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

Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges

UNITED STATES OF AMERICA

v.

LAWRENCE G. HUTCHINS III
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800393
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 August 2007.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commanding General, U.S. Marine Corps Forces Central Command, MacDill Air Force Base, FL.
Staff Judge Advocate's Recommendation: LtCol G.W. Riggs, USMC.
For Appellant: Maj S. Babu Kaza, USMCR; Maj Jeffrey Liebenguth, USMC.
For Appellee: Capt Mark V. Balfantz, USMC; Mr. Brian K. Keller, Esq.; Capt Geoffrey S. Shows, USMC.

20 March 2012

OPINION OF THE COURT

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

PERLAK, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiracy, making a false official statement, unpremeditated murder, and larceny, violations of Articles 81, 107, 118, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907,

918, and 921. The members sentenced the appellant to a dishonorable discharge, a reprimand, confinement for 15 years, and reduction to pay grade E-1. The convening authority (CA) approved only so much of the sentence that included a dishonorable discharge, reduction to pay grade E-1, and confinement for 11 years.

The appellant initially advanced three assignments of error, averring that: (1) the military judge erred by refusing to instruct the members that they could consider the impact of the operational environment and the appellant's state of mind for the lesser included offense of voluntary manslaughter; (2) the military judge erred in denying the defense challenge for cause against a member who had been in charge of pre-deployment urban warfare training for the appellant and his co-conspirators, and; (3) the military judge erred by denying the defense motion to suppress the appellant's confession. We then specified two additional issues: (4) was the trial defense counsel's release valid and, if not, was there good cause to terminate the attorney-client relationship; and, (5) did the military judge err by conducting a closed session of court when the Government had not asserted a privilege claim under MILITARY RULES OF EVIDENCE 505, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The matter involving the irregular disappearance of the trial defense counsel required additional proceedings pursuant to *United States v. DuBay*, 37 C.M.R. 411, (C.M.A. 1967).

This court issued an opinion *en banc* in which we determined that the appellant's trial defense counsel's representation was improperly terminated. *United States v. Hutchins*, 68 M.J. 623, 630 (N.M.Ct.Crim.App. 2010). Finding that we were unable to assess for prejudice, we set aside the appellant's convictions. *Id*. at 631. The Court of Appeals for the Armed Forces (CAAF) reversed our decision, finding that the relief of the trial defense counsel was a matter which could be assessed for prejudice and that the errors surrounding his release did not materially prejudice the substantial rights of the appellant. *United States v. Hutchins*, 69 M.J. 282, 293 (C.A.A.F. 2011). The CAAF then remanded the case to this court for Article 66(c), UCMJ, review.

On remand, the appellant submitted four supplemental assignments of error, asserting that: (6) the Secretary of the Navy's comments concerning the appellant's case amounted to unlawful command influence (UCI) that undermined the appellant's post-trial rights; (7) his defense team was ineffective because it was unprepared to present mental health evidence at the

pretrial *Daubert* hearing, and failed to offer such evidence as extenuation and mitigation in sentencing; (8) the appellant's sentence was excessive and disproportionate to that of his co-conspirators; and, (9) the evidence was factually insufficient to support guilty findings for conspiracy and unpremeditated murder.

After thoroughly reviewing the record of trial and with the benefit of the parties' briefs, we conclude that the findings and the sentence are correct in law and fact and that the appellant suffered no error materially prejudicial to his substantial rights. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was assigned as squad leader for 1st Squad, 2nd Platoon, Kilo Company, 3rd Battalion, 5th Marines, assigned to Task Force Chromite, conducting counter-insurgency operations in the Hamdaniyah area of Iraq in April 2006. In the evening hours of 25 April 2006, the appellant led a combat patrol to conduct a deliberate ambush aimed at interdicting insurgent emplacement of improvised explosive devices (IEDs). The court-martial received testimony from several members of the squad that indicated the intended ambush mission morphed into a conspiracy to deliberately capture and kill a high value individual (HVI), believed to be a leader of the insurgency. The witnesses gave varying testimony as to the depth of their understanding of alternative targets, such as family members of the HVI or another random military-aged Iraqi male. Considerable effort and preparation went into the execution of this conspiracy. Tasks were accomplished by various Marines and their corpsman, including the theft of a shovel and AK-47 from an Iraqi dwelling to be used as props to manufacture a scene where it appeared that an armed insurgent was digging to emplace an IED. Some squad members advanced to the ambush site while others captured an unknown Iraqi man, bound and gagged him, and brought him to the would-be IED emplacement. The stage set, the squad informed higher headquarters by radio that they had come upon an insurgent planting an IED and received approval to engage. The squad opened fire, mortally wounding the man. The appellant approached the victim and fired multiple rifle rounds into the man's face at point blank range. The scene was then manipulated to appear consistent with the insurgent/IED story. The squad removed the bindings from the victim's hands and feet and positioned the victim's body with the shovel and AK-47 rifle they had stolen from local Iraqis. To simulate that the victim fired on the squad, the Marines fired the AK-47 rifle into the

air and collected the discharged casings. When questioned about the action, the appellant, like other members of the squad, made false official statements, describing the situation as a legitimate ambush and a "good shoot." The death was brought to the appellant's battalion commander's attention by a local sheikh and the ensuing investigation led to the case before us.

Unlawful Command Influence

We begin our analysis with the appellant's first supplemental assignment of error, alleging that the Secretary of the Navy's public comments about his case constituted UCI. The comments were publically made and their content and timing are not in dispute.[1]

The Secretary of the Navy does not fall within the statutory ambit of Article 2, UCMJ, and the statutory interplay of Articles 2 and 37, UCMJ (10 U.S.C. 802 and 837), does not contemplate an actual UCI paradigm applicable to the secretariat or civilian leadership. Article 37 states: "No *authority convening a general . . . court-martial*, nor *any other commanding officer*, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court . . . ." (Emphasis added). The Article further provides that: "*No person subject to this chapter* may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." (Emphasis added). Assuming *arguendo* only that it was legally possible for the Secretary of the Navy to commit actual UCI, there is nothing before us indicating he did so.

However, the matter of apparent UCI remains, and the admonitions from the CAAF about the potential insinuation of UCI by the civilian leadership of the Department are not lost on us. *See United States v. Hagen*, 25 M.J. 78, 87 (C.M.A 1987) (Sullivan, J., concurring).

The appellant bears the initial burden of raising UCI. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Acknowledging the insidious nature of UCI, the threshold for raising the issue at trial is quite low, "some evidence," but

[1] The Secretary's comments expressed surprise and disappointment with the sentencesawarded and the prospect of continuing service for the personnel involved in this case.

"more than mere allegation or speculation." *Id*. In order to raise UCI on appeal, an appellant must show: (1) facts, which if true, constitute UCI; (2) that the proceedings were unfair; and (3) that UCI was the cause of the unfairness. *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999) (quoting *Biagase*, 50 M.J. at 150). We review claims of UCI *de novo*. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). We must consider both actual and apparent UCI in our review. *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003).

In determining whether the appearance of UCI exists, we objectively evaluate "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). An appearance of unlawful command influence exists where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id*.

The timeline of events in this case, to include any comments made by the Secretary of the Navy, is critical to our resolution of this assignment of error. We have granted the appellant's every motion to attach documents to the record, to include matters from proceedings unrelated to our jurisdictional prerogatives, to permit a full and public vetting of the UCI claim. Portions of those unrelated matters appear in the chart below in italics.

3 Aug 2007	Members Adjudge Sentence at General Court-Martial
15 Feb 2008	Staff Judge Advocate's Recommendation (SJAR)
2 Apr 2008	Addendum to SJAR
2 May 2008	CA's Action (granting clemency)
12 Jun 2008	Record Docketed at N.M.Ct.Crim.App. for Art. 66 Review
Feb 2009	*Navy Clemency and Parole Board (NCPB) Voted to Reduce Sentence to five Years*
17 Nov 2009	***SECNAV Comments About Appellant's Case Made Public***
Jan 2010	*NCPB Voted Against Clemency or Parole*
22 Apr 2010	N.M.Ct.Crim.App. Issued Opinion Setting Aside Findings and Sentence
7 Jun 2010	Judge Advocate General (JAG) Certified Case to the CAAF
14 Jun 2010	Appellant Released From Confinement
11 Jan 2011	The CAAF Reversed the N.M.Ct.Crim.App. Decision and Remanded to N.M.Ct.Crim.App.
17 Feb 2011	N.M.Ct.Crim.App. re-docketed Case for Art. 66 Review

The sequence of events is apparent; evidence in support of the appellant's claim is absent. We have no claim of error before us of any unlawful influence of the CA at the trial level. The CA approved the sentence of the court-martial, but granted significant clemency post-trial. He sent the record to this court for review. The Secretary of Navy made his comments eighteen months later, during a time where the approved sentence was properly a matter under the cognizance of his Clemency and Parole Board. This court, upon its *en banc* review of this case, operating under its own jurisdictional mandate, made the decision to set aside the findings and sentence based on the anomalous relief of counsel. We find no merit in appellant's unsupported assertion that this court was somehow unlawfully influenced by the Secretary of the Navy--in a court-martial we collectively voted to reverse. We make no findings or holdings relative to the Secretary of the Navy's putative influence upon the JAG or the CAAF. On the record before us, significant, legitimate questions of law were certified by the JAG to a court empowered by Congress to answer them; CAAF did so.

Based on the timeline above and all matters of record in this case, we hold that the appellant has failed to meet his threshold burden of showing facts which, if true, would constitute apparent UCI. We hold that under the circumstances present in this case, the comments by the Secretary of the Navy related to his prerogatives in clemency, were separate and legally distinct from proceedings under Article 66, UCMJ, and could not reasonably be perceived by a disinterested member of the public as UCI or otherwise indicative of an unfair proceeding in this court-martial. We hold that the Secretary of the Navy's actions did not constitute either actual or apparent UCI and the assigned error is without merit.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense team was ineffective in two instances: (1) during the pretrial *Daubert* hearing, by being unprepared to present mental health evidence; and (2) at trial by failing to offer mental health evidence as extenuation and mitigation in sentencing. We resolve this assignment adversely to the appellant.

In assessing the effectiveness of counsel, we apply the standard established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and presume competence absent evidence to the contrary. *United States v. Cronic*, 466 U.S. 648, 658 (1984);

see also United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001). An appellant must demonstrate both that his counsel's performance was deficient and that the deficiency resulted in prejudice. *Strickland*, 466 U.S. at 687. We will not second-guess strategic or tactical trial decisions of defense counsel absent the appellant's showing of specific defects in his counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). We review ineffective assistance of counsel claims *de novo*. *Id.* at 474.

We decline to accept the Government's argument that the initial CAAF decision in this case, regarding the irregular relief of trial defense counsel, was somehow of broader effect, to include a prophylactic ruling on the issue of ineffective assistance of counsel. However, reviewing the matter *de novo*, we conclude that the defense team was not ineffective during the pretrial *Daubert* hearing, cross-examination of witnesses at trial, presentation of the defense case, presentation of sentencing matters, or in their overall representation of the appellant. The appellant's defense team consisted of multiple attorneys experienced in military justice who, as reflected in the record, engaged in an effective and aggressive defense during all stages of the appellant's court-martial. The assigned error takes issue with aspects of the defensive strategy and presentation that, collectively, fails to establish anything approaching counsel ceasing to meaningfully function as counsel. Reviewing the matter *de novo* and in light of the requirements under *Strickland*, this assignment of error has no merit.

Sentence Appropriateness and Proportionality

Next, the appellant asserts that his sentence was excessive and disproportionate to other members of his squad. We disagree. A table summarizing the essential charges and disposition for every member of the squad involved in this case is provided below.

Name / Pleas	**Convictions**	**Adj. Discharge/ App. Discharge**	**Adjudged Confinement**	**Approved Confinement**
Appellant Not Guilty	Unpremeditated Murder; Larceny; False statement; Conspiracy	Dishonorable/ Dishonorable	15 years	11 years

LCpl[2] Pennington Guilty	Conspiracy; Kidnapping	Dishonorable/ Bad-Conduct	14 years	21 months
HM3[3] Bacos Guilty	Conspiracy; Kidnapping	Dishonorable/ None	10 years	345 days
LCpl Jackson Guilty	Conspiracy; Aggravated assault	Dishonorable/ None	9 years	Susp. excess of time served (454 days)
LCpl Shumate Guilty	Obstr. of Just.; Aggravated assault	Dishonorable/ None	8 years	Susp. excess of time served (453 days)
PFC[4] Jodka Guilty	Conspiracy; Aggravated assault	Dishonorable/ None	5 years	Susp. excess of 18 months
Cpl[5] Magincalda Not Guilty	Conspiracy; Wrongful approp.; Housebreaking	None	448 days	448 days
Cpl Thomas Not Guilty	Conspiracy; Kidnapping	Bad-conduct/ Bad-Conduct	None	None

We conduct separate reviews to determine the appropriateness of a sentence and whether a sentence is disproportionate to companion cases. We review the appropriateness of sentences *de novo*. *United States v. Roach*, 66 M.J. 410, 412 (C.A.A.F. 2008). We may only affirm a sentence that we find correct in law and fact based on our review of the entire record. Art. 66(c), UCMJ. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988). Our analysis requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

This court is not required to "engage in sentence comparison with specific cases 'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Closely related cases include those with "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.* An appellant alleging sentence disparity bears the burden

[2] Lance Corporal.

[3] Hospital Corpsman Third Class.

[4] Private First Class.

[5] Corporal.

of demonstrating that any cited cases are "closely related" and that the sentences are "highly disparate." *Id.* If the appellant meets this threshold, the burden shifts to the Government to demonstrate a rational basis for the differences. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288. Sentence comparison does not require sentence equation. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). The test in sentence disparity cases is "not limited to a narrow comparison of the relative numerical values of the sentences at issue." *Lacy*, 50 M.J. at 289. In evaluating sentence disparity, we examine the adjudged sentence vice the approved sentence; but in evaluating the appropriateness of the sentence generally, we may consider both adjudged and approved sentences. *United States v. Roach*, 69 M.J. 17, 21 (C.A.A.F. 2010).

We first turn our attention to the appellant's sentence disparity claim. Applying the first step of the *Lacy* analysis, we find the appellant's case is closely related to every member of his squad, since each member participated in the same plan ultimately leading to murder. As to the second *Lacy* factor, we find that the appellant's adjudged sentence is not disparate from these closely related cases. The variations are readily attributable to the prerogatives of members granted by Congress. *Lacy,* 50 M.J. at 287. Assuming, *arguendo* only, that we found only the contested general courts-martial before members to be closely-related, and assuming without deciding that the length of confinement for the appellant was highly disparate, he still has not met his burden to demonstrate an entitlement to relief. Even in this skewed hypothetical scenario, we find that the record amply demonstrates a rational basis for the disparity. First, the appellant was the squad leader and senior Marine among his co-conspirators. Second, the appellant initiated the idea and proposed the scheme to various squad members who then brainstormed how to perfect the appellant's plan. Third, the appellant was the only team member convicted of murder, and was sentenced by the members as such. Fourth, the appellant received a greater number of convictions than the co-conspirators. Additionally Cpl Magincalda and Cpl Thomas had previous combat experience prior to this tour, while the appellant committed his crimes during his first deployment. The members were permitted to consider evidence of prior deployments for mitigation in sentencing, and the significant combat histories of these Marines would have played a significant role in the determination of their sentences.

Turning to the issue of sentence appropriateness, although a dishonorable discharge is a harsh punishment with serious ramifications, in this particular case it is not an unjustifiably severe punishment. Neither is the appellant's remaining approved punishment. We reach that conclusion after careful consideration of the entire record of trial, including the evidence presented in extenuation and mitigation, and the matters submitted in clemency. However, we balance that consideration against the nature of the offenses committed by the appellant. After giving the appellant "individualized consideration . . . on the basis of the nature and seriousness of the offense and the character of the offender," we are convinced that his sentence is not inappropriately severe, nor is it unlawfully disparate from the sentences imposed upon his Marine co-conspirators. *Snelling*, 14 M.J. at 268. Granting relief absent a substantive legal error would be an act of clemency, a congressionally allocated function entrusted to other authorities, but not to this court.[6] *Healy*, 26 M.J. 395-96. In light of the forgoing, we resolve this assignment adversely to the appellant, finding no error in his adjudged or approved sentence based upon either disparity or severity.

Member Challenge for Cause

We now turn to the appellant's second assignment of error from his initial brief – that the military judge erred by denying the defense's challenge for cause against Major D, a member who provided pre-deployment urban warfare training for the appellant and his co-conspirators.

Major D was an instructor for a nearly one-month pre-deployment program that consisted of both live-fire and urban warfare training provided to infantry battalions. During the training, Major D reviewed various unit standard operating procedures to determine whether they were tactically sound and offered suggestions for improvement. The appellant's battalion was but one of numerous battalions that Major D trained during his instructor tour and he had no specific recollection of any individual Marine in the appellant's battalion. In response to questioning on *voir dire*, Major D related his understanding of a "dead check" as a practice to confirm whether someone was feigning death, accomplished by the application of contact to

[6] We note that the appellant has benefitted from the CA granting substantial clemency in the form of a four-year reduction in sentence and disapproval of the adjudged reprimand. On 30 March 2011, the appellant also received clemency in the form of a 251-day reduction in his sentence from officials exercising the authority of the Secretary of the Navy.

some body part to elicit an involuntary physical reflex. Upon further inquiry, Major D acknowledged that he had heard of "dead checks" in which Marines would shoot wounded individuals out of a sense of mercy. Record at 972.

The defense challenge for cause was premised on the proposition that Major D would somehow bring some predisposition related to the differing usages of the term "dead check." However, his responses were forthcoming as to what his doctrinal-type understanding was as a trainer, also acknowledging a more colloquial use by combat units. Major D did not express any predisposition to disbelieve or be unduly critical of a witness discussing the topic. The military judge denied the defense challenge for cause and found nothing that would create an appearance that either Major D or the proceedings would be unfair or biased. He found that no apparent bias existed as the internal "dead check" training provided within the appellant's unit even if it was not what Major D taught in his program, and that Major D indicated he could follow the military judge's instructions and evaluate the case solely on the evidence presented. The defense team then used its peremptory challenge on a different member, thereby preserving the denied challenge for cause for his appeal. *See* RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

We review a military judge's ruling on a challenge for cause for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000) (citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.M.A. 1997). "Actual and implied bias are separate legal tests, not separate grounds for challenge." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (citation and internal quotation marks omitted). We test for implied bias using the totality of the factual circumstances. *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). We test for actual bias by determining if any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (citation and internal quotation marks omitted).

We test for implied bias using an objective standard: "whether, in the eyes of the public, the challenged member's circumstances do injury to the perception of appearance of fairness in the military justice system." *United States v. Albaaj*, 65 M.J. 167, 171 (C.A.A.F. 2007) (citation and internal

quotation marks omitted). We review a military judge's ruling on a challenge for implied bias "under a standard less deferential than abuse of discretion but more deferential than *de novo*." *Id*. (citation and internal quotation marks omitted). Because the determination of actual bias is a question of fact driven by the military judge's observations during trial, we are generally deferential to a military judge's determinations of actual bias. *Id*.

The military judge in this case correctly applied the tests for both actual and implied bias and noted his analysis of the facts and law for the record. While he did not expressly mention the actual words "liberal grant mandate," the record demonstrates his proper application of the doctrine. The liberal grant mandate is tailored to the public's perception of the trial and should govern defense challenges. *See United States v. Townsend*, 65 M.J. 460, 463-64 (C.A.A.F. 2008). "Where a military judge does not indicate on the record that he has considered the liberal grant mandate in ruling on a challenge for implied bias, we will accord that decision less deference during our review of the ruling." *Id*. While there is an obvious prophylactic effect to the practice of a military judge stating the words "liberal grant mandate," we do not find those words alone to be an incantation that, if absent, erodes the deferential standard accorded to the ruling of the military judge in this case. The military judge was clearly addressing the mandate and the public's perception of the trial as a factor used in his determination: "With respect to apparent bias on his part, what the public would see . . . ." Record at 1003.

Considering the record as a whole, we find that the appellant did not meet his burden of establishing that grounds for challenge against Major D based on implied bias existed. There was no evidence presented that Major D's training program taught the type of "dead check" that the appellant performed, and Major D stated that he had previously heard of the technique. There is no indication in the record that Major D had any personal stake in such tactics. We find that most people in the member's position would not be prejudiced and that any reasonable member of the public would not have any doubt as to the fairness of the military justice system or the impartiality of the appellant's court-martial panel. During *voir dire*, Major D clearly demonstrated his willingness to judge the appellant's case based on the evidence presented at trial in accordance with the military judge's instructions. There was neither actual nor apparent bias demonstrated by this member and his service on this court-martial did not serve to undermine the

appearance of fairness or otherwise "diminish[] public perception of a fair and impartial court-martial panel." *United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006). Accordingly, we hold that the military judge did not err by denying the appellant's challenge for cause.

Findings Instructions

The appellant next contends that the military judge erred by refusing to instruct the members that they could consider the impact of the operational environment on the appellant's state of mind for the lesser included offense of voluntary manslaughter. We find that the military judge did not err in denying the instruction.

Whether a jury was properly instructed is a question of law we review *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). The military judge must bear the primary responsibility for assuring that the jury is properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)). Generally, a military judge has substantial discretionary power to decide whether to issue a jury instruction. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010) (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). A failure to provide correct and complete instructions to the members prior to deliberations carries constitutional implications, specifically if the failure amounts to a denial of due process. *See United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979). Assuming without deciding that the instructional error alleged would trigger due process concerns, we test for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006).

In order to convict for voluntary manslaughter, the lesser included offense of unpremeditated murder, members must find that heat of passion was caused by adequate provocation. Art. 119, UCMJ. Provocation is determined using a reasonable person standard, which is tested objectively, while heat of passion is a subjective test. *See United States v. Curtis*, 44 M.J. 106, 151 (C.A.A.F. 1996) ("A reasonable person is judged by an objective standard, not a subjective one . . . .") (citing *McKinney v. Israel*, 740 F.2d 491, 495 (7th Cir. 1984) ("Testimony on appellant's subjective anger and passion would not have been relevant due to the lack of evidence of

objectively adequate provocation."); *United States v. Duncan*, 36 M.J. 668, 671 (N.M.C.M.R. 1992) ("An accused must, subjectively, be in the heat of sudden passion when the killing occurs, but what provokes that passion 'must have an objective existence outside the mind of the one who kills unlawfully . . . .'" (quoting *United States v. Garza*, 37 C.M.R. 814, 828 (A.B.R. 1966))).

At trial, the appellant requested that the military judge instruct the members that they could consider the impact of the operational environment on the appellant and his physical and mental conditions at the time of the offense in deciding whether he was guilty of voluntary manslaughter. Specifically, the appellant points to the impact from suffering from post-traumatic stress disorder, acute sleep deprivation, his state of constant provocation, and the effect from his chain of command creating a climate of vigilantism and abuse towards suspected insurgents. The military judge instructed the members that they could consider such evidence for the unpremeditated murder offense, but could not for the voluntary manslaughter offense. In doing so, the military judge applied an objective reasonable person standard vice a subjective standard requested by the defense.

We find that the military judge accurately instructed the members on the lesser included offense of voluntary manslaughter. The objective standard for provocation was appropriately given during instructions for voluntary manslaughter, and both parties were free to argue their perspectives in closing arguments. Even assuming *arguendo* that the military judge had erred in not providing the instruction, we hold that such error was harmless beyond a reasonable doubt, because we are convinced beyond a reasonable doubt that the error did not contribute to the appellant's conviction or sentence. *Wolford*, 62 M.J. at 420. Accordingly, we hold that the military judge did not err in denying the defense's proposed findings instruction.

Suppression of the Appellant's Confession

The appellant asserts that the military judge erred when he denied the defense motion to suppress his confession. We review this ruling for an abuse of discretion and accept a military judge's findings of fact unless they are clearly erroneous. *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000). When a suspect invokes his right to an attorney during an interrogation, all questioning must stop until: (1) an attorney

is provided, or (2) the suspect himself initiates a discussion. *Edward*s *v. Arizona*, 451 U.S. 477, 484-85 (1981). If an appellant unambiguously invokes his rights, investigators are required to "scrupulously honor his invocation before engaging in any further discussion regarding waiver." *United States v. Delarosa*, 67 M.J. 318, 324 (C.A.A.F. 2009) (citation and internal quotation marks omitted). Voluntariness of a confession is a question of law we review *de novo* by examining the totality of the circumstances, including the details of the interrogation and the characteristics of the appellant. *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002). In this case, we find that the military judge's findings of fact were not clearly erroneous and adopt them for our analysis.

The appellant advised of his rights under Article 31(b), UCMJ, waived those rights, and initially made an official statement describing the killing of the unidentified Iraqi man as a "good shoot" and the product of a combat patrol encountering an insurgent. However, when subsequently informed that a member of the squad had confessed to his role in a staged homicide, the appellant requested to speak with an attorney. The interview was terminated.

The appellant and his squad had previously been relocated from Patrol Base Bushido and were billeted in berthing trailers in Fallujah during the conduct of the investigation. The appellant was assigned an escort, who remained with him at all times. The appellant was permitted to meet with the chaplain and use the head and shower facilities outside the trailer, but was not allowed to use MWR facilities, telephones, computers, the postal service or other methods of communication. As a matter of investigative sequestration, he was not allowed to speak with the other members of his squad. The appellant remained in these conditions from 10 through 18 May, a circumstance conceded by the Government during presentencing to be restriction tantamount to confinement.

On 18 May 2006, Naval Criminal Investigative Service (NCIS) agents approached each member of the squad, including the appellant, to request permissive authorizations to search their belongings. The appellant authorized the search both orally and in writing. During the search, the agents did not attempt to reinitiate any questioning of the appellant. However, the appellant, unprompted, asked the NCIS agents if the door was still open to tell his side of the story. The lead investigator replied that they could not speak to him because he had invoked his right to counsel. The appellant said that he wanted to

speak with the agents and did not need an attorney. The agents nonetheless declined to speak with the appellant. They indicated they would follow up the next day.

On 19 May 2006, NCIS brought the appellant to their trailer and he was again fully advised of his Article 31(b) rights. He again waived them. The appellant indicated that he desired to reinitiate the interview, just as he had indicated the previous night. He then described the murder and events leading up to the murder and he typed a detailed confession and provided a short handwritten statement. The appellant now claims that despite initiating the second interrogation and waiving his right to a lawyer, his confession was involuntarily because NCIS agents approached him for a permissive search authorization after he had invoked his right to counsel a week earlier. The facts as developed at trial do not indicate that NCIS agents approached the appellant for the purpose of reinitiating a custodial interrogation. Rather, their purpose was to inquire into obtaining authorization to search for evidence in the appellant's belongings. It is the appellant who reinitiated the interview and desired to make an additional statement, distinguishing this case in this critical way from *Edwards*. Consistent with *Miranda v. Arizona*, 384 U.S. 436 (1966), the facts in this case establish circumstances that make it clear that the appellant, ". . . knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475 (citation omitted).

From the date he invoked his right to counsel, the NCIS agents conspicuously honored his request to terminate the interview and did not re-initiate a custodial interrogation. There is nothing in the facts as found by the military judge to indicate any events that would challenge, in a military context, the concerns in *Michigan v. Harvey*, 494 U.S. 344, 350 (1990), "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Id.* (citation omitted).

Reviewing the military judge's denial of the motion to suppress the appellant's confession, we conclude he did not abuse his discretion in this case. We find nothing in his findings of fact to be clearly erroneous. *See Simpson*, 54 M.J. at 283. Based upon our *de novo* review and in light of the entire record, we find the appellant's confession was voluntary and the ruling on its admission at trial did not constitute an abuse of the military judge's discretion.

Remaining Assignments of Error

We find no basis to grant relief based on the remaining assigned error challenging factual sufficiency. The specified issue regarding the relief of trial defense counsel has been decided by the Court of Appeals for the Armed Forces. As for our remaining specified issue regarding a closed session of court, assuming without deciding that there was error in the military judge's handling of the session, any such error did not result in any material prejudice to the substantial rights of the appellant.

Conclusion

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

Senior Judge CARBERRY and Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court