

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MACHELLO K. HANCOCK  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000400  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 13 January 2010.

**Military Judge:** LtCol David Jones, USMC.

**Convening Authority:** Commanding General, 3d Marine  
Logistics Group, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol J.J. Murphy,  
III, USMC.

**For Appellant:** LT Daniel Napier, JAGC, USN.

**For Appellee:** LT Kevin Shea, JAGC, USN.

**28 June 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

MITCHELL, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy to obstruct justice, conspiracy to commit an indecent act, violating a lawful general order, two specifications of indecent acts, burglary, and obstruction of justice, in violation of Articles 81, 92, 120, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 920, 929, and 934. The appellant was sentenced to 24 months confinement, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant submitted six assignments of error.<sup>1</sup> We have considered the record of trial, the pleadings of the parties, and the oral argument presented in this matter. We find that no errors materially prejudicial to the substantial rights of the appellant were committed. Arts. 59(a) and 66(c), UCMJ.

### **Background**

On 17 April 2009, the appellant was attending a command function at Okuma Campgrounds in Okinawa, Japan and had rented a cabana for the event. The appellant, who was a Marine corporal at the time of the offense, was dating Private First Class (PFC) B, USMC. Earlier in the evening, the appellant and PFC B had consensual sex in the appellant's cabana. The appellant then left the room to socialize with other service members at the campground. Two of the service members were First Sergeant (1stSgt) Norwood, USMC, and Staff Sergeant (SSgt) Keys, USMC. The three had a conversation about the appellant's earlier sexual encounter with PFC B and engaged in general "sexual banter" about her.

Later that night, the appellant, 1stSgt Norwood, and SSgt Keys went to the appellant's cabana, where PFC B was lying naked under the covers. 1stSgt Norwood proceeded to remove the covers from PFC B, and they all began to touch her breasts and vagina.

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<sup>1</sup> I. BEFORE TRIAL, APPELLANT WAS SUBJECTED TO 120 DAYS OF RESTRICTION AND 136 DAYS OF ILLEGAL SOLITARY CONFINEMENT. THE MILITARY JUDGE ERRED BY NOT DISMISSING THE CHARGES WITH PREJUDICE FOR THESE ARTICLE 13 AND SPEEDY TRIAL VIOLATIONS.

II. THE PRETRIAL AGREEMENT WAS INVOLUNTARY WHERE IT WAS THE RESULT OF PROMISES FROM THE GOVERNMENT APART FROM THE PLEA AGREEMENT TO RELEASE APPELLANT FROM ILLEGAL AND COERCIVE CONDITIONS IN EXCHANGE FOR PLEADING GUILTY. THE MILITARY JUDGE ERRED BY FAILING TO INQUIRE AS TO WHETHER APPELLANT WOULD HAVE VOLUNTARILY SIGNED THE PRETRIAL AGREEMENT AND PLED GUILTY ONCE INFORMED THAT THOSE CONDITIONS WERE ILLEGAL AND ASSURED THAT HE WOULD NO LONGER BE SUBJECTED TO SOLITARY CONFINEMENT.

III. THE MILITARY JUDGE IMPROPERLY SEVERED APPELLANT'S ATTORNEY-CLIENT RELATIONSHIP PRIOR TO THE ARTICLE 13/SPEEDY TRIAL MOTION.

IV. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE TRIAL DEFENSE COUNSEL ALLOWED APPELLANT TO SPEND 136 DAYS IN ILLEGAL PRETRIAL SOLITARY CONFINEMENT (AFTER 120 DAYS OF PRETRIAL RESTRICTION TANTAMOUNT TO CONFINEMENT) WITHOUT FILING A PRETRIAL ARTICLE 13 OR SPEEDY TRIAL MOTION, AND SUBSEQUENTLY ABANDONED APPELLANT BEFORE THE ISSUE WAS LITIGATED BY A SUBSTITUTE TRIAL DEFENSE COUNSEL.

V. THE MILITARY JUDGE ERRED BY ACCEPTING APPELLANT'S PLEAS TO THE ADDITIONAL CHARGES AFTER: (1) APPELLANT STATED THAT HE WAS ON PRESCRIPTION PAINKILLER MEDICATION FOLLOWING A SURGERY AT THE TIME OF THE OFFENSES AND HAD ABSOLUTELY NO MEMORY OF COMMITTING THEM, (2) FAILING TO EXPLAIN THE DEFENSE OF INVOLUNTARY INTOXICATION TO APPELLANT, AND (3) ALLOWING APPELLANT TO SPECULATE AS TO HIS OWN SPECIFIC INTENT WITHOUT SUPPORTING EVIDENCE.

VI. THE MILITARY JUDGE ERRED BY ACCEPTING APPELLANT'S GUILTY PLEA TO AN INDECENT ACT WHERE APPELLANT'S MISCONDUCT INSIDE SERGEANT L'S BARRACKS ROOM AMOUNTED ONLY TO AN EXPOSURE.

During this sexual conduct, someone knocked on the door and 1stSgt Norwood exited the cabana. Following his departure, the appellant and SSgt Keys had sexual intercourse with PFC B in the presence of each other. When the sexual encounter was over, the appellant and SSgt Keys left, but PFC B stayed in the cabana. The appellant eventually returned to the room and slept in the same bed with PFC B. The following morning, PFC B reported the incident as a sexual assault. A few days later, the appellant, 1stSgt Norwood, and SSgt Keys, anticipating that there might be an investigation, conspired to make false statements to the investigating agents. 1stSgt Norwood eventually made a false statement to the Naval Criminal Investigative Service (NCIS) investigating agent.

On 27 April 2009, the appellant was placed on pretrial restriction. Sixty days later, he was removed from pretrial restriction and placed on Liberty Risk Charlie (LRC).<sup>2</sup> On 24 August 2009, while on LRC, the appellant broke into Sergeant (Sgt) L's barracks room while she was asleep. Sgt L awoke to see the appellant standing at the foot of her bed, naked, with his erect penis in his hand. She shouted and cursed at him to leave, and while he did not respond at first, he eventually walked out of her room. Sgt L immediately reported the incident. The appellant claimed to have no memory of the incident because he was apparently taking Percocet for a recent surgery. The appellant was placed in pretrial confinement on 25 August 2009, and immediately assigned as a maximum custody<sup>3</sup> detainee, presumably due to the nature and seriousness of his charges. He was moved to the general population on 8 January 2010, approximately one week after the convening authority signed the pretrial agreement. Due to the nature of the appellant's pretrial confinement, pretrial restriction, and LRC, the trial defense counsel filed a post-trial motion alleging a violation of Article 13, UCMJ. After a post-trial Article 39(a), UCMJ, session was held, the military judge found that an Article 13, UCMJ, violation had occurred, and ultimately awarded the appellant an additional 156 days credit.<sup>4</sup>

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<sup>2</sup> The restrictions placed on the appellant's liberty while assigned to Class "C" liberty risk included: no off-base liberty, the requirement to log in with the barracks duty noncommissioned officer at specified times, no purchase or consumption of alcohol, a requirement to be in the uniform of the day, and no authorized visitors (military or civilian) in the barracks. Defense Exhibit C at 8.

<sup>3</sup> Maximum custody is also referred to as "special quarters" or "solitary confinement" in the record of trial and in the parties' briefs.

<sup>4</sup> The military judge, in addition to the confinement credit earned per *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (141 days), gave the appellant 156 days for the Article 13 violation which was calculated as follows: day for day credit for each day spent in pretrial confinement special quarters (136), and one day credit for every three days the appellant spent on Liberty Risk Charlie. Record at 305.

## Article 13, UCMJ and Speedy Trial

After sentencing, counsel for the defense submitted a motion for unlawful pretrial confinement credit alleging a violation of Article 13, UCMJ. Appellate Exhibit VII. After receiving evidence and hearing argument on the motion, the military judge found an Article 13 violation. The appellant asserts that the military judge's remedy for the Article 13 violation was inadequate and that he erred by not *sua sponte* dismissing the charges. Appellant's Brief of 14 Sep 2010 at 12. He also avers the military judge erred by not finding a speedy trial violation, and similarly requests the charges be dismissed with prejudice. *Id.* at 19-21.

### A. Article 13, UCMJ

Article 13, UCMJ, prohibits: (1) the intentional imposition of punishment on an accused before trial, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003) (citations omitted). The "punishment prong" of Article 13, UCMJ focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of the pretrial restraint. *United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003) (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)).

Article 13, UCMJ issues have "mixed constitutional and statutory concerns," which require application of the historical facts of custody to constitutional principles. *McCarthy*, 47 M.J. at 165. The "ultimate issue of unlawful pretrial punishment presents a mixed question of law and fact qualifying for independent review." *Id.* (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)) (internal quotation marks omitted).

The ultimate *legal* question as to whether the appellant is entitled to credit is reviewed *de novo*. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). However, the sufficiency of a military judge's relief is reviewed for an abuse of discretion. *United States v. Williams*, 68 M.J. 252, 257 (C.A.A.F. 2010). We defer to a military judge's findings of fact unless they are clearly erroneous. *Mosby*, 56 M.J. at 310. In the case *sub judice*, both parties agree that the unnecessarily rigorous conditions of confinement constituted an Article 13, UCMJ, violation. The only remaining issue before this court is whether the military judge's relief was sufficient.

During the post-trial Article 39(a), UCMJ, session, the appellant requested administrative credit for illegal punishment that occurred during pretrial confinement, pretrial restriction, and LRC. Specifically, the trial defense counsel requested two-for-one confinement credit for the 136 days the appellant spent in "special quarters," (in addition to the 141 days of day-for-day credit the appellant received in accordance with *United*

*States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Record at 243, 263; AE VII. The trial defense counsel also requested an additional 60 days for illegal pretrial restriction (one day credit for every two days the appellant spent on pretrial restriction and liberty risk). Record at 263. The military judge concluded the pretrial restriction and the LRC were not tantamount to confinement, but still awarded 20 days of administrative credit for illegal pretrial punishment in violation of Article 13, UCMJ. Record at 295, 298, 305. He also awarded an additional 136 days of credit for illegal pretrial punishment while in confinement, not because there was any intent to punish, but because the excessive conditions constituted punishment. *Id.* at 301, 305. The military judge expressed concern for arbitrarily placing the appellant in maximum custody based solely on the seriousness of the charges. *Id.* at 303-04. The appellant now asserts the military judge's award of administrative credit was insufficient and requests the findings and sentence be set aside and the charges be dismissed with prejudice. Appellant's Brief at 20-21.

The appellant relies heavily on the Court of Appeals for the Armed Forces (CAAF) decision in *United States v. King*, 61 M.J. 225 (C.A.A.F. 2005) to buttress his argument. In *King*, the appellant spent two weeks pretrial in solitary confinement and the trial judge found no Article 13 violation. The CAAF, after finding that Article 13 was violated, fashioned a remedy in which it awarded the appellant three-for-one credit for the time he spent in solitary confinement.<sup>5</sup> *King* is readily distinguishable from the appellant's case. The appellant in *King* had to rely on a remedy fashioned by the appellate court because he was given no relief at trial (the military judge found no Article 13 violation). By contrast, in *Williams*, 68 M.J. at 252, the CAAF reviewed the confinement credit awarded by a military judge for an Article 13 violation under an abuse of discretion standard. In *Williams*, the CAAF declined to give additional relief where the trial judge granted the appellant 188 additional days credit for the Article 13 violation.<sup>6</sup> The court found that "the military judge did not abuse his discretion in awarding one-for-one confinement credit . . . under Article 13, UCMJ . . . ." *Id.* at 257 (emphasis added). While *Williams* was primarily concerned with the statutory or regulatory vehicle through which credit was awarded, the court's language indicates a military judge deserves greater deference for the amount of credit they award. See also *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001) (citing *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983)) (noting the "broad authority" of a military judge to order administrative credit for Article 13, UCMJ violations).

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<sup>5</sup> In *King*, the appellant requested three-for-one confinement credit as a remedy for the Article 13 violation.

<sup>6</sup> The principle issue in *Williams* involved the relationship between violations of service regulations by brig officials and relief under either RULE FOR COURT MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) or Article 13, UCMJ. *Williams*, 68 M.J. at 255-57.

After conducting our own *de novo* review, we concur with the military judge that the appellant was entitled to additional confinement credit for the Article 13 violation. We also found nothing in the record to suggest the military judge's findings of fact are clearly erroneous or unsupported by the record. Finally, we do not find that the military judge abused his discretion in granting 156 days of administrative credit for the Article 13, UCMJ, violation. Accordingly, we decline to grant the appellant additional relief.

## **B. Speedy Trial**

The appellant asserts on appeal that he was denied a speedy trial as guaranteed by Article 10, UCMJ, and RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Appellant's Brief at 17-20. R.C.M. 707(a) states, "[t]he accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; [or] (2) The imposition of restraint under R.C.M. 304(a)(2)-(4) . . . ." We apply a *de novo* standard of review to the legal question of whether an accused received a speedy trial. *United States v. Cooper*, 58 M.J. 54, 57-58 (C.A.A.F. 2003). Where a military judge has made findings of fact when ruling on a speedy trial motion, we give them substantial deference and review for clear error. *Id.* at 58.

In the present case, the appellant asserts that LRC was tantamount to confinement, thereby causing the speedy trial clock to continue to run after the accused was taken off pretrial restriction. Appellant's Brief at 17-18. If so, then more than 120 days would have elapsed from the time the appellant was placed in pretrial restriction to the time of trial. If not, the speedy trial clock would not start to run until preferral of charges and would have stopped when the appellant signed the motion for docketing, less than 120 days later.

The parties dispute whether a speedy trial issue was raised at trial. Our review of the record shows a speedy trial issue under R.C.M. 707 was raised during the post-trial Article 39(a) session and ruled on by the military judge. AE VII at 17; Record at 290, 291. The military judge found that the defense did not present any evidence that the commanding officer placed the appellant on LRC for irregular or impure motives, and that LRC was designed to protect relations with the host country of Japan. Record at 291-92. He further found that LRC was not a subterfuge for restriction. *Id.* at 291. As a result, the speedy trial clock did not continue to run,<sup>7</sup> but started again at the

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<sup>7</sup> This scenario also requires a finding that the time between release from pretrial restriction and the preferral of charges was a "significant period" within the meaning of R.C.M. 707(b)(3)(B). While such a finding was not articulated by the military judge, he did find there were no impure motives on the part of the commander, and that LRC did not adversely impact any pretrial preparation. Record at 292, 294. As a result, we are convinced that under the facts of this case, 31 days is a significant period of time following

preferral of charges and was stopped when the appellant signed the motion for docketing less than 120 days later.

After a thorough review of the record, nothing suggests the military judge's findings of fact with respect to LRC were clearly erroneous and we accept them as our own. We find that the speedy trial clock appropriately restarted upon the preferral of charges, and stopped when the appellant signed the motion for docketing. Accordingly, we find that no R.C.M. 707 violation occurred.<sup>8</sup>

### **Voluntariness of Pretrial Agreement**

The appellant claims his pretrial agreement was involuntary because he only signed it while he was held in maximum custody under "illegal and inherently coercive conditions." Appellant's Brief at 24. The appellant further argues he pleaded guilty because of promises and conversations separate and apart from the pretrial agreement. *Id.* at 23-24.

Appellate courts normally will not consider post-trial claims of *sub rosa* agreements when the appellant and counsel have made on-the-record assurances to the military judge that no other agreements exist. *United States v. Muller*, 21 M.J. 205, 207 (C.M.A. 1986). In addition, this court has consistently relied upon an accused's on-the-record statements when reviewing claims of coercion. See *United States v. Inong*, 57 M.J. 501, 503 n.5 (N.M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 460 (C.A.A.F. 2003) (applying waiver to issue of pretrial punishment, but noting that an accused's plea was provident after he made on-the-record assurances of voluntariness despite claiming he could only get out of solitary confinement by signing a pretrial agreement); *United States v. Soto*, No. 9701024, unpublished op. (N.M.Ct.Crim.App. 30 Jun 1999); *United States v. Miller*, No. 9801102, unpublished op. (N.M.Ct.Crim.App. 19 Mar 1999) (finding the accused to have freely entered into an agreement despite raising the issue of coercion while in solitary confinement); (finding an accused provident to a guilty plea based on his sworn responses during the providency inquiry and the stipulation of fact, despite the claim that he acquiesced to a pretrial

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release from restraint so that the speedy trial clock did not continue to run. See *United States v. Ruffin*, 48 M.J. 211, 212-13 (C.A.A.F. 1998); *United States v. Gray*, 26 M.J. 16, 20 (C.M.A. 1988); *United States v. Easter*, No. 854397, unpublished op. (N.M.C.M.R. 5 May 1986) (per curiam).

<sup>8</sup> We note that appellant's argument focuses on the R.C.M. 707 speedy trial clock, but relief is ultimately requested under Article 10, UCMJ. Appellant's Brief at 20. There was no Article 10, UCMJ, violation raised during the proceedings. Without litigating any Article 10, UCMJ, motion at trial, the issue was waived once the appellant unconditionally pleaded guilty. *United States v. Dubouchet*, 63 M.J. 586, 588 (N.M.Ct.Crim.App. 2006). Recognizing that, according to the defense affidavit attached to the record, the appellant specifically chose to raise issues surrounding pretrial restraint in order to gain sentence credit under Article 13, we choose to apply waiver in this case and decline to grant relief.

agreement while in maximum custody pretrial confinement for 228 days), *aff'd*, 2000 CAAF LEXIS 17 (C.A.A.F. Jan. 14, 2000) (summary disposition).

In the present case, the military judge asked the appellant whether there were any outside agreements and if he was forced or threatened to sign the agreement. Record at 112-13. The appellant consistently responded with on-the-record assurances that (1) he was pleading guilty voluntarily, (2) he signed the pretrial agreement voluntarily, and (3) no other oral or written agreements existed. *Id.* at 8, 16, 112-13.

While the military judge found the conditions of the appellant's confinement amounted to illegal pretrial punishment, we do not accept the appellant's argument that solitary confinement - even if illegal for Article 13, UCMJ purposes - is "inherently coercive." Every accused who signs a pretrial agreement does so for some future benefit, most often for relief from post-trial confinement. It does not necessarily follow that an accused situated in confinement more arduous than normal (even illegal) will lose the ability to voluntarily sign a pretrial agreement.<sup>9</sup> Consistent with the cases cited above, the appellant's post-trial claims are insufficient to overcome his on-the-record assurances of voluntariness particularly where the appellant litigated the conditions of his confinement at trial and made no reference to coercion at any time. *See Muller*, 21 M.J. at 207. We therefore find the appellant's claims to be without merit.

#### **Severance of the Trial Defense Counsel and Ineffective Assistance of Counsel**

In his third and fourth assignments of error, the appellant maintains that his lead defense counsel, Captain (Capt) D, was (1) constitutionally ineffective and (2) improperly severed by the military judge with respect to his representation. Appellant's Brief at 25, 28. We will address both issues in this section.

In order to prevail on a claim of ineffective assistance of counsel, the appellant must demonstrate that his "counsel's performance fell below an objective standard of reasonableness." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006) (citations omitted). Specifically, the appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet the prejudice

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<sup>9</sup> *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (noting that any system that encourages the negotiation of pleas will inevitably and permissibly have a discouraging effect on the defendant's difficult choice to balance the assertion of trial rights with the risk of more severe punishment).

prong, the appellant must show that counsel's errors were so serious that the results of the trial are unreliable. *Id.*

If the issue can be resolved by addressing the prejudice prong of this test, we need not determine whether counsel's performance was deficient. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (quoting *Strickland*, 466 U.S. at 697). When challenging the effectiveness of counsel after a guilty plea, the appellant must show that absent the deficient performance, he would have pled not guilty and insisted on proceeding to trial. *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008).

Here, the appellant argues he would not have pleaded guilty and that he signed the pretrial agreement involuntarily to escape solitary confinement, and that his counsel's performance was deficient because he failed to file a pretrial Article 13, UCMJ motion. Appellant's Brief at 30. The appellant cannot show that a successful Article 13, UCMJ, motion would have caused him to insist on proceeding to trial particularly where it was litigated at trial and the relief ordered was in the form of sentence credit, not dismissal. Similarly, because we agreed above with the military judge's ruling on the speedy trial motion, there is no possible prejudice to the appellant.

Furthermore, the appellant frames the issue of Capt D's post-guilty plea representation as both abandonment—implicating ineffective assistance of counsel—and as improper severance of counsel by the military judge—implicating a trial error testable for prejudice under Article 59(a), UCMJ. *Id.* at 25-27, 30; see *United States v. Hutchins*, 69 M.J. 282, 292 (C.A.A.F. 2011) (citing *United States v. Acton*, 38 M.J. 330, 336-37 (C.M.A. 1993)). Assuming without deciding both deficient performance through abandonment and trial error through improper severance, we will resolve the issue by addressing any possible prejudice to the appellant.<sup>10</sup> Art. 59(a), UCMJ; *Quick*, 59 M.J. at 386.

Capt D was not present during the post-trial Article 39(a) session, so any alleged prejudice would have to be felt through the results of that session. The appellant was successful in his Article 13, UCMJ motion and received day-for-day confinement credit (additional to Allen credit) based on the military judge's reasoned analysis described above. Despite Capt D's absence, the appellant remained represented by 1stLt R who, through agreement with Capt D, investigated, prepared, and argued the Article 13, UCMJ, motion. Government Response to Court Order filed 7 Feb

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<sup>10</sup> Although abandonment by defense counsel may, in some cases, permit the presumption of prejudice, the circumstances of this case do not require such a finding. This is particularly true because there was no "complete denial of counsel" as the appellant remained represented by First Lieutenant (1stLt) R for an issue she maintained primary responsibility over. See *United States v. Cronin*, 466 U.S. 648, 658-62 (1984); see also *United States v. Pierce*, 40 M.J. 149, 151 (C.M.A. 1994) (deciding to assess prejudice because there was no showing of "total abandonment" by defense counsel during the post-trial process).

2011 (Affidavit of Capt D, USMC of 2 Feb 2011 at 3); Appellant's Motion to Attach filed 14 Feb 2011 (Affidavit of Capt R, USMC of 11 Feb 2011 at 3).<sup>11</sup> The appellant's argument effectively asks us to accept that the mere presence of Capt D in the courtroom would have yielded a different result. Even if Capt D was present and argued the motion, nothing in the record suggests that the outcome would have been any different. See *Hutchins*, 69 M.J. at 293. In fact, the appellant benefited from 1stLt R's efforts. Therefore, the absence of Capt D, assuming either abandonment or improper severance, neither materially prejudiced a substantial right of the appellant nor caused the results of the motion session to be unreliable. Art. 59(a), UCMJ; *Strickland*, 466 U.S. at 697.

### **Appellant's Lack of Memory to Additional Charges**

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge abuses his discretion when he "fails to obtain from the accused an adequate factual basis to support the [guilty] plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We "afford significant deference" to the military judge in this area of inquiry, and ask whether the record as a whole demonstrates a "substantial basis" in law or fact for questioning the providence of the plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). While the facts as revealed by the accused must objectively support the guilty plea, a guilty plea will only be considered improvident if testimony or other evidence of record reasonably raises the question of a defense, or includes something patently inconsistent with the plea in some respect. See *United States v. Roane*, 43 M.J. 93, 98-99 (C.A.A.F. 1995). When an accused "'sets up matter inconsistent with the plea' . . . the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Art. 45(a), UCMJ). However, the "mere possibility" that a defense exists is not enough of a basis for overturning the trial results. *Id.*

On appeal, the appellant claims the military judge erred because he (1) failed to explain the defense of "involuntary intoxication" and (2) permitted the appellant to speculate as to his specific intent for the burglary offense when he had no memory of committing the crime. Appellant's Brief at 33-36. The

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<sup>11</sup> Although Capt R (1stLt at the time of trial) minimizes her representation of the appellant throughout her affidavit, she was detailed counsel and was present through the trial, and maintained primary responsibility for the Article 13, UCMJ motion. Additionally, we have considered the affidavits of Captains R and D under the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), and have determined that accepting Capt R's statement concerning Capt D's representation at face value, no relief would be afforded to the appellant because of the success of the Article 13, UCMJ, motion.

CAAF has treated involuntary intoxication as an affirmative defense only if it amounts to legal insanity. *United States v. Peterson*, 47 M.J. 231, 233-34 (C.A.A.F. 1997); *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996). In addition, the appellant's inability to recall the specific facts of his offense does not prevent his guilty plea from being provident so long as he is personally convinced of his guilt based upon a review of the Government's evidence.<sup>12</sup> *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011) (citing *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977)); R.C.M. 910(e), Discussion.

While the facts of this case certainly raised the mere possibility of an intoxication defense, "the military judge adequately inquired into it and resolved all potential inconsistencies" during the providence inquiry. *Peterson*, 47 M.J. at 233. The facts and circumstances of *Peterson* are instructive for the resolution of the present case. In *Peterson*, the appellant plead guilty to housebreaking and indecent assault, and claimed on appeal his intoxication, both voluntary and involuntary, negated his specific intent to the offenses. *Id.* at 233-34. The court addressed both involuntary and voluntary intoxication and found no defense under either theory. *Id.* at 234. In doing so, the same facts relating to appellant's *mens rea* were applied to both the voluntary and involuntary intoxication claims. *Id.*

Here, while the indecent act is a general intent crime, the appellant now claims the military judge did not sufficiently inquire into the appellant's intoxication, particularly because he did not distinguish between voluntary and involuntary intoxication. Appellant's Brief at 34. However, as in *Peterson*, the facts elicited here were sufficient to resolve any possible intoxication defense. For instance, the military judge began his inquiry by engaging in a detailed colloquy with the appellant centered on the fact that he had no memory of committing the offense. Record at 86-94. The appellant was further able to articulate why he could not recall the facts of the offense. *Id.* at 87. It was clear the appellant reviewed all the evidence, was present at and understood the Article 32 investigation and ensuing report, and had no reason to doubt the credibility of the complaining witness. *Id.* On several occasions, the military judge ensured that the appellant did not wish to raise any defenses for "mental issues," "intoxication," or "amnesia." *Id.* at 89, 97. He further confirmed that the defense counsel, in consultation with the appellant, believed no issues existed with

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<sup>12</sup> This court has reviewed several cases where the accused did not remember certain facts but was still provident because of a sufficient inquiry by the military judge. See *United States v. McManus*, No. 200101372, unpublished op. (N.M.Ct.Crim.App. 18 Jul 2003); *United States v. Peterson*, No. 9700894, unpublished op. (N.M.Ct.Crim.App. 20 Feb 1998); *United States v. Alves*, No. 9701610, unpublished op. (N.M.Ct.Crim.App. 31 Mar 1999); *United States v. Mahoney*, No. 9400276, unpublished op. (N.M.Ct.Crim.App. 22 Mar 1995); *United States v. Powell*, No. 893616, unpublished op. (N.M.C.M.R. 14 Jun 1991).

respect to the defense of insanity, which would relate to involuntary intoxication. *Id.* at 97; see *Peterson*, 47 M.J. at 233-34.

The military judge also adequately addressed the issue of specific intent. He explained the difference between general and specific intent as it related to the two Additional Charges. Record at 96. The appellant's responses indicated his understanding that if he were to plead not guilty, the trier of fact would have to be convinced beyond a reasonable doubt that he specifically intended to commit an indecent act when he broke into the barracks room of Sgt L. *Id.* at 96-97. Moreover, we disagree with the appellant's characterization that his answers as to specific intent were "pure speculation." Appellant's Brief at 36. In fact, the military judge sufficiently discussed the appellant's review of the evidence and his presence at the Article 32 hearing. Record at 88-93. The appellant did not speculate as to his specific intent—he was convinced of it by the evidence with which he was confronted. *Id.*

We are therefore convinced the numerous references to any mental health, intoxication, or amnesia defenses, followed by repeated assurances from the appellant that he was waiving those defenses based on his review of the evidence was sufficient to resolve any inconsistency between his lack of memory and his guilty pleas. *Id.* at 96-98. Having carefully considered the record of trial, we detect no substantial basis in law or fact to question the appellant's guilty pleas.

#### **Indecent Act versus Indecent Exposure**

In his final assignment of error, the appellant claims that he is not guilty of an indecent act because his actions only amounted to an exposure. Appellant's Brief at 36. The text of Article 120(k), UCMJ states the following: "Any person . . . who engages in indecent conduct is guilty of an indecent act . . . ." The President has promulgated two required elements for the offense of indecent act to be met: "[(1)] That the accused engaged in certain conduct; and [(2)] that the conduct was indecent conduct." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(11). The MCM further defines indecent conduct as actions of "immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." MCM, Part IV, ¶ 45a(t)12.

The appellant's argument that his actions were merely an exposure relies on the premise that "active participation" from Sgt L was required to satisfy the offense of an indecent act. Appellant's Brief at 38 (citing *United States v. Johnson*, 60 M.J. 988, 988-89 (N.M.Ct.Crim.App. 2005); *United States v. Eberle*, 41 M.J. 862, 865 (A.F.Ct.Crim.App 1995)). However, the "active participation" requirement is part of the former offense of indecent acts with another in violation of Article 134, UCMJ,

which has been "replaced in its entirety by [the] new offense [of indecent act]." MCM, App. 23, at A23-15. The appellant in this case was charged with the latter.

No cases to date have addressed whether participation or interaction between an accused and a victim is required for a violation of Article 120(k), UCMJ. But any such requirement is absent in both the statutory text and the elements promulgated by the President. This is inapposite to the prior offense, which required the indecent conduct to be "with a certain person." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV ¶ 90b Therefore, an offense charged under the new Article 120(k) is unconstrained by the participation requirement stemming from *United States v. Thomas*, 25 M.J. 75, 77 (C.M.A. 1987) and its progeny, and an accused can be found guilty of an indecent act so long as he commits conduct that is indecent as described in the elements and definitions above.

In the facts of this case, the appellant undoubtedly committed conduct that was indecent. He admitted to standing over Sgt L with his erect penis in his hand. Record at 95-96; Prosecution Exhibit 1. The act of holding his erect penis and standing over Sgt L while she was sleeping is more than simply exposure—it is conduct. Additionally, holding one's erect penis in front of another person while they are sleeping is immoral conduct relating to "sexual impurity" and "repugnant to common propriety." MCM, Part IV, ¶ 45a(t)12. The fact that the appellant was erect also illustrates it was done to "excite sexual desire." *Id.* Finally, the impropriety of his conduct was plainly evident when Sgt L screamed at him as soon as she awoke. Record at 89; 136-37. As a result, the appellant's actions meet the elements and definitions of indecent act in violation of Article 120(k), UCMJ, and the military judge did not err in finding his plea provident to the charged offense.

### **Conclusion**

Both the findings of guilty and sentence approved by the convening authority are affirmed.

Chief Judge REISMEIER and Judge BEAL concur.

For the Court

R.H. TROIDL  
Clerk of Court