

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Laprie D. TOWNSEND
Master-at-Arms Second Class (E-5), U. S. Navy**

NMCCA 200501197

Decided 12 January 2007

Sentence adjudged 2 April 2004. Military Judge: J.W. Rolph.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
Capt ROGER E. MATTIOLI, JAGC, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial, composed of officer and enlisted members, of attempted unpremeditated murder, and reckless endangerment, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. His sentence included a dishonorable discharge and confinement for 10 years. The convening authority (CA) approved the sentence as adjudged; however, in an act of clemency, he reduced the period of confinement to six years.

We have reviewed the record of trial, the appellant's four assignments of error,¹ and the Government's answer. We find

¹ I. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S CHALLENGE FOR CAUSE AGAINST LT B[].

II. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION FOR MISTRIAL.

III. WHETHER FURTHER FACT-FINDING INQUIRY IS NEEDED IN LIGHT OF NEWLY DISCOVERED EVIDENCE THAT THE FORENSIC EXAMINER RELIED UPON HAD SUBSEQUENTLY COMMITTED MISCONDUCT IN ANOTHER CASE.

merit in the appellant's claim of unreasonable multiplication of charges, and will take corrective action in our decretal paragraph. Otherwise, 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.

Background

This case involves the use of firearms in retaliation for the victim's attack on the appellant's female friend. The appellant was informed that his victim, Dentalman (DN) Thurmond, had physically assaulted the appellant's female roommate. Armed with a firearm, the appellant arranged for his victim to meet him at a hotel in the Ocean View area of Norfolk, Virginia. The appellant and two others arrived at the hotel first and laid in wait for the victim. The victim, also armed with a firearm, arrived with two others in a vehicle and parked across the street from the hotel. The appellant's vehicle pulled out from the hotel and ran parallel to the victim's car, at which time the appellant and the passenger sitting in front of him opened fire on DN Thurmond's car. Of the five rounds that struck the victim's car, only one struck the victim. The appellant confessed to the shooting but claimed it was self-defense. The round that struck the victim was traced back to the appellant's gun by forensics.

Member Challenge

In his first assignment of error, the appellant asserts that the military judge erred by denying the appellant's challenge for cause against one of the members, Lieutenant (LT) B, because he (1) is the son of a police officer; (2) freely admitted that he held police officers in high esteem; (3) had been a legal officer; (4) was attending law school and studying criminal law during the court-martial; (5) hoped to eventually become a prosecutor; and, (6) expressed a disdain for defense lawyers. Appellant's Brief and Assignments of Error of 27 Jul 2006 at 6. The Government argues that nothing in the record suggests that LT B was not impartial or would betray his oath, or that the public would perceive the appellant's trial as unfair. Government's Answer of 29 Sep 2006 at 10.

Several months prior to the appellant's court-martial, LT B completed a court-martial member's questionnaire. Appellate Exhibit V at 13-16. On that form, he indicated that he was presently engaged in graduate study on a part-time basis at Regent University Law School. In addition, he listed that he had attended the Naval Justice School's Non-Lawyer Legal Officer

IV. WHETHER ATTEMPTED PREMEDITATED MURDER CONSTITUTES AN UNREASONABLE MULTIPLICATION OF CHARGES WITH RECKLESS ENDANGERMENT WHEN APPELLANT COMMITTED BOTH ACTIONS WITH THE SAME UNDERLYING PURPOSE AND THE GOVERNMENT BROUGHT FORTH BOTH CHARGES UNDER CONTINGENCIES OF PROOF.

Course approximately four years prior, and had served as a legal officer from June 1999-August 2000. *Id.*

The individual *voir dire* of LT B provided the following information about that member. First, LT B had attended the non-lawyer legal officer course; however, he would follow the military judge's instructions even if they differed from what he learned in his previous training. Second, at the time of trial, LT B was attending law school and was taking a criminal law class, in which he was studying the concepts of self-defense, the use of force, the theories of intent, and cooling-off period. However, he stated that he could follow the military judge's instructions even if they differed from what he learned at law school and from his own personal experience. Third, LT B hoped to become a criminal prosecutor, but that didn't influence him or bias him toward the prosecution. He stated that the accused had to be proven guilty beyond a reasonable doubt. Fourth, LT B's father is in law enforcement and LT B had a healthy respect for law enforcement personnel. However, he would follow the military judge's instruction to use the same factors when weighing the credibility of a Naval Criminal Investigative Service (NCIS) Agent as he would any other witness. Fifth, LT B had high respect for military defense counsel because they were officers and therefore had high ethics and morals. LT B had less respect for defense counsel depicted on television and those out in the civilian world. Record at 216-38.

The appellant challenged for cause two officers, including LT B. *Id.* at 316. The military judge granted the challenge against the other officer and denied the challenge against LT B. *Id.* at 320. In doing so, the military judge stated that he found LT B to be extremely genuine and sincere in his responses and that LT B made it clear that he would listen to all evidence, that he did not have a bias toward one side or the other, that he understood the presumption of innocence and the burden of proof, and that he was legitimately sincere and serious about his role at appellant's court-martial. *Id.* at 320-21. After the military judge denied the challenge against LT B, the appellant used his peremptory challenge against another member. *Id.* at 323.

1. The Law

An accused is entitled to a trial by members who are qualified, properly selected, and impartial. Art. 25, UCMJ. RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) provides a basis for challenge of a court member whenever it appears that the member should not participate in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." This rule includes challenges for actual bias as well as implied bias. *United States v. Moreno*, 63 M.J. 129, 133 (C.A.A.F. 2006)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)).

Military judges are enjoined to be liberal in granting challenges for cause. *Moreno*, 63 M.J. at 134. We review rulings

on challenges for cause for abuse of discretion. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). On questions of actual bias, we give the military judge great deference because we recognize that he has observed the demeanor of the participants in the *voir dire* and challenge process. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000)(citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). This is because a challenge for cause for actual bias is essentially one of credibility. *United States v. Miles*, 58 M.J. 192, 194-95 (C.A.A.F. 2003). This court, however, gives less deference to the military judge when reviewing a finding on implied bias, because it is objectively viewed through the eyes of the public. *Moreno*, 63 M.J. at 134; *Napolitano*, 53 M.J. at 166. We, therefore, apply an objective standard when reviewing the judge's decision regarding implied bias. *Miles*, 58 M.J. at 195.

Actual bias and implied bias are separate tests, but not separate grounds for a challenge. *Miles*, 58 M.J. at 194. The first prong of the implied bias test is objective, viewed through the eyes of the public, and focuses on the perception or appearance of fairness in the military justice system. *Moreno*, 63 M.J. at 134; *Strand*, 59 M.J. at 458. The second prong of the implied bias test asks whether, despite a disclaimer of bias, most people in the same position as the challenged member would be prejudiced.² *Napolitano*, 53 M.J. at 167. If there is too high a risk the public will perceive that an accused received less than a court composed of fair, impartial, and equal members, our superior court has not hesitated to set aside the affected findings and/or sentence. See *United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 135; *United States v. Weisen*, 56 M.J. 172, 176-177 (C.A.A.F. 2001). However, when there is no actual bias, implied bias should be invoked rarely. *Strand*, 59 M.J. at 458.

2. Actual Bias

The military judge did not err in finding that LT B was not actually biased against appellant or his defense counsel. LT B admitted that he held police officers in high esteem that he wanted to be a prosecutor after completing law school, and that he accorded defense attorneys who appeared on television less respect than military defense attorneys. The entire record of his group and individual *voir dire* responses, however, reflect an appropriate understanding and appreciation of his role, and the ability and willingness to remain impartial, listen to the evidence and to follow the military judge's instructions. Giving the military judge great deference because he observed LT B's demeanor during the *voir dire* and challenge process, we conclude

² This element of the implied bias analysis is one of actual bias. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006)(quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)).

the military judge did not abuse his discretion by denying the challenge based on actual bias.

3. Implied Bias

There is no implied bias in this case. When evaluating a claim of implied bias, we look to whether the public, made up of reasonable people, would perceive the court-martial proceedings to be unfair; and, whether, despite a disclaimer of bias, most people in the member's position would be actually biased. We consider a reasonable person to be one who does not bear a predisposed belief for or against the military justice system, and who draws their conclusions concerning bias and fairness from all the facts. To conclude otherwise, we would find implied bias in every case if viewed through the eyes of public citizens who have a predisposed dislike for the military. Likewise, we would never find implied bias if viewed through the eyes of public citizens who have a predisposed view that the military is infallible.

Looking through the eyes of these reasonable people, we conclude that the public would not question the fairness of this particular trial or the military justice system in general based on LT B's service as a member. To the contrary, we conclude that the public would be left with a very positive impression of those who sit as members and the fairness resulting from their participation in the military justice system. Additionally, we do not believe that an observer could reasonably question whether LT B could set aside his familial relationships, career plans, or lack of respect for television defense attorneys in order to give the appellant a fair trial and to impose a fair sentence. R.C.M. 912(f)(1)(N).

To find implied bias in this case, we would have to apply a *per se* disqualification rule based on (1) familial association with law enforcement; (2) knowledge of the law; and, (3) future plans to practice law as a prosecutor along with a lack of respect for civilian defense counsel. This would be contrary to current military and civilian law.³ Finally, LT B was not *per se* disqualified from serving as a member because he held less respect for television defense lawyers than military defense lawyers, because appellant was represented by military defense lawyers. There simply is no support for implied bias in the

³ See *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997)(law enforcement personnel and their spouses are not *per se* disqualified from sitting on courts-martial); *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)(peace officers are not disqualified from service as members of courts-martial as a matter of law); *United States v. Glaze*, 11 C.M.R. 168, 171-72 (C.M.A. 1953)("the presence of a lawyer as a member of the court is neither in violation of any act of Congress nor contrary to the ordinary concepts of justice."); *United States v. Carpintero*, 398 F.2d 488, 490 (1st Cir. 1968) (juror not disqualified even though he attended law school with one of the prosecutors and with the brother of the other prosecutor); *Daut v. United States*, 405 F.2d 312, 315 (9th Cir. 1968)("There is no prohibition against attorneys serving on jury panels in U.S. district courts").

record. We, therefore, conclude that the military judge did not abuse his discretion in denying the appellant's challenge for cause against LT B on grounds of implied bias. This assignment of error is without merit.

Member Misconduct

In his second assignment of error, the appellant asserts that the military judge erred by not declaring a mistrial when it was discovered that during the course of the appellant's court-martial, LT B consulted "outside legal treatises that directly pertained to appellant's case and possibly relied upon them during the deliberations," in violation of the military judge's instruction. Appellant's Brief at 7. The appellant alleges that this occurred when LT B studied such topics as homicide, manslaughter, and conspiracy in his criminal law class at night while the court-martial was still proceeding during the day. *Id.*

Just prior to the court-martial closing for deliberation on sentence, trial defense counsel notified the military judge of possible misconduct by LT B. Record at 1813-15. Trial defense counsel had contacted LT B's criminal law professor to ascertain the content of the course materials LT B was studying during the course of the trial. *Id.* The professor informed him that LT B was studying the law of conspiracy and homicide, the Model Penal Code, and that LT B had attended these classes. Trial defense counsel asserted that LT B's attendance at these classes during the pendency of the court-martial cast substantial doubt on the fairness of the proceedings, and moved for a mistrial. *Id.*

Based upon this disclosure, the military judge recalled LT B for further *voir dire*. *Id.* at 1817. LT B indicated that he had attended his criminal law class three times during the course of this trial. *Id.* at 1818. The subject matter of the three classes included homicide, manslaughter, and the defenses thereto. *Id.* He also studied accomplice liability, aiding and abetting, attempts, and conspiracy. *Id.* at 1818-19, 1837. LT B stated that his class had been studying from various sources of law, including the Model Penal Code, Virginia law, and common law. The Model Penal Code was included as part of his Criminal Law textbook. *Id.* at 1826-27. LT B admitted that he studied the materials and cases assigned for each lesson which were contained in his textbook and in the Model Penal Code. LT B admitted that (1) the matters were related to the subject of appellant's court-martial, but he denied looking up anything out of curiosity or for use in deliberating on the appellant's case, *Id.* at 1827-29; (2) that when he was studying Conspiracy and Homicide for law school, he would think back to this case since it was fresh on his mind, *Id.* at 1838-39; and, (3) that it is possible that he brought some general experience from the past two years of law school, and more specifically, from the past two weeks, into deliberations, but he denied that he brought any specific piece of material that he recalled from his criminal law class and introduced it into the deliberations. *Id.* at 1836-37, 1849-50.

LT B repeatedly stated that he followed the military judge's instructions on the law in deliberations, and did not substitute his understanding of a standard or of a law for the instructions. *Id.* at 1830-37, 1852-53. In fact, LT B stated that he was not aware of a difference or a disparity between the law that he studied and the instructions that he received from the military judge. *Id.* at 1831. He repeatedly stated that he did not use his school materials or what he learned in class to resolve any of the issues involved in the appellant's case. *Id.* at 1830-37, 1852-53. In addition, LT B stated that the members did not discuss the rule of law during deliberations and that he had discussed another area of the case that had nothing to do with the actual law itself. *Id.* at 1833-34. He admitted that there was a discussion during deliberations about the various standards that may apply, but he denied injecting any specific material gathered from his law school training into the deliberations. *Id.* at 1834-37.⁴

Trial defense counsel asked that the judge declare a complete mistrial, arguing that by attending criminal law classes and using his criminal law textbook to prepare for the classes and considering the issues involved in the case in the context of what he was studying at the time, LT B violated the military judge's instructions to not consult outside sources of law. Trial defense counsel argued that by doing so, LT B injected these outside sources of law into the case through his own judgment and also through his deliberations with the other members. *Id.* at 1860-63. The military judge denied the motion for mistrial, finding that LT B did not commit misconduct, and that no manifest injustice would result. *Id.* at 1870-71.

In denying the motion, the military judge entered findings of fact, including the following:

7. During both preliminary *voir dire* and during the extensive *voir dire* conducted in association with this Motion for Mistrial, the Court found Lieutenant B[] to be completely open, honest, earnest, and sincere in all of his responses.

. . . .

9. Lieutenant B[] did not research matters concerning this general court-martial in any legal publication, including the Model Penal Code - including the charges alleged, evidentiary issues addressed, factual matters involved, defenses asserted, etc.

10. Lieutenant B[] did not discuss with his professor or with his classmates the specific substantive matters involved with this court-martial

⁴ Following questioning, the military judge asked LT B to not attend his criminal law classes that night. Record at 1857.

11. Any and all readings and research lieutenant B[] did during the course of this trial related solely to his law school assignments, and not to the matters being specifically addressed by this court-martial Lieutenant B[] relied solely upon the instructions given by the military judge as to the law he applied in arriving at his findings in this case, and did not deviate from such.

12. Lieutenant B[] did not inject into the court-martial deliberations the specific subject matter of his law school studies, his opinions in relation thereto, or any other improper matter.

13. Lieutenant B[] followed the military judges (sic) often repeated instruction "not to consult any source, written or otherwise, as to the legal and factual matters involved in this case."

. . . .

Appellate Exhibit LIII (emphasis in the original).

R.C.M. 915(a) provides that as a matter of discretion, a military judge may declare a mistrial when such an action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. Declaration of a mistrial is a drastic remedy, however, and such relief should be granted only to prevent a manifest injustice against an accused. *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)(quoting *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). The trial judge's discretionary decision not to declare a mistrial will not be disturbed absent clear abuse of that discretion. *Id.*

The military judge's findings of fact are clearly supported by the record and therefore are not erroneous, and we adopt them as our own. Therefore, we conclude that: (1) LT B did not violate the judge's instructions; (2) LT B did not consult outside legal materials in specific reference to the issues involved in this trial; (3) LT B did not inject matters from his criminal law studies into the deliberations; (4) LT B adhered to the military judge's instructions; and, (5) that no impropriety occurred.⁵ A mistrial was not manifestly necessary in this case

⁵ The appellate defense counsel asserts that LT B could be subject to criminal charges for his behavior. Appellant's Brief at 10, fn 59. The Rules of Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General (JAG Instruction 5803.1C) require that an attorney have a good faith basis for making a claim in a proceeding. See Rule 3.1, JAGINST 5803.1C. We find it wholly improper of appellate defense counsel to suggest that LT B committed criminal misconduct without a good faith basis for such an accusation. When viewed in light of the evidence of record, this accusation of criminal conduct is frivolous and could not be

and therefore, we conclude that the military judge did not abuse his discretion in denying the motion for mistrial.

**Post-Trial Developments
Regarding Expert Witness**

For his third assignment of error, the appellant claims that he is entitled to a fact-finding hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), in order to determine whether the United States Army Criminal Investigation Laboratory (USACIL) forensic firearms and tool marks examiner utilized in appellant's case properly tested the 36 items that were submitted by the Government for identification. The appellant's Brief at 12. The appellant asserts that this further fact-finding is necessary in light of newly discovered evidence that the examiner committed misconduct in another case. *Id.*

At the appellant's trial, Mr. Michael E. Brooks of USACIL was qualified as an expert in forensic firearms and tool mark examination. He examined 36 items of evidence received from the NCIS, including appellant's 9mm DAC handgun, and the victim's 9mm Bryco handgun, along with magazines, bullets and cartridge cases. Mr. Brooks testified that the bullet fragments recovered from the victim's leg, the bullet fragments recovered from the vehicle the victim was riding in, and the bullet fragments recovered from the store front adjacent to the vehicle, all matched the appellant's 9mm handgun. Mr. Brooks also testified that none of the cartridge cases or bullets recovered matched the victim's 9mm handgun.

The Government presented the testimony of witnesses who were present during the shooting. DN Taylor, DN Malone and the victim, DN Thurmond, all stated that shots were fired on them from the front and rear passenger seats of the appellant's vehicle. A passenger in the appellant's vehicle, Seaman (SN) Bradley, confirmed this information, stating that the appellant was seated behind him, that he heard shots fired from the window behind him, and that he then fired on the car the victim was riding in. SN Bradley testified that there were no threatening gestures from the victim's car that provoked the shooting, and the occupants of the victim's vehicle stated that their car windows were up at all times.

The Government also presented the testimony of Mr. James D. Garcia, a forensic chemist in the Trace Evidence Division of USACIL, who testified that gunshot residue was detected on the samples taken from the passenger side front door and seat, as well as the rear seat and door of the appellant's vehicle. The results of the test were consistent with the evidence presented

made in good faith. If this was a federal civil proceeding, this claim could be considered a violation of Federal Rules of Civil Procedure Rule 11, for which sanctions could be levied against appellate defense counsel.

that the appellant and SN Bradley fired their handguns from the front and rear passenger seats. No gunshot residue was detected on the samples taken from the victim's vehicle.

Two years after the appellant's trial, USACIL issued a memorandum to all staff judge advocates concerning administrative action taken against Mr. Brooks. The Memorandum stated that an administrative inquiry into an allegation of misconduct by Mr. Brooks showed that he erred in the interpretation of gun shot patterns, and also tampered with public records and made false allegations regarding their loss and destruction, all in the same case. USACIL Memorandum dated 8 May 2006 at 2.

In reviewing the findings and sentence in the appellant's case in light of the newly discovered evidence regarding post-trial misconduct by one of the forensic examiners who worked on the appellant's case, we must decide whether the results of trial are reliable in view of the newly discovered evidence. *United States v. Luke*, 63 M.J. 60, 63 (C.A.A.F. 2006)(citing *United States v. Murphy*, 50 M.J. 4, 15-16 (C.A.A.F. 1998)). We find that the results of trial in this case are reliable and that the appellant has not demonstrated that there are material questions of fact that could give rise to relief in this case.

Contrary to appellant's argument, this case is not analogous to *Luke*. There, the forensic DNA examiner engaged in misconduct in at least six cases over a two and one-half year period. The misconduct involved misrepresentations that the expert had examined evidence when he had not, made false data entries, and conducted deficient DNA analysis. The DNA testing was crucial to the Government's case and in corroborating the victim's testimony. Our superior court determined that there were material questions of fact that could give rise to relief and that further inquiry was necessary. *Id.* at 62. In this case, however, we conclude that there are no material questions of fact. The new evidence of Mr. Brooks' misconduct regarding gunshot pattern interpretation does not implicate his work in firearms and tool mark analysis conducted in this case, years earlier. Moreover, Mr. Brooks' testimony was not crucial to the Government's case. In light of the overwhelming evidence of the appellant's guilt, we find that a different verdict would not have reasonably resulted as to the findings. Similarly, this case does not present the compelling circumstances that were present in *Murphy*. Unlike in *Murphy*, this is a non-capital case, and the challenged evidence does not rise to the level of a defense, as does evidence of lack of mental responsibility.

Mr. Brooks testified as an expert in forensic firearms and tool mark examination. His conclusions were based upon his examination and firing of the appellant's handgun, his examination of the victim's handgun, and the comparison of the bullets to the recovered bullet fragments. When viewed in light of the overwhelming evidence presented by the Government that the

appellant fired his handgun at the vehicle in which the victim and two others were riding, Mr. Brooks' testimony was cumulative and of little value. Quite simply, all the essential elements of attempted unpremeditated murder and reckless endangerment were established without Mr. Brooks' testimony. His analysis did not include any bullet fragments found in the appellant's car because none were found. A different USACIL examiner was involved in the gun powder residue analysis of both vehicles. Therefore, Mr. Brooks' analysis had nothing to do with the appellant's claim that the victim fired on him first. The bottom line is that a different verdict as to findings would not reasonably result even if Mr. Brooks never testified. Therefore, there is no prejudice to the appellant and a fact-finding hearing is not warranted.

Unreasonable Multiplication of Charges

For his fourth assignment of error, the appellant claims that charging the attempted murder of DN Thurmond by discharging a firearm at him, and also charging reckless endangerment of DN Thurmond by discharging a firearm into the car in which he was riding, is an unreasonable multiplication of charges. We agree, and we will take corrective action in our decretal paragraph.

The doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." See *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). To resolve claims of an unreasonable multiplication of charges, we look at (1) whether the appellant objected to proceeding on charges at trial based on an unreasonable multiplication of charges theory; (2) whether the specifications are aimed at distinctly separate criminal acts; (3) whether the charges misrepresent or exaggerate the appellant's criminality; (4) whether the charges unreasonably increase an appellant's exposure to punishment; and, (5) whether the charges suggest prosecutorial abuse of discretion in the drafting of the specifications. By weighing all of these factors together, we are able to determine whether the charges are unreasonably multiplied. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). While conducting our *Quiroz* analysis, we are also mindful that "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4), Discussion.

The appellant was charged with attempted premeditated murder of DN Thurmond in the sole specification under Charge I. The *actus reas* was the "discharge of a loaded firearm" at DN Thurmond. Charge Sheet. The appellant was also charged with reckless endangerment toward DN Thurmond and two other people in the same car, in the sole specification under Charge III. The *actus reas* was "discharging a loaded firearm at a vehicle" in which all three named victims were riding. *Id.* The record shows the act charged as attempted murder of DN Thurmond in the sole

specification under Charge I is the identical act charged as reckless endangerment in the sole specification under Charge III.

Our *Quiroz* analysis shows that the appellant failed to raise an objection to these charges at trial. Although the failure to object is not dispositive of our analysis as to the challenged offense, it can significantly weaken the appellant's claim on appeal. *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000), *set aside and remanded on other grounds*, 55 M.J. 334 (C.A.A.F. 2001). As to the second and third *Quiroz* factors, we are convinced that the attempted murder of DN Thurmond and the reckless endangerment of DN Thurmond are aimed at identical criminal conduct and that, separately charged, unreasonably exaggerate the appellant's misconduct as to that victim, but not as to the other two occupants of the car in which DN Thurmond was riding. As to the fourth *Quiroz* factor, we note that the appellant's punitive exposure was not increased, because life without eligibility for parole was the maximum authorized punishment for the attempted murder charge. The final factor, prosecutorial overreaching in the charging, is not apparent from a review of the charge sheet, and it appears that the manner of charging was selected for contingencies of proof. See Record at 16.

We are satisfied that, on balance, our *Quiroz* analysis favors a finding of unreasonable multiplication of charges as to the offenses of attempted murder of DN Thurmond and the reckless endangerment of DN Thurmond by discharging a firearm into the car DN Thurmond was riding. Under the facts of this case, we hold that excepting DN Thurmond from the sole specification under Charge III as a named victim is required. We will take corrective action in our decretal paragraph by excepting the language "Dentalman Willie E. Thurmond, U.S. Navy" from the specification under Charge III. Otherwise, this assignment of error is without merit.

Conclusion

The sole specification under Charge III is amended to read as follows:

In that Master-at-Arms Second Class (Surface Warfare/Air Warfare) Laprie D. Townsend, U.S. Navy, Naval Amphibious Base Little Creek, Regional Security, Naval Amphibious Base Little Creek Precinct, Virginia Beach, Virginia, on active duty, did, at or near the Hampton Roads Area, Virginia, on or about 2 October 2003, wrongfully and recklessly engage in conduct, to wit: discharging a loaded firearm at a vehicle containing Dentalman Roderick M. Malone, U.S. Navy, and

Dentalman Deandre Taylor, U.S. Navy, and other acts and that the accused's conduct was likely to cause death or serious bodily harm to Dentalman Roderick M. Malone, U.S. Navy, and Dentalman Deandre Taylor, U.S. Navy.

The findings, as amended, and the sentence as approved below are affirmed. The findings of this court do not require that the sentence be reassessed. We direct that the supplemental court-martial order reflect this court's action.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court