual act took place.

The military judge did not instruct the panel the accused's voluntary intoxication could cause him to be unable to form the specific intent required by the specification. Neither side objected to the military judge's instructions.

During deliberations, the panel asked the military judge the following question: "If the assailant of sexual assault is unaware of what he or she is doing, is the incident still considered a wrongful offense?"

In an Article 39(a), UCMJ, session, the military judge proposed answering the panel's question by directing them to the definition of what constitutes a "sexual act" under Article 120(g)(1)(B), UCMJ. Both parties agreed with the military judge's proposed answer. **[*3]** The military judge then reread the definition of "sexual act," to include the requirement that the act be committed with a specific intent.

The president of the panel stated that the military judge had answered their question. Both parties then again stated they had no objection to the military judge's explanation.

The panel convicted the accused of the offense.

The court-martial proceeded directly to presentencing. The government called a single sentencing witness who testified about the effects the offense has had on her.

The defense presented five sentencing witnesses. The witnesses testified to the accused's duty performance, character, and the effect that his conviction would have on his wife and family.

The accused then made an unsworn statement. The statement was made by answering questions by counsel, and included the following exchange:

> Q. Did you ever consider testifying during the case in chief?
>
> A. I have.
>
> Q. Why didn't you do that?
>
> A. After drinking for so much, the memories, they're not really there and my testimony would be, "I don't remember," "I don't remember," and "I don't remember." I don't know. There's no point to it, I don't think.
>
> Q. You didn't feel comfortable testifying **[*4]** because you don't have the memory?
>
> A. No, ma'am.
>
> Q. Now that you've heard [the alleged victim] testify about what she does remember, how does it make you feel?
>
> A. It makes me feel a little surprised, because that's not me. And I'd like to think that I do take care of my Soldiers and although she wasn't my Soldier, she was junior to me. And I wouldn't try to hurt her, but--I don't know. I'm sorry. I don't remember that night to say I'm sorry for this [sic] or for hurting you. I don't know how to say it. I never meant to do anything. We were in Vegas. We're--I never meant for anything, ma'am.
>
> [. . .]
>
> Q. Is there anything else that you'd like the panel to consider before they deliberate on your sentence?
>
> A. I don't have enough recollection of that night to be able to say yes or no, either way, but I never intended for anything. If it actually did or not, I don't know, but my memory is there--they're not there to say yes or no.

As an unsworn statement, appellant was not cross-examined. The defense then rested their sentencing case. After discussing sentencing instructions during an Article 39(a), UCMJ, session, the court-martial recessed for the evening.

The next morning, the military judge informed **[*5]** the parties he believed he erred in his findings instructions. Specifically, he stated that he should have given the members the voluntary intoxication instruction. *See* Dep't. Of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook [hereinafter Benchbook], para. 5-12 (10 Sep. 2014). The military judge stated that he saw two options: a mistrial or reinstructing the panel then

allowing them to re-deliberate.

The defense said they would not request a mistrial and would instead request that the panel be allowed to re-deliberate on findings.

The government objected to this proposed remedy. The government was specifically concerned appellant, who had not testified at trial, had made a lengthy unsworn statement during sentencing specifically telling the panel about his mental state due to his voluntary intoxication.

The military judge explained he believed he had committed error in omitting the voluntary intoxication instruction and the accused had been prejudiced by the error. He also stated, however, the error may be harmless. The military judge sua sponte considered, but rejected, declaring a mistrial. In determining whether a mistrial was warranted he assessed the evidence in the **[*6]** case as follows:

> . . . the court notes that the defense in this case was not that Staff Sergeant Lara did not intend to abuse humiliate [the alleged victim] or to arouse himself; rather, the defense was that the sexual act never occurred and that [the alleged victim] was creating false memories due to an alcohol-induced blackout. Factually speaking, the likelihood that the panel members would have concluded that Staff Sergeant Lara penetrated [the alleged victim's] vulva with his fingers, but that he did not do so with the intent to arouse—excuse me, with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person, is so remote that the very high standard for a mistrial as previously cited is not satisfied.

The military judge then decided that a mistrial was not warranted and overruled the government's objection. The military judge called the members back into the court-martial, and provided them with the voluntary intoxication instruction. The parties did not give a second closing argument addressing the new instruction, nor did they object to not being able to give such argument.

Shortly after the members began deliberating, **[*7]** this court issued a stay of the proceedings so that we could consider the instant writ petition. *United States v. Shahan and Lara*, ARMY MISC. 20160776 (Army Ct. Crim. App. 9 Dec. 2016) (order). We held oral argument six days later on 15 December 2016.

DISCUSSION

To obtain the requested writ of prohibition, petitioner must show: (1) there is "no other adequate means to attain relief;" (2) the "right to issuance of the writ is clear and indisputable;" and (3) the issuance of the writ is "appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) (citations and internal quotation marks omitted). "A writ of prohibition . . . is a 'drastic instrument which should be invoked only in truly extraordinary situations.'" *United States v. Howell*, 75 M.J. 386, 390 (C.A.A.F. 2016) (quoting *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983)).

At oral argument, both parties appeared to agree that the United States has no other means of obtaining relief. Should we not issue the writ, both parties believe that were the members to return a finding of not guilty, that finding would be conclusive in all respects. "However mistaken or wrong it may be, an acquittal cannot be withdrawn or disapproved." *United States v. Hitchcock*, 6 M.J. 188, 189 (C.M.A. 1979) (citing *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962)). Accordingly, our focus today is on whether the right to the issuance of the writ is clear and indisputable. Broadly, this **[*8]** question regards the

authority of the military judge. May the military judge of a court-martial composed of members reinstruct the members and direct them to re-deliberate on findings that have already been announced in open court?

A. Dietz v. Bouldin

Recently the U.S. Supreme Court addressed a similar issue in *Dietz v. Bouldin*, 136 S. Ct. 1885, 195 L. Ed. 2d 161 (2016). In that civil case, a jury returned a judgement for the plaintiff of zero dollars. The district court judge thanked the jury for their service and ordered them "discharged," and they were "free to go." However, a few minutes later the judge ordered the clerk to bring the jurors back. The judge realized, because of a stipulated agreement on damages, a verdict of zero dollars was not "legally possible." *Id.* at 1890. Over plaintiff's objection, the judge reinstructed the jury and directed them to re-deliberate. The Court affirmed the district judge's "inherent power" to reinstruct the jury in that case.

The Court noted that they had never "precisely delineated the outer boundaries of a district court's inherent powers . . . ." *Id.* at 1891. The Court then established a two-part test for determining whether a federal district judge has an inherent power:

> First, the exercise of an inherent power must be **[*9]** a "reasonable response to the problems and needs" confronting the court's fair administration of justice. *Degen v. United States*, 517 U.S. 820, 823-824, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996). Second, the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute. *See id.*, at 823; Fed. Rule Civ. Proc. 83(b) (districts courts can "regulate [their] practice in any manner consistent with federal law"); *see, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) (holding that a district court cannot invoke its inherent power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)).

Dietz, 136 S. Ct. at 1892. The Court then concluded:

> These two principles—an inherent power must be a reasonable response to a specific problem and the power cannot contradict any express rule or statute—support the conclusion that a district judge has a limited inherent power to rescind a discharge order and recall a jury in a civil case where the court discovers an error in the jury's verdict.

Id.

Applying *Dietz* to this case we are constrained by two threshold concerns. First, any direct comparison of the inherent power of a military judge to a federal district court judge is dangerous. The difference in authority is not so much a difference in degree, but a difference in kind. It would be wrong to assume that merely **[*10]** because a district court judge has a certain inherent authority, that same reasoning would apply to a military judge. However, the flipside to this argument may be persuasive. A military judge likely does not have *greater* inherent authority than a district judge. Not only do military judges and federal district judges stand on different constitutional footing, but also Article 36, UCMJ, would appear to operate to provide military judges *at most* the same authority as a federal district court judge.

Second, *Dietz* was a civil case. The Court in *Dietz* specifically "caution[ed] that our recognition here of a court's inherent power to recall a jury is limited to civil cases only. . . . we do not address here whether it would be appropriate to recall a jury after a discharge in a criminal case." 136 S. Ct. at 1895. Thus, at best, *Dietz* is

silent (and perhaps skeptical) of allowing a federal district court judge to reinstruct a jury in a criminal case.

Notwithstanding these two limiting considerations, we find the *Dietz* framework helpful.

1. A Reasonable Response to the Problems Confronting the Court

The first question posed by *Dietz* was whether the judge's actions are a reasonable response to the problems and needs confronting **[*11]** the court's fair administration of justice. Here, the military judge commendably brought to the parties' attention an error he had made when instructing the panel.[1] However, the military judged recognized the error only after all the sentencing evidence was already before the members. Thus, the military judge needed to determine whether it was a reasonable response to the situation to tell the members to ignore all the sentencing evidence, reinstruct the members, and direct them to re-deliberate. The accused specifically asked for this remedy.

The government, by contrast, believes that the panel cannot be expected to ignore the accused's lengthy unsworn statement regarding his intoxication at the time of the assault. More specifically, the government believes the effect of the military judge's actions allows the accused to present exculpatory evidence during sentencing without subjecting himself to the crucible of cross-examination.[2] Given the military judge's superior position, we do not find the military judge's actions to be unreasonable given the problems confronting the court.

2. Contrary to any limitation contained in the rules

The second question *Dietz* poses is can a judge **[*12]** exercise an inherent power that is "contrary to any express grant of or limitation on the district court's power contained in a rule or statute." 136 S. Ct. 1888. We address the two rules on point. Rule for Courts-Martial [hereinafter R.C.M.] 924 addresses when a court-martial may reconsider a finding. R.C.M. 1102 addresses the military judge's authority to order a proceeding in revision.

a. Rule for Courts-Martial 924 : Reconsideration

At oral argument, counsel for the accused argued that the military judge was exercising his inherent authority to allow the members to reconsider their findings. For courts-martial composed of members, R.C.M. 924 reads as follows: "(a) *Time for reconsideration*. Members may reconsider any finding reached by them before such finding is announced in open session." Counsel for the

---

[1] We note that the military judge described the voluntary intoxication instruction as a mandatory instruction on a defense. Under R.C.M. 920(e)(3) a military judge is required to instruct on "any special defense under R.C.M. 916 in issue." However, voluntary intoxication is not a defense under R.C.M. 916 and is not otherwise a "special defense." *See* R.C.M. 916(a) (definition of "special defense"). Rather, the instruction guides a panel in assessing whether the government has met its burden of proving beyond a reasonable doubt that the accused possessed a certain specific intent. However, whether it is an instruction on a defense—or whether it is a mandatory or discretionary instruction—all appear to be beside the point. The military judge determined based on the case in front of him that its omission was error. This decision we do not second guess in determining this writ petition.

[2] Here, the defense specifically declined to ask for a mistrial. Thus, were the government to ask for a mistrial, or were the judge to direct a mistrial sua sponte, the government may be barred from retrying the accused under the Double Jeopardy Clause. *See Watada v. Head*, 530 F. Supp. 2d 1136 (W.D. Wash. 2007) (federal district judge prohibited retrial of soldier when first court-martial ordered mistrial over defense objection).

accused argued that we should interpret this rule as limiting only the member's authority to initiate a reconsideration, and not a limitation on the military judge's authority to direct the members to reconsider a finding. We do not find that interpretation persuasive, and instead find that the rule clearly prohibits reconsiderations of a panel's finding after it has been announced in open session.

First, we note that the drafter's analysis to the 1995 **[*13]** amendment to the R.C.M. states that the rule "limits reconsideration of findings by the members to findings reached in closed session but not yet announced in open court . . . ." R.C.M. 924 analysis at A21-72.

Second, we note that our superior court has stated, citing R.C.M. 922 and 924(a) that "when the panel announced its findings in open court, those findings were final and were not subject to reconsideration by the members." *United States v. Thompson*, 59 M.J. 432, 440 (C.A.A.F. 2004). In *Thompson*, the Court of Appeals for the Armed Forces (CAAF) found that the military judge's ability to reinstruct the panel regarding faulty instructions ended once the panel's findings were announced. *See also* UCMJ art. 52(c) (requiring a vote of more than one-third of the members to reconsider a finding of guilty). Similarly, in *United States v. Chandler*, 74 M.J. 674 (Army Ct. Crim. App. 2015), we considered whether a military judge's post-trial hearing to address instructional error could be considered a reconsideration, stating:

> The hearing could also be viewed as a flawed attempt at reconsideration of findings, for which R.C.M. 924 governs. Contrary to R.C.M. 924, the proceeding occurred after the panel unambiguously announced findings on 10 July 2012, and it occurred at the military judge's direction instead of a panel member's proposal.

Id. at 684.

Accordingly, we find **[*14]** that R.C.M. 924 unambiguously prohibits the members from reconsidering their findings after they have been announced in open court.

b. Rule For Courts-Martial 1102: Proceedings in Revision

R.C.M. 1102(b)(1) allows a military judge to direct a proceeding in revision "to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused."

In *Chandler*, this court determined that proceedings in revision may not be used to correct instructional error:

> We endorse initiative-taking by military judges. Such an approach is crucial in our justice system, which favors resolution of disputed issues at trial. We also understand the desire for quickly reaching a solution in the field, instead of waiting for a convening authority or an appellate court to order the same solution. However, our system's range of post-trial remedies does not include remand to an original finder of fact in order to cure instructional error. This limitation is understandable, since one cannot reasonably expect panel members to set aside their original findings and deliberate anew.

Id. at 684. We went on to describe the post-trial hearing as "void *ab initio*" and a "nullity." **[*15]** *Id.* We did not consider the re-announced findings as having cured any instructional error. In short, we determined that reinstructing the panel and asking them to re-deliberate, did not, in law, cure the initial instructional error. Our superior court reached a similar conclusion, albeit regarding sentencing instructions. *United States v.*

Gleason, 43 M.J. 69, 71 n.4 (C.A.A.F. 1995) ("[T]he purpose of the proceeding . . . was to correct an error in the sentencing instructions, which is not a proper purpose for a proceeding in revision.").

We have one stark difference, however, between *Chandler, Gleason*, and the case before us today. Here, the accused requested the panel be reinstructed and allowed to re-deliberate. However, we do believe that the military judge's *authority* to order re-deliberation can turn on the tactical decisions of the accused. In *Chandler*, for example, we described the proceeding as not being lawful. 74 M.J. at 683.

Accordingly, the binding precedent of this court and our superior court prohibits a proceeding in revision in these circumstances.

B. Issuance of the Writ

If the military judge may not allow the panel to reconsider (under R.C.M. 924) or revise (under R.C.M. 1102) the panel's findings, then the findings must stand or be set aside. Therefore, we find that **[*16]** the government's right to the issuance of the writ is clear and indisputable. If findings cannot be reconsidered or revised, and there cannot be *two* sets of findings as to the same specification from the same court-marital, issuance of the writ is appropriate.

C. Mistrial

Our issuance of the writ prohibits the military judge from allowing the panel members to re-deliberate the findings in this case. However, the writ does not prohibit the military judge from considering whether a mistrial is an appropriate remedy for the instructional error in the case. We note that the initial decision not to grant a mistrial was based on two considerations. First, the military judge believed a less drastic remedy was available. Second, the accused did not ask for a mistrial because, at least partially, he preferred the remedy of reinstructing the panel. Accordingly, at the request of the accused or sua sponte, the military judge should consider whether, "as a matter of discretion" a mistrial is "manifestly necessary in the interests of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915.

CONCLUSION

The writ of prohibition **[*17]** sought by the United States is GRANTED. The record of trial is returned to the military judge for action not inconsistent with this opinion.

Senior Judge MULLIGAN and Judge FEBBO concur.

End of Document

United States v. Spear

United States Air Force Court of Criminal Appeals

July 30, 2015, Decided

ACM 38537

Reporter

2015 CCA LEXIS 310 *

UNITED STATES v. Staff Sergeant JAMES R. SPEAR II, United States Air Force

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

Subsequent History: Review denied by United States v. Spear, 2015 CAAF LEXIS 838 (C.A.A.F., Sept. 28, 2015)

Prior History: **[*1]** Sentence adjudged 24 October 2013 by GCM convened at Buckley Air Force Base, Colorado. Military Judge: Grant L. Kratz. Approved Sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-3.

Counsel: For the Appellant: Major Nicholas D. Carter; Major Isaac C. Kennen; and Philip D. Cave, Esquire.

For the United States: Major Daniel J. Breen; Captain Thomas J. Alford; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, HECKER, and TELLER, Appellate Military Judges.

Opinion by: ALLRED

Opinion

OPINION OF THE COURT

ALLRED, Chief Judge:

The appellant was convicted at a general court-martial, consistent with his pleas, of one specification of negligent dereliction of duty, three specifications of larceny of military property, and one specification of housebreaking, and, contrary to his plea, of an additional specification[1] of larceny of military property, in violation of Articles 92, 121, and 130, UCMJ, 10 U.S.C. §§ 892, 921, 930. The panel of officer members sentenced the appellant to a bad-conduct discharge, confinement for 18 months, and reduction to E-3. The convening authority approved the sentence as adjudged.

Before us, the appellant argues (1) the government violated his Fifth Amendment[2] right to due process by prosecuting him before a court-martial panel of five members whose verdict was not required to be unanimous, (2) the military judge abused his discretion

---

[1] For this specification of larceny, the appellant pled guilty to the lesser offense of stealing military property of a value **[*2]** equal to or less than $500.00, but, after a litigated trial, the panel found him guilty of the original offense which alleged the property was valued at more than $500.00. The panel also found the appellant not guilty of another specification of larceny of military property and of communicating a threat, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934.

[2] U.S. CONST. amend. V.

in denying the defense challenge of a court member for cause, (3) his plea of guilty to dereliction of duty was improvident, and (4) the military judge abused his discretion in refusing to give instructions concerning co-conspirator or accomplice testimony. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant was a member of the Security Forces. On four occasions between May 2012 and February 2013, he entered a Security Forces warehouse, without authorization, for the purpose of stealing military property. During one of the entries, **[*3]** the appellant took a backpack, batteries, flashlight, gloves, and a mosquito net. Another time, he removed two rifle cases. On a third occasion, he stole a backpack. And on the fourth, he took gear bags and plates of body armor.

On 11 February 2013, with no military purpose, the appellant used his government travel card to buy gas and food. The next day, he misused the card to make similar purchases. On 8 April 2013, he misused the card a third time for a meal at a restaurant.

Further facts relevant to this case are addressed below.

I. Composition of the Court-Martial

The appellant now contends for the first time that his Fifth Amendment right to due process was violated because he was convicted by a court-martial panel of only five members and because their verdict did not have to be unanimous.[3] The appellant cites Supreme Court cases discussing due process relative to the size and unanimity of civilian juries, and he argues those decisions stand for the proposition that "there is some point at which [court-martial panels are] too small to be considered constitutionally reliable for criminal conviction purposes, especially if they are not required to be unanimous in their decision."

In *Ballew v. Georgia*, 435 U.S. 223, 245, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978), the Supreme Court found a trial by jury of less than six members deprives a defendant of the right to trial by a jury as contemplated by the Sixth Amendment.[4] The decision was based on empirical studies showing that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." *Id.* at 239. Subsequently, in *Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979), the Court held that conviction by a non-unanimous six-member jury also fails to comply with the Sixth Amendment, saying:

---

[3] This court previously **[*4]** addressed a related issue in *United States v. Daniel*, ACM 38322, 2014 CCA LEXIS 224 (A.F. Ct. Crim. App. 1 April 2014) (unpub. op.), *aff'd without opinion*, 73 M.J. 473 (C.A.A.F. 2014), *cert. denied* (12 January 2015). The appellant contends that adverse decision is distinguishable from his case because it dealt with verdicts by six-member panels, not five-member panels.

[4] The *Sixth Amendment* reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The Amendment's provision as to trial by jury is made applicable to the states by the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

> [M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts **[*5]** rendered by six-person juries to be unanimous.

441 U.S. at 138.

The appellant's argument in this case focuses on due process under the Fifth Amendment, contending that the Supreme Court's decisions in *Ballew* and *Burch* are based in due process.[5] He also notes the Supreme Court's statement that, in the military context, determining whether the Due Process Clause applies to a facet of the military justice system requires an evaluation of "whether the factors militating in favor [of, as contended here, the right to a larger panel] are so extraordinarily weighty as to overcome the balance struck by Congress" between the needs of the military and the rights of service members. **[*6]** *Weiss v. United States*, 510 U.S. 163, 177-78, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976)) (internal quotation marks omitted). In the appellant's view, this issue of panel size and unanimity should be subjected to judicial review because the "balance struck by Congress" has radically changed[6] and, in light of the concerns expressed by the Supreme Court regarding juries, have unbalanced the military justice system to the extent that permitting trials before a five-member panel not required to be unanimous is no longer sustainable under the Constitution. He also notes that, prior to 1921, Congress generally required 13 members unless convening a panel of that size would cause "manifest injustice to the service." *See Martin v. Mott*, 25 U.S. 19, 34-35, 6 L. Ed. 537 (1827). Given that history and the Supreme Court precedent discussed above, the appellant urges this court to find that Congress' decision to authorize trial by five non-unanimous panel members is in conflict with the appellant's constitutional right to a larger panel.

The *Weiss* standard is the appropriate test to determine whether a due process violation has occurred in the court-martial setting. *United States v. Vazquez*, 72 M.J. 13, 18 (C.A.A.F. 2013). In *Weiss*, the Supreme Court noted that:

> Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings. But in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8. . . .
>
> Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures,

[5] Our superior court has repeatedly held that the Sixth Amendment rights regarding a jury trial do not apply to courts-martial. *See, e.g., United States v. McClain*, 22 M.J. 124, 128 (C.M.A.1986); *United States v. Curtis*, 32 M.J. 252, 267-68 (C.M.A. 1991) (rejecting a similar argument to the appellant's within the context of a death penalty case); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002); *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing *Ex parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942)).

[6] Among others, he cites to recent changes in the purpose and procedures **[*7]** of Article 32, UCMJ, 10 U.S.C § 832, investigations, the removal of convening authorities' discretion during post-trial review of sexual assault cases, and the lack of a statute of limitations for sexual assault offenses.

> and remedies related to military discipline. Judicial deference thus is at its apogee when reviewing congressional decisionmaking in this area. Our deference extends to rules relating to the rights of servicemembers: Congress has primary responsibility for the delicate task of balancing **[*8]** the rights of servicemen against the needs of the military. . . . We have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated.

Weiss, 510 U.S. at 176-77 (second omission in original) (citations and quotation marks omitted). [3]

Judicial deference is "at its apogee" when an appellant is challenging the authority of Congress to govern military affairs. *Weiss*, 510 U.S. at 177; *Solorio v. United States*, 483 U.S. 435, 447, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987); *see also Middendorf v. Henry*, 425 U.S. 25, 43, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976). It is the appellant's heavy burden to demonstrate that Congress' determinations about panel size and unanimity should not be followed. *See id.; Weiss*, 510 U.S. 181. He must show the factors weighing in favor of his interest are so "extraordinarily weighty" that they overcome the balance struck by Congress in making these determinations. *See id.* at 179. The appellant here has failed to do so.

To support his argument, the appellant contends the Supreme Court's rationale in *Ballew* is wholly applicable to the military justice system in that small groups of military members are subject to the same problems identified by that court. As did two federal courts that reviewed a similar claim by an appellant during a collateral attack on his court-martial, we disagree. In *Sanford v. United States*, a federal **[*9]** district judge declined to adopt and apply the empirical data from *Ballew* to the military context based on substantial distinctions between the military and civilian legal systems, including that military panel members are selected based on their qualifications and that each panel member is selected from the accused's own profession (that of military service). 567 F. Supp. 2d 114, 119-20 (D.D.C. 2008) (citing *United States v. Wolff*, 5 M.J. 923, 925 (N.C.M.R. 1978); *United States v. Guilford*, 8 M.J. 598, 602 (A.C.M.R. 1979)). During the appeal of that decision, the court of appeals also faulted the appellant for "recasting *Ballew* as a due process case that would apply directly to courts-martial as a preexisting constitutional requirement," when, in fact, "there is no prevailing Fifth Amendment standard on this issue with which to require military conformity." *Sanford v. United States*, 586 F.3d 28, 35, 388 U.S. App. D.C. 303 (D.C. Cir. 2009).

We find the reasoning and conclusions of these courts convincing. The appellant has failed to demonstrate that Fifth Amendment due process requires a court-martial panel to have six or more members who must be unanimous. With our deference to Congress at its apogee, we find the appellant has failed to meet his heavy burden of showing the existence of any extraordinarily weighty factors that would overcome the balance struck by Congress between the needs of the military and the rights of service members.

*II. Challenge **[*10]** of Court Member*

The appellant alleges the military judge erred by denying a defense challenge for cause against a potential panel member, Captain (Capt) SS. The appellant contends Capt SS should have been excused under both the actual and implied bias standards. We disagree.

Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) provides that 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." "This rule encompasses challenges based upon both actual and implied bias." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008) (citing *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)).

"The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)) (internal quotation marks omitted). Because "[t]he existence of actual bias is a question of fact," we "provide the military judge with significant latitude in determining whether it is present in a prospective member. *Id.* (citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). Actual bias is reviewed "subjectively, through the eyes of the military judge or the court members." *Warden*, 51 M.J. at 81 (quoting *Napoleon*, 46 M.J. at 283) (internal quotation marks omitted). A "challenge based on actual bias is essentially one of credibility, and because the military **[*11]** judge has an opportunity to observe the demeanor of court members and assess their credibility on voir dire, a military judge's ruling on actual bias is afforded deference." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)) (internal quotation marks omitted).

Implied bias is "viewed through the eyes of the public, focusing on the appearance of fairness." *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (quoting *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)) (internal quotation marks omitted). Therefore, appellate courts employ an objective standard when reviewing a military judge's decision regarding implied bias. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). We review issues of implied bias "under a standard less deferential than abuse of discretion but more deferential than de novo." *Id.* (quoting *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003)) (internal quotation marks omitted). In reviewing challenges for cause under the implied bias standard, military judges are required to follow the "liberal grant" mandate, which "supports the UCMJ's interest in ensuring that members of the military have their guilt or innocence determined 'by a jury composed of individuals with a fair and open mind.'" *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005) (quoting *United States v. Smart*, 21 M.J. 15, 18 (C.M.A. 1985)). "[I]n the absence of actual bias, where a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances **[*12]** in which the military judge's exercise of discretion will be reversed will indeed be rare." *Clay*, 64 M.J. at 277.

In the present case, after the military judge denied the defense challenge for cause, trial defense counsel challenged Capt SS peremptorily—and she was removed from the court panel. For this reason alone, the appellant's claim is meritless.

Prior to 2005, R.C.M. 912(f)(4) permitted appellate review of a denied challenge for cause even if the appellant successfully removed that panel member through use of a peremptory challenge, so long as trial defense counsel stated on the record that he would have exercised the defense's peremptory challenge against another member if the challenge for cause had been granted. *See United States v. Leonard*, 63 M.J. 398, 402-03 (C.A.A.F. 2006). In 2005, however, the President promulgated amendments to the *Manual for Courts-Martial* that significantly altered this rule. Now, "[w]hen a challenge for cause has been denied[,] the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, *shall preclude further consideration of the challenge of that excused member*

upon later review." R.C.M. 912(f)(4) (emphasis added). Under the current rule, because the appellant removed Capt SS from the **[*13]** panel through the use of his peremptory challenge, further review of the military judge's denial of the appellant's challenge for cause is precluded.

Moreover, even assuming our review of the matter is not precluded, we find no error. The appellant argues that Capt SS should have been excused for two reasons: first, because she might have been distracted by a personal scheduling conflict; and second, because of responses she provided when asked about threats and violence.

Scheduling Conflict. During group voir dire, the military judge asked the panel, "[D]oes anyone know of anything of either a personal or professional nature, which would cause you to be unable to give your full attention to these proceedings throughout the trial?" Several members responded affirmatively, including Capt SS. When the military judge followed up with Capt SS individually, she indicated that she was a single parent with potential day care issues. She responded, however, that with adequate notice, she could make arrangements to avoid any conflict.

The appellant's senior defense counsel (SDC) explored the day care issue further. He asked Capt SS, "[W]ould it potentially get you upset about the situation if you had to sit **[*14]** on a court-martial?" She replied, "Oh, no, sir." The SDC then asked, "You'd still be able to focus on the facts, focus on the evidence?" And she answered, "Yes, sir."

Responses Regarding Threats and Violence. During individual voir dire, the SDC asked Capt SS whether she would be able sit as an impartial court member in a case involving threats or violence. She responded candidly, "I don't know." When the SDC probed further, Capt SS expressed a potential concern for her own safety and that of her children—she believed it possible that, if the appellant was a violent offender, he might seek retribution against those serving on his panel. Capt SS assured the court, however, that she would be able to fairly consider the evidence at trial, and render a verdict of not guilty if the appellant's guilt was not proved beyond a reasonable doubt. She likewise indicated a belief that she could objectively consider the evidence and render a fair sentence.

In ruling upon a defense challenge for cause against Capt SS based upon actual and implied bias, the military judge declared:

> [Capt SS] has certainly indicated that she could consider all of the evidence. . . . She certainly was being thoughtful **[*15]** with her answers, but I did not see an emotional reaction from her.
>
> I don't believe her family situation comes into play. She's already exhibited an ability to have other people pick up her children. There's no indication that she would be distracted by that situation. She seems very capable of planning for it.
>
> While she stated that discussion of such things, certainly discussion of threats, generally, makes her uncomfortable, I'm not sure that it's not a bad thing for people to be uncomfortable. In fact, one could question the wisdom of people being comfortable in sitting in judgment of others. I don't believe that her language or her body language indicated any sort of bias.
>
> I understand the liberal [grant] mandate[7] as well as the implied bias standard. I don't believe that a reasonable individual looking in on these

[7] The record of trial indicates the military judge stated, "I understand the liberal grand mandate . . . ." We find that to be merely a typographical **[*16]** error.

> proceedings could believe that [Capt SS]'s participation in the deliberation room would create an appearance of unfairness.
>
> Therefore, the defense challenge for cause based on actual or implied bias against [Capt SS] is denied.

In our view, the military judge properly considered the defense challenge based upon implied as well as actual bias. He recognized his duty to liberally grant defense challenges, and he placed his reasoning on the record. We find the military judge did not abuse his discretion in denying the challenge for cause.

III. Providence of Plea

The appellant was charged with willful dereliction of duty for misusing his government travel card on divers occasions. He pled and was found guilty of the lesser offense of negligent dereliction of duty. On appeal, he claims his plea of guilty to this offense was improvident because the military judge failed to address the defense of ignorance or mistake of fact.

The military judge properly advised the appellant as to the elements of the lesser offense to which he was pleading guilty, as follows:

> The first element is that you had a certain prescribed duty, that is; to refrain from using your government travel card for unauthorized purposes.
>
> The second is that you knew or reasonably should have known of the assigned duty.
>
> And three . . . that within the continental United States, on divers occasions between on or about 1 February 2013 and on or about **[*17]** 15 April 2013, you were, through neglect, derelict in the performance of that duty by negligently failing to refrain from using your government travel card for unauthorized purposes.

The definitions the military provided the appellant included the following:

> "Dereliction" is defined as a failure in duty, a shortcoming, or delinquency.
>
> "Negligently" means an act or failure to act by a person under a duty to use due care, which demonstrates a lack of care, which a reasonably prudent person would have used under the same or similar circumstances.
>
> That an individual reasonably should have known of duties may be demonstrated by regulations, manuals, customs, academic literature, testimony of persons who have held similar or related positions, or similar evidence.

During the providence inquiry, the appellant expressly agreed that the elements and definitions given him by the military judge correctly described what he did. He declared under oath that he knew, through briefings and training, that the government travel card issued to him was to be used "only for approved expenses, such as for TDYs, PCS's, or while on orders" and that he had a duty to refrain from using his card on any other occasions. **[*18]** He went on to describe three separate situations in which he negligently and without authorization used the card to purchase gas and food. He explained further:

> [W]hen I made these transactions I was not in a TDY or PCS status, or in any other—other status that would authorize me to use my GTC. Instead of exercising due care and paying for my expenses with a personal card, I carelessly removed a card from my wallet, and paid with my [government travel card].
>
> No one made me do this. I did not believe I was authorized to do so. And if I had exercised greater care and caution, I could have avoided misusing the [government travel card].

When asked if he could have avoided using the

government travel card if he had wanted to, the appellant responded "yes."

Before us, the appellant now claims the military judge erred by failing "to ensure that his use of the [government travel card] was not based on a mistaken belief that he was actually using a personal credit card." We disagree.

During a guilty plea inquiry, the accused must establish not only that he believes he is guilty but also that the factual circumstances support that plea. *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011). If, at any time during the proceeding, "an accused sets up matter **[*19]** inconsistent with the plea, . . . the military judge must either resolve the apparent inconsistency or reject the plea." *Id.* (quoting Article 45(a), UCMJ, 10 U.S.C. § 845(a)) (internal quotation marks omitted). Once the military judge has accepted the guilty plea and entered findings of guilty, an appellate court will not set them aside unless it finds a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *see also* Article 45(a), UCMJ, 10 U.S.C. § 845(a). To rise to the level of inconsistency contemplated by Article 45(a), UCMJ, the matters raised at trial must have reasonably raised the question of a defense or must have been inconsistent with the plea in some respect. *United States v. Roane*, 43 M.J. 93, 98 (C.A.A.F. 1995). In determining on appeal whether there is a substantial inconsistency, this court considers the "full context" of the plea inquiry. *United States v. Smauley*, 42 M.J. 449, 452 (C.A.A.F. 1995).

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). Generally, for crimes not involving specific intent, willfulness, knowledge, or premeditation, the ignorance or mistake must be both honest (actual) and reasonable. **[*20]** *Id.* Thus, even if the appellant honestly and mistakenly believed he had used his personal credit card, that belief had to be objectively reasonable under the circumstances. *See id.* Furthermore, the ignorance or mistake of fact cannot be based on the accused's carelessness or his negligent failure to discover the true facts. *See United States v. True*, 41 M.J. 424, 426 (C.A.A.F. 1995).

Here, we find no substantial basis, either in law or fact, to question the appellant's plea. The appellant admitted he acted negligently on these occasions, stating he had failed to exercise due care when he removed the card from his wallet. He also described his actions as careless. Under these circumstances—including the appellant's misuse of the government travel card on three separate occasions over a two month period—we are convinced that the defense of ignorance or mistake was not reasonably raised during the plea inquiry and the appellant's responses in the providence inquiry did not set up a matter in substantial conflict with his plea.

IV. Instruction to Members

Airman First Class (A1C) RS and Senior Airman (SrA) GD were fellow Security Forces members who provided testimony against the appellant during findings. In discussing findings instructions, trial **[*21]** defense counsel requested that the military judge provide co-conspirator and accomplice instructions pertaining to these individuals.[8] The trial counsel objected and the

[8] Trial defense counsel offered no specifics as to the wording of their proposed instructions. Presumably counsel desired the Military Judges' Benchbook instruction regarding accomplices, which reads in pertinent part:

> A witness is an accomplice if he/she was criminally

military judge declined to give the instructions, finding neither of the individuals was culpably involved in any of the crimes with which the appellant was charged. On appeal, the appellant claims the military judge erred by not giving an accomplice instruction.

Whether a military judge properly instructs the court members is a question of law we review de novo. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). A military judge's decision not to provide an instruction is reviewed for an abuse of discretion. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). "[T]he military judge has substantial discretion in deciding on the instructions to give and whether [a defense-requested] instruction is appropriate." *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003). "This discretion must be exercised in light of correct principles of law as applied to the facts and circumstances of the case." *Id.* Denial of a requested instruction is error if the instruction is (1) correct, (2) not substantially covered in the main instruction, and (3) "'is on such a vital point in the case that the failure to give it deprived [the] defendant of a defense or seriously impaired its effective presentation.'" *Id.* (alteration in original) (quoting *United States v. Zamberlan*, 45 M.J. 491, 492-93 (C.A.A.F. 1997)). For the military judge's refusal to instruct the members to be error, all three prongs of the test in *Miller* must be satisfied.

In the present case, the appellant has failed to meet the third prong of the *Miller* test. That is, on the particular facts of this unique case, **[*23]** the requested instruction was not on such a vital point that the failure to give it deprived the appellant of a defense or seriously impaired effective presentation. After the appellant entered his pleas, only four matters were litigated during findings. The appellant prevailed on three of those matters.[9] The members rendered only one finding contrary to the appellant's own pleas—and in that instance, the testimony and credibility of A1C RS and SrA GD were not material to the outcome.[10] Under

involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness's believability, that is, a motive to falsify his/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/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) **[*22]** (__).)

Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 7-10 (1 January 2010).

[9] In two instances—specifications alleging larceny of rifle magazines and communicating a threat, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934—the appellant pled and was found not guilty. In the third instance—a specification alleging larceny of rifle cases of a value greater than $500.00, in violation of Article 121, UCMJ, 10 U.S.C. § 921—the appellant was found, in accordance with his plea, guilty only of the lesser offense of larceny of property equal to or less than $500.00.

[10] In the single instance where a finding of guilty exceeded his **[*24]** pleas, the appellant had pled guilty to the lesser offense of stealing military property consisting of a gear bag (singular) and body armor plates, of a value equal to or less than $500.00—and the members found him guilty of the greater offense alleging theft of gear bags (plural) and property having a value more than $500.00. In our view, the testimony of the witnesses in question—Airman First Class (A1C) RS and Senior Airman (SrA) GD—could have had little impact on the outcome. Neither witness offered any evidence as to the value of the stolen bags—indeed SrA GD provided no testimony regarding stolen bags whatever—and the testimony of A1C RS that he saw the appellant steal a single bag was consistent with the appellant's own admission that he stole just one bag.

these circumstances, the lack of an accomplice instruction did not deprive the appellant of a defense and did not seriously impair the effective presentation of the defense case.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are **AFFIRMED**.

End of Document

CERTIFICATE OF SERVICE, U.S. v. COL PRITCHARD, CHARLES L., (Respondent); MSG DIAL, ANDREW J. (Real Party in Interest) (Misc 20220001)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@army.mil*** on this 24th day of January 2022.

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
Daniel.l.mann.civ@army.mil

PANEL NO. 3