

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

**Before  
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CAITLIN L. SMITH  
ENSIGN (O-1), U.S. NAVY**

**NMCCA 201100594  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 18 May 2011.

**Military Judge:** LtCol Eugene Robinson, USMC.

**Convening Authority:** Commandant, Naval District Washington,  
Washington Navy Yard, Washington, DC.

**Staff Judge Advocate's Recommendation:** LCDR M.M. Steingold,  
JAGC, USN.

**For Appellant:** LCDR Michael R. Torrasi, JAGC, USN; LT Ryan  
Mattina, JAGC, USN.

**For Appellee:** Capt David Roberts, USMC.

**27 December 2012**

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

WARD, Judge:

A panel of officers sitting as a general court-martial convicted the appellant, contrary to her pleas, of one specification of fraudulent appointment, six specifications of false official statement, and one specification of wearing an unauthorized rank insignia, in violation of Articles 83, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 883, 907, and 934. The panel sentenced her to confinement for 30

months and a dismissal from the Naval service. At the recommendation of the staff judge advocate (SJA), the convening authority (CA) disapproved the guilty finding to the Article 134 offense,<sup>1</sup> dismissed that Charge, approved 29 months confinement and a dismissal,<sup>2</sup> and except for the dismissal ordered the sentence executed.

The appellant raises eight assignments of error:

(1) The military judge improperly instructed the panel on the affirmative defense of lack of mental responsibility;

(2) The military judge improperly instructed the panel on the issue of partial mental responsibility;

(3) The court-martial lacked jurisdiction over the fraudulent appointment offense;

(4) The military judge abused his discretion when he denied the defense motion for a mistrial;

(5) The military judge abused his discretion in allowing trial counsel to elicit improper testimony from a defense expert witness;<sup>3</sup>

(6) The military judge committed plain error in allowing improper argument from the trial counsel during sentencing;

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<sup>1</sup> The SJA recommended disapproving the guilty finding pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) as the specification did not allege the terminal element.

<sup>2</sup> The CA took action on 3 November 2011, 169 days after trial concluded. Under the *Moreno* standards, a CA's failure to take action within 120 days of the completion of trial is presumptively unreasonable and triggers the four-factor analysis set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Attached to the record of trial is a letter from the CA explaining the reasons for the delay, to include, *inter alia*, the length of the transcript and a twenty-day extension for defense counsel to submit clemency matters. Having reviewed the record of trial and applying the *Barker* factors, we are satisfied that the appellant's "due process right to timely review" has not been violated. *Id.* at 135.

<sup>3</sup> We have reviewed the record and find this assigned error to be without merit. *United States v. Clifton*, 35 M.J. 79, 81 (C.M.A. 1992).

(7) The CA's action reassessing the sentence after dismissing the Article 134 offense requires a sentence rehearing or, in the alternative, a new action; and

(8) The sentence is inappropriately severe.

After reviewing these assignments of error, the pleadings of the parties and the record of trial, we find merit in the appellant's final assigned error and take appropriate action in our decretal paragraph. Following our corrective action, we conclude that the findings and the reassessed sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **I. Factual Background**

For most of her life, the appellant has had a pervasive compulsion to lie. As a teen and later young adult, she alienated family and friends with constant lying and false embellishment of her experiences, accomplishments and pedigree. She often sought to perpetuate these lies to extreme lengths. Witnesses at trial described how the appellant insistently clung to these falsehoods as if they were true, even in the face of overwhelming evidence to the contrary. Her family and friends encouraged her to seek help, but she remained either reluctant to do so or oblivious to their concerns. Her pattern of falsehoods and insistence in their reality led to strained relationships; as a result, her first marriage ended in divorce.

Her particular deceit in procuring an appointment into the United States Navy is salient to the charges before us. In 2008, she visited a Navy recruiting office on the campus of the University of Delaware where she professed interest in several officer programs. On 16 July 2008, she applied for a position in the highly selective Naval Nuclear Propulsion Program within the Naval Reactors (NR) command. On her application, she provided a litany of false representations pertaining to her education, employment and personal background.<sup>4</sup> Pursuant to her

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<sup>4</sup> These included the following:

- 1) That she received a PhD in Chemical Engineering and a PhD in Environmental Engineering from the University of Delaware (UoD), both with a 4.0 grade point average (GPA);
- 2) That she received a Masters degree in Chemistry from Duke University, also with a 4.0 GPA;
- 3) That she received a Bachelor of Arts degree in Honors Chemistry from the University of North Carolina - Chapel Hill with a 3.97 GPA;

application, she underwent a screening interview, followed by a more thorough interview before a panel of senior executive service civilians, and then a final and decisive interview by the Director of Naval Reactors. That same day, 4 September 2008, she accepted a position as an engineer in NR and began receiving pay. The next month she completed an SF-86 form as part of her application for a required security clearance. As part of her SF-86, she completed an Electronic Questionnaire for Investigations Processing (e-QIP) where she repeated some of her earlier false claims and added new ones.

After completing officer training at Naval Station Newport, Rhode Island, the appellant reported to NR at the Washington Navy Yard in Washington, DC. However, her e-QIP and SF-86 had raised several "flags" and, as a result, she was sent on temporary duty to another tenant command at the Navy Yard. An investigator from the Office of Personnel Management (OPM), the federal agency conducting the background investigation for her security clearance, interviewed the appellant over a five-day period. During these interviews, the appellant repeated many of her previous misrepresentations and added a few more.<sup>5</sup>

During this period of temporary duty, the appellant worked at the Naval History museum. She often puzzled those around her with her comments and behavior. One time she told her supervisor that she had a personal relationship with all of the Joint

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- 4) That she received an academic scholarship for being second in her high school graduating class of 500 students;
  - 5) That she was an accomplished equestrian having beaten out 100 other female riders for an "equestrian scholarship" and that she had participated in the Junior Olympics as an equestrian;
  - 6) That she received a "full ride" fellowship from both Duke and UoD;
  - 7) That she had two registered patents;
  - 8) That she previously held a security clearance "for top secret work in 1999 to work at Tunnel research facility in Durham, NC"; and
  - 9) That, when listing foreign travel, she had "[t]raveled to England, Paris, Madrid, Barcelona, Germany, Poland, Portugal, Switzerland on sightseeing trip. During stay in England, Aunt is a Lady and I was invited to tea with the Queen of England Elizabeth."

Prosecution Exhibit 3.

<sup>5</sup> During her interview, she lied and said she had never been married. She also falsely claimed that she defended her doctoral thesis on wastewater management before a five-member panel of University of Delaware professors. At one point during these interviews, she brought a large three ring binder full of materials she represented would substantiate her background information. After the investigator pointed to a joint tax return in the binder indicating that she was formerly married, she stopped bringing it to the interviews. Record at 1470-72.

Chiefs of Staff. She claimed that her relationship with them dated back to when she was 12 years old and fell overboard during a sailing trip, only to be "jointly" saved by the Joint Chiefs.<sup>6</sup> Several co-workers also noticed her wearing the rank insignia of a Lieutenant (Junior Grade) (LTJG), pay grade (O-2).<sup>7</sup> When pressed, the appellant claimed a spot-promotion by the Chief of Naval Operations (CNO) and an accelerated pay grade initiated by the Bureau of Naval Personnel (BUPERS).

Not surprisingly, before trial the appellant underwent a sanity board inquiry pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The board diagnosed her with personality disorder, not otherwise specified, with narcissistic and antisocial traits, but found her mentally competent both at the time of the offenses and at trial. In a pretrial hearing held pursuant to R.C.M. 909, the military judge also found her mentally competent to stand trial.

Over the course of a five-day trial, both the Government and the defense put the appellant's long history of mendacity squarely before the members. The Government sought to portray her as a manipulative narcissist who compulsively lied in order to feed her notions of grandiosity. The defense by contrast attempted to cast her as a sad and pathetic person who could not differentiate between truth and reality in her own life. Both parties submitted evidence of the appellant's innumerable misrepresentations and falsehoods from her personal and professional life. Trial essentially boiled down to whether, at the time of the offenses, the appellant could mentally distinguish fact from fiction when representing her background to the Navy.

## II. Discussion

### A. Lack of Mental Responsibility Instruction

Lack of mental responsibility (LMR) is an affirmative defense. R.C.M. 916(k). The defense exists if, at the time of the offense, the appellant (1) was suffering from a severe

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<sup>6</sup> *Id.* at 1948-49.

<sup>7</sup> The appellant was commissioned as an Ensign (O-1) and remained in the pay grade O-1 at all relevant times herein.

mental disease or defect, and (2) as a result was unable to appreciate the nature and quality of his or her actions or the wrongfulness thereof. Art. 50a(a), UCMJ; *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001); R.C.M. 916(k)(1). The appellant carries the burden at trial of proving both elements by clear and convincing evidence. Art. 50a(b), UCMJ; *Martin*, 56 M.J. at 103; R.C.M. 916(k)(3).

Before trial, the appellant's trial defense counsel (TDC) requested that the military judge alter the standard LMR instruction in the Military Judges' Benchbook. Appellate Exhibit XCVI; Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 6-4 (1 Jan 2010). TDC argued that the Benchbook instruction misstated the statute by excluding certain mental disorders and conditions from the definition of "severe mental disease or defect." AE XCVI; Record at 1098-1101.

The military judge denied the defense request and at trial instructed the members that the term "several mental disease or defect"

can be no better defined in the law than by the use of the term itself; however, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by non-psychotic behavior disorders and personality disorders.

Record at 2282 (emphasis added).

The appellant now alleges that the erroneous LMR instruction "improperly limited the members' consideration of whether [the appellant] was mentally responsible for her actions." Appellant Brief of 5 Apr 2012 at 37.

We review claims of instructional error *de novo*. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006). We evaluate the instructions in the context of the overall message conveyed to the jury. *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011). A failure to provide correct and complete instructions to the members prior to deliberation on findings carries constitutional implications, specifically if the failure amounts to a denial of due process. *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979). An erroneous instruction on an affirmative defense can amount to a denial of due process. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). Furthermore, a jury instruction which lessens to any extent the

Government's burden to prove every element of a crime violates due process. *Francis v. Franklin*, 471 U.S. 307, 313-14 (1985). In either event, due to the constitutional implications, we test whether such error was harmless beyond a reasonable doubt. *Lewis*, 65 M.J. at 87 (citation omitted); *Wolford*, 62 M.J. at 422 (citation omitted).

Upon review of the military judge's instructions and the record before us, we find no error. "Severe mental disease or defect" is an affirmative defense when it prevents the accused from appreciating the nature and quality or wrongfulness of her acts. Art. 50a, UCMJ. Article 50a is modeled on its federal counterpart, the Insanity Defense Reform Act of 1984, codified at Title 18 U.S.C. § 17, which was "intended, *inter alia*, to narrow the definition of insanity." *Martin*, 56 M.J. at 103; see also *United States v. Lewis*, 34 M.J. 745, 748-49 (N.M.C.M.R. 1991).

Both the federal statute and Article 50a, UCMJ, distinguish severe mental diseases or defects from other mental diseases and defects. This court previously noted that the legislative history to the Insanity Defense Reform Act "reflects that the 'concept of severity was added [to the legislation] to emphasize that non-psychotic behavior disorders or neuroses such as "inadequate personality," "immature personality," or a pattern of "antisocial tendencies" do not constitute the defense.'" *Lewis*, 34 M.J. at 749 (quoting S.Rep. 225 at 229, 422, 1984 U.S.Code Cong. & Admin.News at 3182, 3411); see also *United States v. Long*, 562 F.3d 325, 334 (5th Cir. 2009) (finding that by creating the severe requirement "Congress intended to exclude non-psychotic behavioral disorders, such as 'inadequate personality, immature personality, or a pattern of antisocial tendencies.'" ).

In outlining the parameters of a sanity board inquiry, the President explains that this term "severe" "does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects." R.C.M. 706(c)(2)(A). The definition contained in the Benchbook instruction and used by the military judge derives from this same language. The appellant correctly notes that the President's rulemaking power is procedural and cannot serve to restrict the statutory defense contained in Article 50a, UCMJ. But the President's definitions within the Manual that clarify or give meaning to the UCMJ can be persuasive, particularly in

the absence of any definition in the statute. *United States v. Nerad*, 69 M.J. 138, 146, n.10 (C.A.A.F. 2010).

Contrary to the appellant's argument, we do not find the President's inclusion of this language in R.C.M. 706 to be an attempt to limit the scope of the statutory right in Article 50a, UCMJ. Rather, we find it consistent with the legislative intent behind Article 50a, UCMJ. See *Lewis*, 34 M.J. at 750, n.12 (recognizing that the executive interpretation of "severe" in R.C.M. 706 is consistent with the legislative histories of both the federal and military mental responsibility statutes); see also *United States v. Hurn*, 52 M.J. 629, 634 (N.M.Ct.Crim.App. 1999), *aff'd*, 58 M.J. 199 (C.A.A.F. 2003) (finding that an instruction relying on the definition of "severe" from R.C.M. 706 was proper). We also note that the President amended R.C.M. 706 in 1987 to add this definition of "severe" following the enactment of the Insanity Defense Reform Act of 1984 and Article 50a, UCMJ. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 21, at 21-41. Thus, we find that the instruction in question accurately states current law.<sup>8</sup>

Assuming without deciding, however, that the military judge incorrectly defined "severe mental disease or defect," we find any such error harmless beyond a reasonable doubt. During the trial, four experts testified as to their diagnosis and opinion of the appellant's mental state. Of those four, two testified for the appellant. The first, Dr. Daniel Lynch, diagnosed the appellant with delusional disorder, non-bizarre, grandiose type, and he deemed her condition nonpsychotic. Record at 1822, 1829. Dr. Lynch explained at length the differing belief structure with someone suffering from delusional thinking, but he did not specifically address whether, at the time of the offenses, the appellant could appreciate the nature and quality of her actions, or the wrongfulness of her actions.<sup>9</sup>

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<sup>8</sup> We disagree with appellant's argument that this instruction runs afoul of *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) and *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993). Those cases stand for the proposition that psychosis has never been the *sine qua non* of a legal insanity defense. That remains true. In our view, the Benchbook instruction does not contain such a requirement since it speaks in terms of non-psychotic behavior and personality disorders or defects.

<sup>9</sup> Dr. Lynch explained that delusional people, through "confabulation", or the process of mixing memory with fantasy, can ultimately believe what they say to be true and have difficulty distinguishing between fact and fantasy. Record at 1844-52. But he also conceded that delusional people can "fabricate" or knowingly create a falsehood to support that same fantasy. Record at 1886-91.

The second defense expert, Lieutenant Colonel (LtCol) Lange, disagreed with Dr. Lynch's diagnosis, instead finding that the appellant suffered from pseudologia fantastica (PF), an extreme form of pathological lying. *Id.* at 1982-83. PF sufferers, unlike those with delusional disorder, can perceive truth from a lie but crave the internal reward of pursuing the fantasy perpetuated by the lie. *Id.* at 1986-89, 1990-93. Of note, LtCol Lange testified that at the time of the offenses the appellant was able to appreciate the nature and quality of her actions and the wrongfulness of her behavior. *Id.* at 1998.

In rebuttal, the Government called two expert witnesses, Dr. Sweda and Commander (CDR) Malone. Dr. Sweda was a member of the appellant's R.C.M. 706 board and testified that the board ruled out delusional disorder, instead diagnosing the appellant with personality disorder, not otherwise specified with narcissistic and antisocial traits. *Id.* at 2088. He further testified that the appellant at the time of the offenses could appreciate the nature, quality and wrongfulness of her behavior and was always aware of the falsity of her representations. *Id.* at 2094. He also explained how he found deficiencies in the testing administered by Dr. Lynch, deficiencies which in his opinion invalidated the results. *Id.* at 2096. The Government's other rebuttal witness, CDR Malone, similar to Dr. Sweda and LtCol Lange, also ruled out delusional disorder. CDR Malone agreed with Dr. Sweda's diagnosis and similarly opined that the appellant at the time of the offenses had the capacity to form specific intent to deceive and act knowingly. *Id.* at 2158-59.

Even assuming that the appellant met her burden of demonstrating a severe mental disease or defect, the defense case failed to prove by clear and convincing evidence that as a result she could not appreciate the nature and quality or wrongfulness of her actions. Art. 50a, UCMJ; R.C.M. 916(k). The appellant's own experts presented conflicting testimony on this latter point and the Government's experts effectively rebutted any inference raised. As the appellant failed to meet her burden as to the second element, we conclude that any instructional error on the first element was harmless, as it did not contribute to her conviction or sentence. *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005).

#### B. Partial Mental Responsibility Instruction

During the same pretrial session, TDC requested to amend the standard instruction on partial mental responsibility (PMR). AE XCVI; Benchbook at ¶ 6-5 (1 Jan 10); Record at 1101-03. TDC

argued that the PMR instruction "erroneously discusses the capacity of the accused to form *mens rea* rather than the requirement that the government actually prove that the accused did form the *mens rea*." Record at 1102. The military judge denied the request. Later at trial, he instructed the panel that

An accused may be sane and yet, because of some underlying mental disease, defect, impairment, condition or deficiency may be mentally incapable of entertaining the specific intent to deceive and having the knowledge that certain misrepresentations were false. You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a mental disease, defect, impairment, condition or deficiency of such consequence and degree as to deprive her of the ability to entertain the specific intent to deceive and know that certain misrepresentations were false.

Record at 2285.

The appellant now argues that this instruction was confusing and "lowered the Government's burden and allowed the member's to convict [the appellant] if they believed she possessed the capacity to meet the required *mens rea*." Appellant's Brief at 40.

As before, we review this issue of instructional error *de novo*. *Wolford*, 62 M.J. at 420. We find no error in the military judge's PMR instruction. First, we review the challenged instruction within the context of the entire set of instructions. *Boyd v. California*, 494 U.S. 370 (1990); *United States v. Simpson*, 56 M.J. 462, 466 (C.A.A.F. 2002). Absent evidence to the contrary, we presume that the members follow the military judge's instructions. *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991).

The military judge provided detailed instructions on trial procedure, the elements of each charged offense, types of evidence, defenses, and mental capacity and responsibility. In particular, he instructed the panel that the Government must prove beyond a reasonable doubt that at the time of the offenses the appellant knowingly misrepresented facts and acted with the specific intent to deceive. Record at 2265-72. Later, when explaining PMR, he reiterated that "[o]ne of the elements of the offenses is the requirement of the specific intent to deceive

and that the [appellant] knew that certain misrepresentations were false." *Id.* at 2284. The military judge's instructions correctly identify the requisite *mens rea* and the point in time when the appellant must form the *mens rea*. Rather than broaden the focus to whether she had sufficient mental capacity to form the *mens rea* at any time, as the appellant argues, these instructions correctly constrain the analysis to the time of the offenses. Absent any contrary evidence, we presume that the members followed these instructions and found beyond a reasonable doubt that, despite her mental condition, the appellant acted knowingly and with specific intent at the time of the offenses. *Holt*, 33 M.J. at 408. Accordingly, we conclude that the military judge correctly instructed the members on the issue of PMR.

### C. Jurisdiction over the Article 83, UCMJ Charge

The appellant secured an appointment in the United States Navy and a position in the Navy's Nuclear Propulsion Program through her multiple misrepresentations and outright lies.<sup>10</sup> These lies began with verbal statements she made to her recruiter in the summer of 2008. Record at 1320-21. She also made numerous false claims, outlined *supra*, on her Application for Commission dated 16 July 2008. Prosecution Exhibit 3. And after receiving pay, the appellant listed still more false claims on her completed SF-86 application for security clearance submitted on 29 October 2008, and then repeated these same falsehoods to the OPM investigator during her interviews. PEs 6 and 6A; Record at 1450-1579.

Citing *Solorio v. United States*, 483 U.S. 435 (1987) and *United States v. Kummerle*, 67 M.J. 141 (C.A.A.F. 2009), the appellant now alleges her court-martial lacked jurisdiction over the charged specification under Article 83, UCMJ. She asserts that any misrepresentation occurred prior to her appointment, while she was a civilian, and the court-martial lacked jurisdiction under Article 2(a)(1), UCMJ. We disagree.

We review questions of jurisdiction *de novo*. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006). Courts-martial have jurisdiction over individuals in "a regular component of the armed forces, including . . . volunteers from the time of their

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<sup>10</sup> Following the typical track for selected candidates, the appellant came on active duty in the pay-grade E-6 on 4 September 2008 and was later commissioned an Ensign on 15 September 2008. Her first LES is for the period of 1-30 September 2008. PE 12.

muster or acceptance into the armed forces." Art. 2(a)(1), UCMJ. Court-martial jurisdiction extends to a service member "who was a member of the Armed Services at the time of the offense charged." *Solorio*, 483 U.S. at 451 (footnote omitted). Because the appellant received pay and allowances while on active duty, we find court-martial jurisdiction existed over the appellant.

Still, the appellant argues that *Kuemmerle* requires each element of an offense to be completed while the appellant serves on active duty for jurisdiction to attach.<sup>11</sup> We are not persuaded by her argument, which incorrectly expands the narrow holding in *Kuemmerle*. *Kuemmerle* addresses only the narrow question whether the appellant in that case committed a distribution on a specified date after entering active duty. *Id.* at 145.

Like *Kuemmerle*, the appellant here completed her crime while she was on active duty. Article 83, UCMJ, contains four elements:

(1) that the accused was enlisted or appointed in an armed force;

(2) that the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;

(3) that the accused's enlistment or appointment was procured by that knowingly false representation or deliberate concealment; and

(4) *that under this enlistment or appointment that accused received pay or allowances or both.*

MCM, Part IV, ¶ 7b(1) (emphasis added). Thus, a fraudulent appointment occurs only upon receipt of pay or allowances. *United States v. Farano*, 60 M.J. 932, 934 (N.M.Ct.Crim.App.

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<sup>11</sup> In *Kuemmerle*, the appellant posted an image of child pornography to his online Yahoo! profile page prior to enlisting in the U.S. Navy. The image remained there and he continued to access his profile page after he enlisted. NCIS investigators later accessed *Kuemmerle's* profile and viewed the image there. In affirming his conviction for distributing child pornography, the Court of Appeals for the Armed Forces (CAAF) held that the court-martial possessed jurisdiction over the offense since *Kuemmerle* maintained control over his Yahoo! account where the image resided and NCIS viewed the image after he enlisted in the Navy.

2005). The appellant signed her Application for Commission on 16 July 2008. PE 3. She began receiving pay and allowances on 4 September 2008. PE 12. The specification in Charge I correctly alleges 4 September 2008 as the date of her fraudulent appointment. *Farano*, 60 M.J. at 934. It follows, therefore, that we find jurisdiction attached over this offense. *Solorio*, 483 U.S. 451.

#### D. Motion for Mistrial

During the lunchtime recess on the fourth day of trial, the senior member of the panel, Captain [CAPT] M, went to a nearby eatery. While standing last in line, he noticed the appellant standing outside the entrance looking in his direction. Record at 2027. He then watched as the appellant entered and proceeded to stand directly behind him in line. Uncomfortable with her presence, CAPT M stepped out of line and left the café to avoid any further incidental contact. He later explained that he thought it "inappropriate" that "he should have to be the one to take the initiative to avoid incidental contact." *Id.* at 2028. After returning to the deliberation room, CAPT M relayed the incident to his fellow members and notified the bailiff who in turn informed the military judge.

The military judge then conducted individual *voir dire* of each panel member. Each member disavowed any bias or change in their perception and affirmed that they could remain impartial. *Id.* at 2032-47. At the conclusion of *voir dire*, TDC moved for a mistrial under R.C.M. 915 arguing that the entire panel could no longer remain impartial due to CAPT M's comments. *Id.* at 2048-49. The Government argued that a mistrial was unnecessary and the matter could be adequately addressed with a curative instruction.<sup>12</sup> *Id.* at 2052. The military judge denied the defense motion for mistrial but excused CAPT M for cause. *Id.* Citing the members' demeanor and responses during individual *voir dire*, the military judge found no basis to excuse any remaining members for cause. *Id.* at 2052-54. However, the military judge did not articulate his findings on actual or implied bias.

The appellant now argues that the military judge erred by not granting a mistrial and, in the alternative, that he erred

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<sup>12</sup> Once the panel returned, the military judge advised them to avoid contact with any of the parties or witnesses and to report any such contact to the bailiff. He gave no instruction concerning the matters raised by CAPT M during the lunchtime recess. *Id.* at 2071.

by not excusing the remaining panel members for cause. We disagree.

A military judge's denial of a motion for a mistrial is reviewed for a clear abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). Mistrial is only appropriate where "circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993) (citation and internal quotation marks omitted). Although the defense cast their motion in terms of a mistrial, the essence of their motion was the military judge's refusal to excuse the remaining panel members for bias. Given this fact, we will apply the standards of review set forth below for these allegations of error, and not the "clear abuse of discretion" standard normally applied to a denied motion for mistrial.

#### 1. Actual or Implied Bias: Standard of Review

The appellant argues that the appellant's contact with CAPT M infected the entire panel with actual and implied bias. A military judge's decision to remove a member for actual bias is reviewed for abuse of discretion. See *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (reviewing a military judge's decision whether to dismiss a member *sua sponte* for abuse of discretion); *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). We give the military judge "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor" of the member. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000). In examining decisions over implied bias, however, we provide the military judge somewhat less deference. "Issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*." *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003) (citation and internal quotation marks omitted).

#### 2. Actual Bias

Actual bias must result in excusal where that member's personal bias "will not yield to the evidence presented and to the judge's instructions." *Napoleon*, 46 M.J. at 283 (citation and internal quotation marks omitted). "Because a challenge based on actual bias involves judgments regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility on

voir dire,' a military judge's ruling on actual bias is afforded great deference." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)). After examining the entire record of trial, we find no evidence of actual bias. Each member "indicated that [the member] could remain fair and impartial regarding this case despite having knowledge of that incident between [CAPT M] and [the appellant]." Record at 2053. The military judge did excuse CAPT M because it appeared he "may be affected as a result of that contact." *Id.* at 2052. But he also found that "the remaining members have not developed an opinion one way or another concerning the offenses before the court and the conduct of accused." *Id.* at 2052-53. In light of the members' answers and the military judge's assessment of the members' demeanor during the *voir dire*, we conclude that the military judge did not abuse his discretion by finding no evidence of actual bias.

### 3. Implied Bias

The appellant urges us to grant less deference to the military judge due to his failure to articulate on the record an implied bias test and consideration of the liberal grant mandate on the record. Appellant's Brief at 24. Even affording the military judge less deference that we might otherwise, *United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007), we still find no error by the military judge in denying the defense challenge against the remaining panel members.

Implied bias addresses the perception or appearance of fairness of the military justice system. *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). "Implied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased].'" *Napolitano*, 53 M.J. at 167 (citations omitted). We examine the totality of the circumstances in making judgments regarding implied bias. *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012).

Only one member, CAPT M, was directly involved in this incident. In disclosing the incident to the other panel members, he did not discuss any aspects of the case. Nor did he speak pejoratively of the appellant or discuss any personal opinions he may have formed. The appellant's assertion that the members intentionally downplayed the impact of this incident and that CAPT M's recounting of it "drove up [their] level of personal animosity [toward the appellant]" is completely unsupported by the record. Appellant's Brief at 26.

Based on the responses of the members during *voir dire* and our examination of the record, we agree that an objective public observer would find this panel fair and impartial. Accordingly, we find no error by the military judge in denying the appellant's motion for mistrial.

#### E. Improper Sentencing Argument

During sentencing, trial counsel highlighted various instances of the appellant's dishonest or otherwise unflattering behavior without objection. Record at 2441-54. The appellant now alleges that the military judge committed plain error by allowing trial counsel to refer to these instances of "uncharged misconduct" during argument on sentence. Appellant's Brief at 47-49. Improper argument is a matter we review *de novo*. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). But since trial defense counsel failed to object, we test for plain error. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). To prevail under a plain error analysis, the appellant must show that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (Citation and internal quotation marks omitted). We view the argument of the trial counsel "within the context of the entire court-martial" as it is "improper to 'surgically' carve out a portion of the argument with no regard to its context." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). After reviewing the sentencing argument in the context of the entire court-martial, we find no plain or obvious error.

We begin by noting that counsel may comment on any evidence properly introduced on the merits "including evidence of other offenses or acts of misconduct, even if introduced for a limited purpose." R.C.M. 101(f)(2)(A).

Additionally, "[i]t is appropriate for trial counsel - who is charged with being a zealous advocate for the Government - to argue the evidence of record." *Baer*, 53 M.J. at 237 (citation omitted). The military judge here instructed the panel "to consider evidence admitted as to the nature of the offenses of which the accused stands convicted." Record at 2438. As the trial counsel's comments now highlighted by the appellant pertained to evidence introduced on the merits, we are hard pressed to find error, much less plain or obvious error.

Even if we assume error, we find no material prejudice to a substantial right of the appellant. We consider the question of prejudice in this context by balancing three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the sentence. *Marsh*, 70 M.J. at 107. First, the trial counsel recounted testimony already heard by the members<sup>13</sup> and did not draw any illogical or unsupported conclusions from the evidence. Next, the trial counsel did not present any of the typical improper arguments such as vouching, implying the members were endangered or appealing on behalf of the victim or convening authority. See *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005) (vouching); *Marsh*, 70 M.J. at 107 (placing members' future safety at risk); *United States v. Schroeder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (appeal on behalf of victim). Last, the military judge correctly instructed the members to sentence the appellant "only for the offenses of which she has been found guilty." Record at 2432.

The appellant faced a maximum sentence that included 17 and 1/2 years confinement. Trial counsel argued for five years and the members returned a sentence of 30 months, an amount well below trial counsel's request. We find that the trial counsel's comments, taken as a whole, did not cause the members to stray from the permissible sentencing factors. *Erickson*, 65 M.J. at 224.

#### F. Post-Trial Processing Error and Sentence Appropriateness

The remaining assigned errors involve two separate but related issues; sentence reassessment and sentence appropriateness. Both involve our authority and responsibility under Article 66(c), UCMJ.

First, we address the issue of post-trial processing error. In the SJA's post-trial recommendation to the convening authority, the SJA recommended disapproving the guilty finding for the Article 134 offense of wearing unauthorized rank insignia. The SJA also recommended reducing the sentence from 30 to 29 months confinement. The recommendation included a brief explanation of the *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) decision and its effect on the appellant's case. However, the recommendation did not include any reasoning or

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<sup>13</sup> Both sides presented extensive evidence during the merits of the appellant's myriad lies and dishonest behavior. Some of the trial counsel's comments alluded to evidence introduced by the appellant.

analysis regarding the sentence reduction. The appellant raised no objection to the recommendation.<sup>14</sup> In taking his action, the CA adopted the recommendation without comment, disapproved the guilty finding to the Article 134 offense and reduced confinement by 30 days. Citing error, the appellant now argues for a sentence rehearing or, in the alternative, a new post-trial action. Appellant's Brief at 42-46.

We review alleged errors in post-trial processing *de novo*. Art. 66(c), UCMJ; *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Where an appellant fails to object to errors in the staff judge advocate's recommendation (SJAR), we test for plain error. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). We begin with the rule that when curative action on sentence is recommended, an SJA's recommendation to the convening authority must include guidance "as to how the convening authority rationally should cure the prejudice in the sentence." *United States v. Reed*, 33 M.J. 98, 100 (C.M.A. 1991). Without such guidance, the CA is "acting in the dark." *Id.* (citation omitted). The Government concedes that the SJAR's failure to include such guidance was error, and in light of *Reed*, we agree.

However, this error does not require a remand for either a sentence rehearing or a new action. "A Court of Criminal Appeals can reassess a sentence to cure the effect of prejudicial error where that court can be confident 'that, absent any error, the sentence adjudged would have been of at least a certain severity.'" *United States v. Buber*, 62 M.J. 476, 476 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A sentence of that severity or less will be free of any prejudicial effects of the error. *Sales*, 22 M.J. at 308. Before reassessing, we look to see if "[a] 'dramatic change in the penalty landscape' gravitates away from the ability to reassess." *Buber*, 62 M.J. at 479 (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

Here, we find no such dramatic change in the penalty landscape. The CA's corrective action reduced the maximum confinement penalty to 17 years, a reduction of only six months. Furthermore, the gravamen of the appellant's offenses remained unchanged; she told a number of falsehoods to gain entry into

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<sup>14</sup> TDC disagreed with the SJA's recommendation to reduce the appellant's sentence to confinement by only thirty days, instead recommending a reduction to 20 months. Clemency Request of 26 Oct 2011 at 2. However, TDC did not object to the SJA's failure to provide any substantive guidance to the CA on reassessment.

the Navy and perpetuated them during her background check and when interviewed by criminal investigators. Evidence submitted by both parties on the merits included numerous instances where the appellant engaged in dishonest behavior while on active duty.<sup>15</sup> An additional instance where she wore the unauthorized rank insignia of a LTJG on several occasions is relatively minor in light of her other offenses. Therefore, we conclude that this error does not divest us of our ability to reassess. However, our analysis does not end there.

Our reassessment also includes our obligation under Article 66(c), UCMJ to "affirm only such findings of guilty and the sentence or such part or amount of the sentence as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he or she deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the 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)).

To determine the punishment that the appellant deserves, we must examine the underlying circumstances of her offenses. While we find, as the members did, that the appellant acted knowingly and with the requisite intent, the fact remains that her peculiar mental condition contributed significantly to her misconduct.

There is a common thread throughout this case where the appellant, after conjuring up some imaginary personal achievement or credential, then bizarrely attempts to live a life fashioned around that very same illusion, inevitably to her own detriment. The crux of her offenses is her securing an appointment into the Navy's Nuclear Propulsion Program through misrepresentation and bogus documentation. But she actually spent her brief career at the Navy History and Heritage Command, far away from nuclear propulsion. Narcissism and notions of grandeur motivated her behavior vice malice, greed or a desire

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<sup>15</sup> Even in the absence of the Article 134 offense, the appellant's actions in wearing the unauthorized rank insignia of a LTJG and then claiming a spot promotion by the CNO arguably would be a proper matter in aggravation under R.C.M. 1001(b)(4).

to harm national security.<sup>16</sup> Testimony from her family, co-workers, friends and mental health experts together documented a lifetime of self-destructive behavior. We also note that after trial, two members of the panel recommended clemency. Considering the nature of her offenses and her own circumstances, we find 29 months confinement an inappropriately severe sentence.

Based on our review of the entire record, we find a sentence of 18 months confinement and a dismissal appropriate in all respects for these offenses and this offender. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We are also satisfied that, consistent with *Sales* and *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006), after carefully considering the entire record, the members would have adjudged a sentence of at least this severity even in the absence of a guilty finding for the Article 134 offense.

### **Conclusion**

The findings are affirmed. We affirm only so much of the approved sentence as provides for confinement for 18 months and a dismissal.

Senior Judge PAYTON-O'BRIEN and Judge MCFARLANE concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>16</sup> True, there is an element of manipulative selfishness to her behavior. But we do not accept that on the facts of this record her efforts rose to "severe breaches of Naval Reactors' security and safety" as the Government argued in sentencing. Record at 2442, 2445.