

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**W.L. RITTER**

**J.F. FELTHAM**

**R.E. VINCENT**

**UNITED STATES**

**v.**

**Cody W. OTTLEY  
Sergeant (E-5), U.S. Marine Corps**

NMCCA 200500985

Decided 24 April 2007

Sentence adjudged 1 August 2003. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1 Marine Expeditionary Force, FMF, Camp Pendleton, CA.

CDR MICHAEL J. WENTWORTH, JAGC, USN, Appellate Defense Counsel  
LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel  
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of negligent homicide, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The convening authority approved the adjudged sentence of confinement for 18 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. However, the convening authority suspended all confinement in excess of 12 months, in accordance with a pretrial agreement. He granted clemency by disapproving the adjudged forfeitures, and waiving automatic forfeitures for six months from the date of his action.

The appellant raises four assignments of error, claiming: (1) that the military judge erred in excluding mitigation testimony concerning 1st Special Operations Training Group's (SOTG) discontinuation of the use of simmunitions in close-quarters battle (CQB) training, and the adoption of remedial measures following the offense; (2) that the military judge erred in excluding the testimony of the appellant's supervisor concerning

whether he would have any reservations about serving in combat with the appellant; (3) that the sentence is inappropriately severe for this offense and the offender; and (4) that the appellant has been unreasonably and materially prejudiced by post-trial delay.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. We find merit in the appellant's first and second assignments of error, and will take corrective action in our decretal paragraph. We conclude that the findings are correct in law and fact, and return the record of trial to the Judge Advocate General so that a rehearing on sentence may be ordered. *See* Arts. 59(a) and 66(c), UCMJ.

### **Facts**

On 28 August 2002, the appellant participated in a close quarters battle (CQB) exercise at the Military Operations in Urban Terrain (MOUT) facility aboard Marine Corps Base, Camp Pendleton, California. As part of the exercise, the appellant and other Marines fast-roped from helicopters onto the roof of a building at the MOUT facility, breached their way into the structure, and proceeded to clear it. The building was defended by a force of "aggressor" Marines. Prior to the exercise, the appellant and other members of the assault force were ordered to remove all live rounds from their small arms magazines and to refill their magazines with blank ammunition. They were ordered not to carry live ammunition on the exercise.

The appellant negligently commingled magazines containing blank ammunition and magazines containing live rounds, inserted a magazine containing live rounds into his M4A1 assault rifle, and failed to inspect his weapon to ensure it only contained blanks. During the exercise, he fired several rounds of live ammunition into the body of an "aggressor" Marine, killing him.

At sentencing, the trial defense counsel attempted to introduce testimony from Gunnery Sergeant J.L. Morrison, USMC, SOTG's chief instructor for CQB training on the date of the appellant's offense, about changes made to the CQB curriculum prior to that date. The trial defense counsel also attempted to introduce testimony from Gunnery Sergeant M.R. Schmidt, USMC, an SOTG instructor who served as Range Safety Officer (RSO) of the MOUT facility on the date of the appellant's offense, about remedial measures taken after the event.

The appellant claims the testimony of these witnesses would have "tended to show additional facts and 'circumstances surrounding' the death of [the victim] which [would have] provided a full or complete picture of this tragic event." Appellant's Brief of 27 Feb 2006 at 15. The appellant also claims "their testimony [would have] tended to show that the changes in the curriculum incorporated into Sergeant Ottley's CQB

[training] package increased the risk that blank and live ammunition would become commingled and that the switch from simmunitions to blank ammunition created a situation where live ammunition could be fired in an exercise by mistake, thereby contributing to the death of [the victim], a fact in extenuation of the consequences of appellant's negligence." *Id.*

Following objection by the trial counsel, the military judge excluded Gunnery Sergeant Morrison's testimony as irrelevant. Record at 153. The trial counsel objected to Gunnery Sergeant Schmidt's testimony as irrelevant and also as improper evidence of subsequent remedial measures, in violation of MILITARY RULE OF EVIDENCE 407, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Record at 155. The trial defense counsel argued that the testimony was admissible as evidence of matters in extenuation and mitigation of the appellant's offense, under RULE FOR COURTS-MARTIAL 1001, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Record at 156. The military judge responded saying, "I will tell you right now, that the M.R.E. trumps the R.C.M.," and sustained the trial counsel's objections "as to both relevance and 407." *Id.*

In response to the trial counsel's objection, the military judge ordered Major C. H. Veeris, USMC, the appellant's supervisor for the year prior to his court-martial, not to answer the following question asked by the appellant's trial defense counsel: "Based on your knowledge of that incident [(the offense of which the appellant was convicted)] and your experience with Sergeant Ottley, would you have any reservations about going into combat with him?" Record at 205.

The appellant was sentenced on 1 August 2003. The convening authority acted on the findings and sentence on 25 March 2005, and the case was docketed at this court on 30 June 2005.

#### **Extenuation and Mitigation Evidence**

We agree that the military judge erred in ordering Major Veeris not to testify as to whether he would have reservations about serving with the appellant in combat. Our superior court has concluded that the defense is allowed to present during sentencing "evidence that a witness would willingly serve with the accused again." *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005). "[S]o-called 'retention evidence' is classic matter in mitigation, which is expressly permitted to be presented by the defense. As noted in *Aurich*, 'the fact that a member of an armed force has sufficient trust and confidence in another member is often a powerful endorsement of the character of his fellow soldier.'" *Id.*, (quoting *United States v. Aurich*, 31 M.J. 95, 96 (C.M.A. 1990)).

We also agree that the military judge erred in sustaining the trial counsel's objections to the testimony of Gunnery Sergeants Morrison and Schmidt. R.C.M. 1001(c), is entitled

"Matter to be presented by the defense." R.C.M. 1001(c)(1) states that the defense may present matters in extenuation and mitigation regardless of whether the defense offered such evidence before the findings. Matter in extenuation is introduced to explain the circumstances surrounding the commission of an offense. R.C.M. 1001(c)(1)(A). Extenuation evidence includes evidence of the reasons for committing the offense which do not constitute a legal justification or excuse. *Id.*

Gunnery Sergeant Morrison testified that each CQB training package contained minor changes, resulting from continuous analysis of the course. With regard to the course in which the appellant killed the "aggressor" Marine, he testified, "On this package we had actually added blank fire into the MOUT training evolution. So that was a change, and that was the first package where we did that." Record at 152. When the trial defense counsel tried to question Gunnery Sergeant Morrison about other types of ammunition that had been used in the course, the military judge excluded the testimony as irrelevant because it did not "in any way" change the appellant's "duty," or "the level of his neglect," at the time of the offense. Record at 153.

It is apparent from the record that the trial defense counsel offered Gunnery Sergeant Morrison's testimony to "explain the circumstances surrounding the commission" of the offense, and to demonstrate how those circumstances may have contributed to the appellant negligently loading his weapon with live ammunition. As such, the excluded testimony would have been proper matter in extenuation, and it was error to exclude it.

Similarly, we hold that it was error for the military judge to exclude Gunnery Sergeant Schmidt's testimony about changes made to the CQB training package after the appellant's offense. Although the trial defense counsel argued that he was offering the testimony under R.C.M. 1001, to demonstrate how the circumstances surrounding the appellant's offense led to changes in CQB training, the military judge ruled that the testimony would have been irrelevant and would also have been inadmissible under MIL. R. EVID. 407, as evidence of subsequent remedial measures. Record at 156-57.

It appears from the record that the trial defense counsel offered Gunnery Sergeant Schmidt's testimony in an effort to establish that safety-related changes in the CQB curriculum, made after the offense, impliedly demonstrated that the course was conducted in a less safe manner at the time of the offense. As such, this testimony could have served to "explain the circumstances surrounding the commission" of the offense, and, therefore, would have been proper evidence in extenuation. It was error to exclude it as irrelevant.

It was also error to exclude Gunnery Sergeant Schmidt's testimony as inadmissible under MIL. R. EVID. 407. MIL. R. EVID.

407 provides that, after an event allegedly causes injury or harm, evidence of subsequent remedial measures is inadmissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for warning or instruction. The rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, and includes a nonexhaustive list of examples of such other purposes.

Gunnery Sergeant Schmidt's testimony was not offered for any purpose prohibited by MIL. R. EVID. 407. Rather, it was intended to "explain the circumstances surrounding the commission" of the offense, and might have provided "reasons for committing the offense which do not constitute a legal justification or excuse." As such, this testimony would have been proper evidence in extenuation of the appellant's offense, and it was error to exclude it under MIL. R. EVID. 407.

Having concluded that the military judge erroneously excluded defense sentencing evidence, we must determine whether the error had a "substantial influence on the sentence." See *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)(citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). "If so, then the result is material prejudice to Appellant's substantial rights." *Griggs*, 61 M.J. at 410.

Here, the excluded testimony likely contained evidence that would have been favorable to the appellant. Major Veeris, a field grade officer with 14 years experience in the Marine Corps, presumably would have testified that, although aware of the appellant's offense, he would nonetheless be willing to serve with him in combat. Had such testimony been admitted, it would have been powerful evidence in mitigation. Gunnery Sergeants Morrison and Schmidt might have provided testimony about the circumstances surrounding the offense that could have made the appellant's misconduct appear less egregious than it did at the end of the providence inquiry.

We note that the military judge allowed Major Veeris to testify that the appellant had a resilient military character, had performed admirably under the Major's supervision, had the potential to be involved in future training involving dangerous weapons, was an asset to the Marine Corps, and that the Major would like to see the appellant "continue working under [his] tutelage." Record at 205. Although this testimony contained favorable opinions about the appellant, it lacked what might have been an even more powerful endorsement--specifically, an experienced field grade officer's statement that he would willingly serve with the appellant in combat. Excluding this testimony resulted in a record devoid of the Major's opinion of the appellant's reputation or record for courage, or any other trait considered desirable in a service member serving in combat. See R.C.M. 1001(c)(1)(B). Although the Major's other testimony may have ameliorated somewhat the prejudice resulting from the erroneous exclusion of this evidence, we view evidence of courage,

and willingness to serve with the appellant in combat, as distinguishable from evidence that the appellant has rehabilitative potential or that he should be retained in the Marine Corps.

While it is difficult to determine precisely what impact the excluded evidence might have had on the military judge, we note that the sentence he ultimately imposed was precisely that which the trial counsel asked for in his closing argument. Although this is an extremely close case on the issue of prejudice, we believe the erroneous exclusion of three separate lines of extenuation and mitigation testimony, in light of the cumulative effect this testimony might otherwise have had, tips the balance in favor of the appellant. Therefore, we conclude that the excluded testimony may have substantially influenced the adjudged sentence. See *Griggs*, 61 M.J. at 410.

### **Conclusion**

We affirm the findings, as approved by the convening authority, and set aside the sentence. The record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority with a rehearing on sentence authorized.<sup>1</sup>

Senior Judge RITTER and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>1</sup> Because of our decision on the appellant's first two assignments of error, we will not address his remaining assignments of error pertaining to sentence severity and post-trial delay.