

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ARCHIE L. O'NEIL, Jr.
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**NMCCA 200602504
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 June 2005.

Military Judge: CAPT Keith Allred, JAGC, USN.

Convening Authority: Commanding General, Marine Corps Base,
Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col W.D. Durrett, Jr.

For Appellant: LT Brian Mizer, JAGC, USN.

For Appellee: Capt Roger Mattioli, USMC.

19 June 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Senior Judge:

A general court-martial composed of members, with enlisted representation, convicted the appellant, contrary to his pleas, of two specifications of violating a lawful general order,¹ premeditated murder, adultery, and unlawfully carrying a concealed weapon in violation of Articles 92, 118, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 918, and 934. After a mistrial on sentencing, the convening authority ordered a rehearing on sentence, at which the appellant was sentenced to

¹ U.S. Central Command (CENTCOM) General Order #1A, dated 19 December 2000 (by wrongfully introducing a privately owned firearm into the CENTCOM Area of Operations) and Marine Corps Base Camp Pendleton Base Order P5000.2J, dated 30 April 2002 (by wrongfully failing to register a .45 pistol).

confinement for life without possibility of parole, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's twelve assignments of error (AOE)² and his brief in support

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I. Whether the military judge abused his discretion when he failed to suppress statements given to NCIS as required by M.R.E. 304(a), 305(d), and the Fifth Amendment.

II. Whether appellant received ineffective assistance of counsel when his three defense counsel withdrew from his case one month before his contested trial for premeditated murder.

III. Whether the military judge abused his discretion when he denied appellant's request for continuance.

IV. [Whether] the military judge abused his discretion when he declined to disqualify himself after stating his personal belief that appellant was manipulating his trial by firing attorneys.

V. Whether appellant was denied his Sixth Amendment right to compulsory process for obtaining witnesses and his Fifth Amendment right to present the testimony of such witnesses in his defense when the military judge denied a defense motion to compel the production of three witnesses who would testify to [the victim's] aggressive character.

VI. Whether the military judge abused his discretion by admitting into evidence, over defense objection, photographs of [the victim's] body and the bloody clothing she was wearing when she was killed, where the prejudicial impact of the evidence outweighed its probative value.

VII. Whether appellant was deprived of his Fifth Amendment right against self incrimination when the prosecutor argued to the members that appellant's incriminating statement to NCIS was undisputed.

VIII. Whether appellant was denied due process and the right to be sentenced by members when the military judge rejected the panel's nullification of the mandatory minimum sentence of life in prison with possibility of parole and sentenced appellant to thirty years confinement.

IX. Whether the military judge failed to adhere to the liberal grant mandate when he denied a defense challenge for cause against Captain [M], who was getting his masters degree in forensic science, wanted to work in a crime lab in the future, had been the victim of adultery, did not support jury nullification, and had been sexually assaulted by a male officer and believed that the officer's sentence was too light.

X. Whether the military judge failed to adhere to the liberal grant mandate when he denied a defense challenge for cause against Captain [C], who expressed his belief that PTSD was being abused by malingerers and that many criminals were never punished for their crimes.

XI. Whether appellant was denied due process by a suggestive photo lineup that led to in-court testimony placing him near the scene of the crime shortly after [the victim's] murder.

XII. Whether the military judge erred when he allowed [the victim's] sister to recommend that the members sentence appellant to confinement for life without possibility of parole.

thereof, the Government's Answer, the appellant's Reply, and the appellant's sworn declaration of 14 December 2007. We conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.³

I. FACTUAL AND PROCEDURAL HISTORY OF THE CASE

On the evening of 29 February 2004, at Deer Park on board Camp Pendleton, California, [KO] was shot multiple times and died of her wounds.

The appellant met KO and her husband at Camp Pendleton in September 2002. Prosecution Exhibit 4 at 2. By January 2003, when the appellant deployed to Iraq as part of OPERATION IRAQI FREEDOM, the appellant and KO were engaged in an adulterous affair. PE 55, Defense Exhibit KK. This relationship continued once the appellant returned from Iraq in July 2003. Appellate Exhibit CCXLIV at 1.

By all accounts, the appellant returned from Iraq a changed man. He became paranoid, emotional, irritable and moody. Record at 1763, 1814, 1866. He began to drink alcohol alone in his garage. *Id.* at 1763-64. He seemed unable to make simple decisions such as what to wear or eat. *Id.* at 1764. He started to carry a firearm with him everywhere. *Id.* at 1765-68, 1788. He would sleep with a gun under the bed. *Id.* at 1765. At trial, a forensic psychiatrist testified that the appellant suffered from post-traumatic stress disorder, triggered by his experiences in Iraq.⁴ *Id.* at 1723-25.

Between September 2003 and January 2004, the appellant asked one acquaintance on various occasions if he could obtain a "throw down" gun that "didn't drop shells," *id.* at 1457-58, and asked another if he could get the appellant a weapon without serial numbers. *Id.* at 1602. Around January 2004, the appellant bought a black Heckler and Koch (H&K) .45 pistol from another Marine. *Id.* at 1606-08. He did not register the pistol with base security, as required by a base order.⁵ *Id.* at 1328-40.

Shortly after the appellant returned from Iraq, KO alleged her husband and the appellant's wife were having an affair.⁶ *Id.*

³ The appellant's motion for oral argument on AOE's I, II and VII, filed 18 Sep 2007, is hereby denied.

⁴ The psychiatrist also testified that the appellant suffers from a personality disorder, not otherwise specified, with borderline & narcissistic traits. Record at 1723.

⁵ The appellant resided on board Camp Pendleton and possessed the pistol on base.

⁶ There is no evidence that these allegations were true, and the defense argued that in fact they were an invention of KO to make the appellant jealous and provoke the break up of his marriage.

at 1652. Subsequently, KO made harassing telephone calls to Mrs. O'Neil's work, and on several occasions drove by her home and workplace. *Id.* at 1772-75. Mrs. O'Neil testified that, on another occasion, KO attempted to hit her with a car as she was mailing a letter. *Id.* at 1775. KO attempted to get Mrs. O'Neil fired from her job, *id.* at 1773, and aggressively confronted some of Mrs. O'Neil's co-workers about the alleged affair between Mrs. O'Neil and KO's husband. *Id.* at 1773-75. Throughout this time, the appellant and KO secretly continued their adulterous relationship. PE 4 at 3.

The appellant was scheduled to deploy to Iraq again in the early morning hours of 1 March 2004. On the evening of 29 February, after spending the day with his family, the appellant arranged to meet KO by a barracks at Camp Horno on board Camp Pendleton. *Id.* He told his wife he had to notify a Marine of his grandmother's passing. *Id.*; Record at 1781-82. The appellant brought his H&K .45 pistol with him in a ditty bag. Upon arriving at the barracks, the appellant put the pistol in his waistband so it could not be seen. PE 4 at 3.

After meeting KO by the barracks, and engaging in both fellatio and sexual intercourse with her in the parking lot, the appellant and KO drove to nearby Deer Park in KO's car. Once at Deer Park, the two again engaged in sexual intercourse. Before having sex with KO, the appellant dropped his pistol in the grass nearby, so KO would not see it. *Id.* at 4. After a while, the appellant used a nearby portable toilet. As he got up to go to the toilet, he picked up the pistol, and concealed it in his waistband. *Id.* at 4-5.

In his statement to agents of the Naval Criminal Investigative Service (NCIS), the appellant claimed that, when he came out of the toilet, KO threatened his family, saying "You're just like the rest of them dumb, stupid, mother-fxxxxxxx. I can't wait to kill your bitch and your bastard-ass son." *Id.* at 5. The appellant told the NCIS agents that, upon hearing that threat, he "just lost it and pulled out [his] gun and shot her at least three times." *Id.*; Record at 1051.

Members of the nearby Regimental Guard heard the gunshots, and responded to the scene. Record at 1129-30. The appellant fled when he heard people approaching. PE 4 at 5. Paramedics arrived at the scene shortly after, but were unsuccessful at saving KO's life. Record at 1140-45. KO died at the scene. *Id.* at 1145. She had suffered 11 gunshot wounds, including ones to the brain, the abdomen, both the left and right legs (one of which opened the femoral artery), and the left upper arm, which injured the brachial artery. PE 10 at 1-2.

Meanwhile, shortly after the shooting, three people in a car driving on nearby Basilone Road were flagged down by a man who said his name was Staff Sergeant (SSgt) Nichols. He asked to be driven to the Camp Horno Staff NCO barracks. *Id.* at 1164-67; PE

4 at 5. Two of the three occupants of the car later identified the appellant from a photographic array as the man they picked up that night. Record at 1160-85; 1186-99. As well, the back seat of the car, where "SSgt Nichols" sat, later tested positive for gunshot residue. *Id.* at 1391-94, 1553.

At the barracks, the appellant went to inform one of his Marines of his grandmother's death. PE 4 at 6. While at the barracks, the appellant asked Corporal (Cpl) N. Johnson, USMC, to hold his H&K .45 pistol, saying he was upset about something and did not want to do anything stupid. Record at 1241. A few hours later, before leaving for Kuwait, the appellant retrieved the weapon from Cpl Johnson, and put it in his sea bag, which was subsequently loaded on an airplane with the rest of the unit's equipment for transport to Kuwait. *Id.* at 1243-46; PE 4 at 7-8. The appellant disposed of the weapon in Kuwait. PE 4 at 8.

Based on a tip KO had been having an affair with a Marine named "Archie," NCIS focused their attention on the appellant. Record at 1032-33. By that point, the appellant was already in Kuwait with his unit, awaiting movement into Iraq. *Id.* at 1033. NCIS agents immediately flew to Kuwait to question the appellant. Over the course of five days, the appellant made a series of statements in which he confessed to shooting KO. *Id.* at 1034-1123; PE 1, 2, 3 and 4.

Court-martial proceedings in this case began on 4 October 2004, with the initial Article 39(a), UCMJ, session. Record at 1. At that time, the appellant was represented by Captain (Capt) J. Woodmansee, USMCR, Capt M. Awad, USMC, and Mr. Thomas Watt. *Id.* at 3. On 7 March 2005, after three defense continuances, and with trial set to begin on 24 March, the appellant released Capt Awad. Record at 338-39; AE CXXII. After the Government expressed concern that the appellant might seek to delay trial further due to Capt Awad's release, the judge said "it would not be appropriate to use [the dismissal of Capt Awad] as the sole means of trying to gain [a] future continuance." Record at 339. Nevertheless, that same day, for reasons unrelated to Capt Awad's release, the judge granted the defense a fourth continuance until 6 May 2005. *Id.* at 353. Following the 7 March session of court, Colonel R. S. Chester, USMC, replaced Lieutenant Colonel S. Immel, USMC, as the presiding judge. *Id.* at 356. Additionally, Capt Schotemeyer, USMC, was detailed to replace Capt Awad. *Id.* at 356.

On 30 March, the judge held an *ex parte* hearing at the request of the appellant's defense counsel. *Id.* at 359. Counsel informed the judge they had an irreconcilable conflict with the appellant over the issue of his potential testimony. AE CXXXIII at 2. The judge indicated he was not inclined to allow counsel to withdraw. *Id.* at 3. After a recess to permit the appellant to confer with counsel, the appellant told the judge he wished to release all three of his counsel. He told the judge communication had broken down and he did not trust counsel. *Id.*

at 4. The judge advised the appellant that replacing counsel would not be a basis to further continue the case. *Id.* at 4-5, 7, 9. The appellant indicated he understood, but nevertheless wanted to replace counsel. *Id.* at 5, 7. After determining that Capt M. J. Studenka, USMC, would be assigned as Individual Military Counsel (IMC), and ordering the current defense team to remain on the case until Capt Studenka had relieved them, the judge granted the appellant's request to release counsel. *Id.* at 10; Record at 364. Subsequently, Major Francis, USMC, detailed himself to the case as assistant defense counsel. *Id.* at 363.

Not surprisingly, on 12 April 2005, Capt Studenka moved for a continuance until August 2005, in order to permit him to prepare for trial. AE CXXVI; Record at 377. That request was the appellant's fifth continuance request. The judge established that Capt Studenka had no other assigned duties, and that both Maj Francis and Capt Studenka were experienced criminal litigators. *Id.* at 380-81. The judge refused to continue the case until August but, despite his earlier warnings that the need of new counsel for time to prepare would not be adequate basis for further delay, did continue the case until 26 May 2005. *Id.* at 382.

After convicting the appellant and deliberating on sentence, the members informed the judge they had reached a sentence. Record at 2102. The judge then examined the sentencing worksheet. Although never announced in open court, the worksheet reflected a sentence of 30 years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. AE CCLVIII. After consulting with counsel at an Article 39(a) session, the judge informed the members the sentence they had proposed was not authorized, as the mandatory minimum sentence was confinement for life. He then instructed the members to continue deliberating. Record at 2104. After about ten minutes, the members returned, and the senior member informed the judge that the members could not arrive at the required concurrence on the mandatory minimum sentence, as they believed it to be "too harsh." *Id.* at 2105. At that point, the judge declared a mistrial on sentencing. *Id.*

Subsequently, the convening authority directed a rehearing on sentence before a new panel of members. *Id.* at 2206. That panel sentenced the appellant to life without possibility of parole, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. *Id.* at 3298.

II. DISCUSSION

A. Ineffective Assistance of Counsel, Denial of Continuance, and Disqualification of the Military Judge (AOEs II, III & IV)

The appellant contends he received ineffective assistance of counsel when Mr. Watt, Capt Woodmansee, and Capt Schotemeyer improperly sought to withdraw, and the judge thereafter

erroneously permitted the appellant to release them, approximately one month before trial was scheduled to begin.⁷ He further argues the judge abused his discretion by refusing to continue the case to allow the appellant's new defense counsel to prepare for trial, and by not disqualifying himself after expressing the view the appellant was manipulating the trial by firing attorneys. We disagree.

1. Ineffective Assistance of Counsel (AOE II)

To prevail on a claim of ineffective assistance of counsel, the appellant must show: (1) a deficiency in counsel's performance "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the "deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See also *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

Apart from his allegations concerning the propriety of his counsel's release, the appellant makes no effort to demonstrate how Maj Francis and Capt Studenka, who subsequently represented him at trial, were ineffective, or how any ineffectiveness on their part prejudiced him. Our own examination of the record reveals no basis to conclude the appellant's representation was ineffective.

While Maj Francis and Capt Studenka clearly desired more time to prepare, they were not constitutionally ineffective. They presented a plausible and tactically sound theory of the case. They called and professionally questioned 14 defense witnesses on the merits, including an expert forensic psychiatrist. They introduced various stipulations of fact and expected testimony, and a multitude of exhibits. They requested and obtained a site visit to the crime scene by the court-martial. They skillfully cross-examined 28 Government witnesses on the merits, and filed 10 pretrial motions, including motions to reconsider earlier rulings, and a motion to disqualify the military judge.

The crucial issue was the appellant's state of mind when he killed KO -- did he premeditate or act in response to justifiable

⁷ In addition to his brief, the appellant also submitted a sworn declaration in which he disputes various factual statements made by his counsel in a memorandum for the record that they filed, under seal, at the direction of the military judge, setting out the basis for their conflict with the appellant and the steps they had taken to resolve that conflict. We conclude it is unnecessary to resolve the factual conflicts between these two statements, as the assignment of error is resolved by examining the quality of assistance the appellant ultimately received from Major Francis and Capt Studenka, regardless of whether or not the judge should have allowed the appellant to release his prior defense counsel.

provocation? The Government presented strong circumstantial evidence the appellant premeditated. The defense presented evidence calculated to raise doubt about premeditation and suggest the appellant might have shot KO without reflection, in response to a threat against his family. That evidence was competently presented and argued. The appellant has completely failed to demonstrate that his counsel were deficient or that the late change of counsel prejudiced him.

2. Denial of Continuance (AOE III)

Trial judges possess broad discretion to grant or deny continuances, *Morris v. Slappy*, 461 U.S. 1, 11 (1983), and we review the denial of a continuance for abuse of discretion. *United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004). A judge abuses his discretion if his rulings are "'clearly untenable'" and "'deprive a party of a substantial right such as to amount to a denial of justice.'" *United States v. Weisbeck*, 50 M.J. 461, 464 (C.A.A.F. 1999)(quoting *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997)). Only an unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay will result in reversal. *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003)(quoting *Morris*, 461 U.S. at 11-12). To determine whether a judge has abused his discretion, we use the twelve factors identified in *Miller*, 47 M.J. at 358. See also FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE, § 18-32.00 at 164 (2d ed. 1999).

Considering these factors in light of the record in this case, we conclude the judge did not abuse his discretion in refusing to continue this case from 6 May until August 2005. The judge had granted four previous defense continuance requests, postponing the trial over five months from the originally scheduled trial date of 22 November 2004⁸ until 6 May 2005. No surprise necessitated the continuance from 6 May until August 2005. Indeed, at the *ex parte* session on 30 March, the judge foresaw the likelihood that substitute counsel would want a continuance, and explicitly warned the appellant he would not grant such a request. Nevertheless, the appellant made a knowing and informed decision to release his counsel and seek substitute counsel.

Further, the appellant sought a lengthy continuance of roughly three months, which the judge found would prejudice the Government, both because it would result in the loss of the lead prosecutor, and because of the risk that war casualties in the intervening months could deprive the Government of witnesses.⁹ Record at 537-39. While it is true that trial counsel are

⁸ This was the date originally set to begin seating the members.

⁹ During its case in chief, the Government presented the testimony of eight active duty Marines.

"fungible," *United States v. Royster*, 42 M.J. 488, 490 (C.A.A.F. 1995), it is also true that, in this case, loss of the Government's lead prosecutor would have prejudicially impacted the presentation of the Government's case, and it was appropriate for the judge to consider that prejudice.

Finally, the judge properly considered that the appellant was not acting in good faith. Our superior court has explicitly held that the moving party's good faith is a factor to consider in evaluating continuance requests. *Miller*, 47 M.J. at 358. While the judge was less than thorough in explaining to Capt Studenka and Maj Francis his reasons for concluding the appellant was not acting in good faith (given that the earlier *ex parte* hearing with the prior defense team had been sealed), the record as a whole, including the transcript of the sealed Article 39(a) session, supports that conclusion, and it is not clearly erroneous.

3. Disqualification of the Military Judge (AOE IV)

We also find the judge did not abuse his discretion by refusing to disqualify himself after stating his belief that the appellant was manipulating the trial by firing counsel.

A military judge shall disqualify himself if his impartiality might reasonably be questioned by an objective observer. *United States v. Lewis*, 63 M.J. 405, 414 (C.A.A.F. 2006). A military judge is equally obliged not to disqualify himself when there is no reasonable basis for doing so. *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000). The test is whether, taken as a whole, in the context of trial, the court-martial's legality, fairness or impartiality is put in doubt by the judge's actions. *United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001). We review a judge's decision on disqualification for abuse of discretion. *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000). There exists a strong presumption the judge is impartial, and the appellant must overcome a high hurdle to demonstrate the judge abused his discretion, especially when the alleged bias involved actions taken in conjunction with the judicial proceedings. *Quintanilla*, 56 M.J. at 44.

In ruling on the appellant's fifth continuance motion, the military judge properly considered his evaluation of the appellant's good faith. It is clear the judge based that evaluation on matters of record. Further, nothing in the record suggests to an objective observer that the judge displayed a "deep seated favoritism or antagonism" toward the appellant "that would make fair judgment impossible." *See Liteky v. United States*, 510 U.S. 540, 555 (1994). The judge correctly denied the motion to disqualify.

B. Failure to Suppress NCIS Statements (AOE I)

The appellant contends the judge abused his discretion by failing to suppress the appellant's statements to NCIS. The appellant argues that Prosecution Exhibits 1 through 4 should not have been admitted because, although the appellant was informed of his right to counsel under the Fifth Amendment and Article 31, UCMJ, he became confused by "supplemental advice" given to him by NCIS Special Agent G. A. Reid in response to questions about hiring a civilian attorney. We disagree.

We review the voluntariness of a confession *de novo* as a question of law. *United States v. Cuento*, 60 M.J. 106, 108 (C.A.A.F. 2004)(quoting *United States v. Bubonics*, 45 M.J. 93, 94-95 (C.A.A.F. 1996)). "When a military judge makes special findings of fact, they are the basis for our review of the question of voluntariness, unless clearly erroneous." *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999)(citing *United States v. Cottrill*, 45 M.J. 485, 488 (C.A.A.F. 1997)).

The judge in this case made specific findings. AE CCLXXIV; AE CCLXXV.¹⁰ Those findings are not clearly erroneous, and we adopt them. The judge found, *inter alia*, that the appellant had been advised of his rights under the Fifth Amendment and Article 31, UCMJ, a total of five times, and had waived those rights each time. He further found that on 8 March 2004, the appellant asked Special Agent Reid what would happen to him. Special Agent Reid explained that he would be charged. In response to a general question about hiring a civilian attorney, Special Agent Reid gave the appellant the names of two civilian counsel in the Camp Pendleton area known to handle military justice matters. Special Agent Reid then asked the appellant if he was requesting a lawyer and the appellant said he was not. The appellant subsequently agreed to meet with the NCIS agents again the next day. On each of three subsequent days, the appellant was advised of his rights, and waived those rights. AE CCLXXIV at 4-5. *See also* Record at 83-85.¹¹

We are convinced the brief discussion between the appellant and Special Agent Reid concerning what the appellant might expect

¹⁰ AE CCLXXIV is the initial ruling on the motion to suppress. After the change in military judges and counsel for the defense, the appellant moved to reconsider the earlier ruling denying his motion to suppress. The military judge granted reconsideration and again denied the motion. That ruling is AE CCLXXV.

¹¹ Special Agent Reid testified that "the gunnery sergeant said something to the effect of: Okay, so what happens now? It was kind of like, you know, Help me out here. What should I expect? So we started talking about, well, probably what's going to end up happening is you're gonna get charged with this, and you can get an attorney. You can get a civilian attorney. He asked something about, well, Who's out there? Or something like that, but like, you know, How do I get a civilian attorney? . . . And again, it was, are you asking -- you know, the same thing. Are you asking for an attorney? No, no, no. I just want to know what to expect. . . ." Record at 83.

in terms of obtaining counsel to defend him back at Camp Pendleton, once charged, did not mislead the appellant into believing he did not have the right to consult with counsel during the interrogation. In addition to the multiple times the appellant was advised of his Article 31(b) rights and his repeated waiver of those rights, Special Agent Reid explicitly asked the appellant if he wanted to consult with counsel and the appellant told him he did not. We find the appellant's statements to NCIS were voluntary, and therefore conclude the judge did not err in denying the appellant's motion to suppress.

C. IMPROPER ARGUMENT BY TRIAL COUNSEL (AOE VII)

The appellant argues that, during closing argument, the trial counsel impermissibly commented on the appellant's failure to testify, denying him his Fifth Amendment right to remain silent, by saying that certain facts were undisputed. We disagree.

Because the appellant did not object, this issue was forfeited, absent plain error. *United States v. Diffoot*, 54 M.J. 149, 151 (C.A.A.F. 2000); RULE FOR COURTS-MARTIAL 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). To prevail, the appellant must persuade the court that there was error, that the error was plain or obvious, and that it materially prejudiced his substantial rights. *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). Once the appellant meets his burden, the burden shifts to the Government to show that the constitutional error was harmless beyond a reasonable doubt. *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999).

"[A] trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005)(quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)). Comments that evidence is "unchallenged and undisputed," however, are not indirect comments on the accused's silence absent "other circumstances" that "so color the reference as to make the implication apparent." *United States v. Saint John*, 48 C.M.R. 312, 315 (C.M.A. 1974). A constitutional violation occurs only where the accused is the sole source capable of contradicting the Government's evidence, or where the jury would necessarily interpret trial counsel's argument as a comment on the accused's failure to testify. *United States v. Webb*, 38 M.J. 62, 66 (C.M.A. 1993). Further, the prosecution is not prohibited from making comments that constitute a fair response to claims made by the defense. *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001). To determine whether the trial counsel's statements constituted an impermissible reference to the appellant's right to remain silent, or were a fair response to the defense theory of the case, we must examine them in the context of the entire court-martial. *Carter*, 61 M.J. at 33; *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).

The appellant cites to six instances where the trial counsel told the members some fact was undisputed,¹² and argues that in each instance, only the appellant could have disputed the fact. Appellant's Brief of 15 Jun 2007 at 37. We conclude the trial counsel's comments were not erroneous. Further, even assuming, *arguendo*, they were erroneous, we find the error was not plain and obvious, and that the comments were harmless beyond a reasonable doubt. See *United States v. Dennis*, 39 M.J. 623, 625 (N.M.C.M.R. 1993) *aff'd*, 40 M.J. 305 (C.M.A. 1994)(summary disposition).

In context, the trial counsel's remarks did not call the members' attention to the fact the appellant had not testified, and did not constitute an improper comment on the accused's silence. Rather, they served merely to focus the issues in dispute by putting aside those issues that were essentially uncontested. Indeed, the appellant's counsel himself had told the members during opening statement that the appellant had been engaged in an adulterous relationship with KO and had arranged to meet her the night of her death. Most significantly, the defense counsel admitted during opening statement that the appellant had killed KO, saying, "[the appellant] shot and shot and shot and shot and shot" KO. Record at 1687-88. Further, the fact the appellant's counsel did not object, and the military judge did not take any corrective action *sua sponte*, support the conclusion that, in context, the trial counsel's arguments were neither meant *nor taken* as a comment on the appellant's silence.

The appellant also cites two occasions when the trial counsel argued the appellant had not disputed the accuracy of his confession to NCIS.¹³ While, in these two instances, the trial counsel's arguments drew indirect attention to the fact the appellant had not testified, the appellant invited that argument. During the testimony of the defense expert in forensic psychiatry, Lieutenant Commander (LCDR) G. F. Donovan, Medical Corps, USN, the defense elicited testimony that LCDR Donovan had reviewed the appellant's NCIS statements, had met with the appellant, and had discussed the events giving rise to the charges. LCDR Donovan also testified about the way stress and excitement can distort memory. The clear point of this latter testimony was to suggest the appellant's confession could not be relied upon for the details of precisely what transpired in Deer Park the night of 29 February 2004. By that line of attack, the defense sought to render the appellant's confession sufficiently

¹² That the appellant had an adulterous relationship with KO, record at 1930; that the appellant concealed the murder weapon from KO, *id.* at 1930-31; that the appellant took the murder weapon to Kuwait to dispose of it, *id.* at 1931; and that the appellant killed KO, *id.* Additionally, the trial counsel told the members "a lot of this evidence is not disputed," *id.* at 1931, and later again said, "it [the adulterous affair and the taking of the firearm [to Kuwait]] is undisputed." *Id.* at 1933.

¹³ Record at 1949-50.

unreliable to prevent its use by the Government to establish premeditation from the details of the event.

On cross-examination, the Government established that, during LCDR Donovan's discussions with the appellant, at no time had the appellant disputed the accuracy of his NCIS statement. Record at 1736. Clearly, this evidence was designed to undermine the defense argument that the statement could not be trusted in its details or sequence of events because the accused's memory was imperfect. In this context, the trial counsel's references during argument to the fact the appellant had not disputed the details of his confession were not comments on the accused's silence, but rather on the implausibility of his argument that stress and excitement rendered his memory of the precise details of the shooting and sequence of events unreliable.

D. Denial of Challenges for Cause (AOEs IX and X)

The appellant contends the judge erred by denying his challenges for cause against Capt [M] and Capt [C], both members of the panel convened for the rehearing on sentence. We disagree.

An accused is entitled to trial by impartial members, *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008), and may challenge any member when it appears the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). Members may be challenged for both actual and implied bias. *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). Implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced. *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000); *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999). Military judges are enjoined to liberally grant defense challenges for cause. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006).

A military judge's rulings on actual bias, which involve judgments regarding credibility, are reviewed for abuse of discretion and accorded great deference. *Clay*, 64 M.J. at 276. In light of the statements by both Capt M and Capt C that they could be fair and impartial, we conclude the military judge correctly found no actual bias.

Challenges for implied bias are viewed objectively, "through the eyes of the public, focusing on the appearance of fairness." *Id.* (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). "Although we review issues of implied bias for abuse of discretion, the objective nature of the inquiry dictates that we accord 'a somewhat less deferential standard'" *Townsend*, 65 M.J. at 463 (quoting *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000)). "A military judge who addresses implied bias by applying the liberal grant mandate on the record

will receive more deference on review than one that does not. 'We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law.'" *Clay*, 64 M.J. at 277 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). In this case, the military judge noted he had considered the liberal grant mandate in rejecting the appellant's challenges. Record at 2506.

1. Challenge to Capt M

The appellant challenged Capt M because: (1) he was working on a master's degree in forensic science; (2) he planned to seek post-Marine Corps employment in a forensic laboratory; (3) he had served as a reserve police officer for two years before coming on active duty; (4) his former wife had been unfaithful; (5) a chaplain had previously drugged him and taken nude photos of him; (6) he felt the chaplain's sentence had been too light; (7) he said that, while rehabilitation was possible, the real question for him was whether an accused should ever be returned to society; and (8) he believed that "jury nullification" was "a bad habit." Appellant's Brief at 42.

None of the reasons offered in support of the challenge, either alone or cumulatively, would result in the public perception that Capt M was not fair and impartial. Being or having been a police officer does not *per se* disqualify one from serving as a member. *Townsend*, 65 M.J. at 464. Capt M described no experience or attitude to suggest his prior service as a reserve police officer, years earlier, would affect his ability to be fair and impartial. Likewise, his interest in forensic science and his statement that he "wouldn't mind doing some type of work in a crime lab after retiring from the Marine Corps," Record at 2443, did not in any way suggest he could not be fair and impartial in the appellant's case.

Further, having been the victim of crime is not *per se* disqualifying. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). Capt M's statements during *voir dire* indicated he had not been traumatized by the incident with the chaplain, had never sought counseling concerning it, and was mostly "embarrassed." Record at 2452. While Capt M thought the chaplain's sentence¹⁴ was too light, he expressed general satisfaction with the judicial process in that case. He indicated no continuing rancor or emotional disturbance over the incident, and the circumstances of his victimization were distinct from the facts in the appellant's case.

Likewise, nothing about Capt M's experience of past spousal infidelity and divorce would suggest to the objective observer he could not be fair and impartial in the appellant's case. Not surprisingly, Capt M had not found the experience enjoyable. Nevertheless, his statements on *voir dire* indicated the

¹⁴ Five years confinement.

infidelity had occurred years earlier, and that he had moved on with his life, getting remarried and raising a family.

Nothing Capt M said during *voir dire* indicated he would not or could not keep an open mind about sentence and consider all admissible evidence. Finally, his disinclination to approve of jury nullification indicated nothing more than his commitment to follow the law as given to him by the judge. The challenge for cause against Capt M was properly denied.

2. Challenge to Capt C

The appellant alleges the judge erred by denying his challenge for cause against Capt C because Capt C believed PTSD is often abused by malingerers, and said he would consider punishment as his primary decision factor in sentencing. We conclude there is no objective reason to question Capt C's fairness and impartiality.

On *voir dire*, Capt C related a few personal experiences with Marines who had used PTSD as an excuse to get out of deployment or arduous duty. In one case, Capt C discovered facts proving false a subordinate's claims, which had formed the basis of a PTSD diagnosis. Nevertheless, Capt C also said he believed there was "ample medical proof that [PTSD] really exists." Record at 2462.

Further, Capt C's statement that punishment would be his primary decision factor in sentencing did not indicate an inelastic attitude. "Predisposition to impose some punishment is not automatically disqualifying. *United States v. Jefferson*, 44 M.J.312, 319 ([C.A.A.F.] 1996). 'The test is whether the member's attitude is of such a nature that [the member] will not yield to the evidence presented and the judge's instructions.'" *United States v. Rolle*, 53 M.J. 187, 191 (C.A.A.F. 2000)(quoting *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979)). While "an inflexible member is disqualified; a tough member is not." *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999). Capt C said he would consider factors beside punishment, including rehabilitative potential, and weigh the evidence. Record at 2463. Additionally, in this case, Capt C said that life, *with* possibility of parole, the mandatory minimum, was a realistic sentence he could consider. The military judge correctly denied the challenge against Capt C for implied bias.

E. Remaining AOE's

We find the remaining assignments of error (AOE's V, VI, VIII, XI and XII) to be without merit.

1. Denial of Right to Compulsory Process and to Present a Defense (AOE V)

In AOE V, the appellant contends he was denied his rights to compulsory process and to present a defense¹⁵ by the judge's refusal to order three witnesses produced to testify about KO's aggressive character. The defense proffered that each would describe an encounter with KO in which she acted aggressively. We review the judge's decision to deny the production of a witness for abuse of discretion. *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998); *United States v. Breeding*, 44 M.J. 345, 349 (C.A.A.F. 1996). First, the testimony of these witnesses was not relevant and necessary. The only issue to which these three encounters were relevant was the appellant's state of mind at the time of the shooting. Since, however, the appellant was not present at any of these encounters, and none of the three witnesses had told the appellant about them, their testimony was irrelevant to establishing his state of mind.¹⁶ Further, the judge's ruling did not deny the appellant the ability to present evidence of KO's aggressive character, which he did via other witnesses.

2. Autopsy Photographs and Victim's Clothing (AOE VI)

In AOE VI, the appellant contends the judge erred by admitting KO's bloody clothing and autopsy photographs of her body. The Government initially offered five photographs. The military judge sustained defense objections to two of the five, but admitted the remaining three photographs after conducting a MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) balancing test. Record at 1274.

Evidentiary rulings should not be disturbed absent an abuse of discretion. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). We will not overturn a judge's ruling unless it was "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(quoting *Miller*, 46 M.J. at 65). It is illegitimate to use photographs to inflame or shock the court-martial, *United States v. White*, 23 M.J. 84, 88 (C.M.A. 1986), and the danger of unfair prejudice must not substantially outweigh the probative value. MIL. R. EVID. 403. "[P]hotographs, although gruesome, are admissible if used to prove time of death, identity of the victim, or exact nature of wounds." *United States v. Gray*, 37 M.J. 730, 739 (A.C.M.R. 1992)(citing *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), *set aside and remanded on other grounds*, 36 M.J. 8 (C.A.A.F. 1992) and *United*

¹⁵ In violation of his Sixth and Fifth Amendment rights, respectively.

¹⁶ The appellant learned of these encounters from his wife, who testified both about the incidents and the fact she had told the appellant about them.

States v. Whitehead, 30 M.J. 1066 (A.C.M.R. 1990)), *aff'd*, 51 M.J. 1 (C.A.A.F. 1999).

We are convinced the judge correctly determined that the photographs were relevant and that their probative value outweighed the danger of unfair prejudice. Although the defense was willing to concede that KO died from gunshot wounds, the Government used the photographs to establish that KO was the person found by the first responders from the Regimental Guard, and to assist the medical examiner to explain KO's wounds. Record at 1133-34, 1265-70; PE 27. Further, we have examined the photographs in question and find that they are not so shocking as to inflame a panel of experienced Marine officers and senior enlisted.

The clothes KO was wearing the night she was murdered were also properly admitted. The defense presented evidence that it was cold enough that night to wear gloves -- to provide an innocent explanation for why the appellant wore gloves that night. The Government sought to counter that evidence by showing that KO's was wearing light-weight attire. Record at 1946. We are convinced that any danger of unfair prejudice did not substantially outweigh the probative value of this evidence. KO's clothing was properly admitted.

3. Suppression of Out-of-Court Identifications (AOE XI)

In AOE XI, the appellant contends he was denied due process when the judge denied his motion to suppress testimony from two witnesses that they had picked the appellant's photograph out of a photographic array. LCpl J. Basaldua, USMC, and Mrs. G. Anguiano each testified that, after examining an array of 12 photographs, they identified the appellant as the man they had picked up near Deer Park around the time of the shooting. We review the military judge's decision for abuse of discretion. *United States v. Rhodes*, 42 M.J. 287, 290 (C.A.A.F. 1995)(citing *United States v. Webb*, 38 M.J. 62, 67 (C.M.A. 1993)).

The court applies a two-prong test to determine if eyewitness identification evidence is admissible. First, was the identification unnecessarily suggestive? Second, if so, was it conducive to a substantial likelihood of misidentification? *Id.* (citations omitted). If the court finds the photographic array to have been unduly suggestive, it examines five factors to determine whether there was a substantial likelihood of misidentification: (1) the witness's opportunity to view the appellant at the time of the encounter; (2) the degree of attention the witness was paying; (3) the similarity between the witness's prior description and the actual appearance of the appellant; (4) the witness's level of certainty in making the identification; and (5) the lapse of time between the encounter and the identification. *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

We have examined the photographic array, as well as the relevant testimony concerning LCpl Basaldua's and Mrs. Anguiano's identification of the appellant. We are convinced the judge correctly determined that the photographic array was not unduly suggestive. The individuals in the array are all African-American males of appellant's general age, build and complexion. Furthermore, even if the array was unduly suggestive, we conclude it did not create a substantial likelihood of misidentification. The witnesses had a good opportunity to observe the appellant on 29 February, and were attentive to their odd passenger. The appellant resembles their descriptions of him, and both were very certain of their identifications. Most importantly, the appellant admitted to NCIS that a passing car picked him up on Basilone Road that night.

4. Jury Nullification (AOE VIII)

The appellant argues he was denied his Fifth Amendment right to due process and the right to be sentenced by members when the military judge rejected the members' nullification of the mandatory minimum sentence and declared a mistrial. He contends that to deny the appellant "the possibility of jury nullification would be to defeat the central purpose of the jury system," and that the military judge was "powerless to reject the well-established ability of members to arrive at a sentence contrary to law." Appellant's Brief at 41 (citing *United States v. Datcher*, 830 F.Supp. 411, 415 (M.D. Tenn. 1993)). We disagree.

In *United States v. Hardy*, 46 M.J. 67 (C.A.A.F. 1997), our superior court clearly said, "[i]n the sentencing area . . . jury nullification is impermissible when the Code provides for a mandatory minimum sentence," and that "any such sentence nullification would be subject to reconsideration or a rehearing." *Hardy*, 46 M.J. at 70. See also R.C.M. 1006(d)(6).¹⁷

5. Sentence Recommendation by Victim's Sister (AOE XII)

In AOE XII, the appellant contends the judge erred by allowing KO's sister to recommend the members sentence the appellant to life without possibility of parole.¹⁸ Because the appellant did not object at trial, he forfeited the issue absent plain error. *Powell*, 49 M.J. at 465. We conclude the witness's

¹⁷ Nor does *United States v. Shroeder*, 27 M.J. 87, 90 (C.M.A. 1988), relied on by the appellant, dictate a contrary result. In *Shroeder*, the Court of Appeals for the Armed Forces simply noted the reality that, since even in cases with a mandatory minimum sentence the members have to vote on sentence, members could refuse to vote for the mandatory minimum. *Shroeder* did not, however, hold that members have a right to impose a sentence less than the mandatory minimum.

¹⁸ While KO's sister did not explicitly recommend confinement for life without possibility of parole, she did forcefully express her desire to see the appellant punished as harshly as possible.

comments about the appropriate sentence were improper. *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989). We further conclude the error was obvious. Nevertheless, we decline to grant relief, as we are satisfied the error did not materially prejudice the appellant's substantial rights. Art. 59, UCMJ. See *Finster*, 51 M.J. at 187; *Powell*, 49 M.J. at 463-65. The improper testimony was brief and came from the victim's sister, who unsurprisingly thought the appellant should be punished harshly. Given her bias, we doubt her improper testimony had much effect on the members. This error does not rise to the level of plain error.

III. CONCLUSION

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

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court,

R.H. TROIDL
Clerk of Court