No.

IN THE

SUPREME COURT OF THE UNITED STATES

NIDAL M. HASAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION APPENDIX

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August 1, 2024

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United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 21-0193/AR
Crim.App. No. 20130781

v.

ORDER

Nidal M.
Hasan,
Appellant

On consideration of Appellant's petition for reconsideration, it is, by the Court, this 4th day of March, 2024,

ORDERED:

Upon consideration of Appellant's petition for reconsideration of this Court's opinion issued on September 6, 2023, *United States v. Hasan*, 84 M.J. 1 (C.A.A.F. 2023), that the petition for reconsideration is granted in part and denied in part, that the Court's judgment is vacated, and that no additional filings are authorized. Further action on the case shall be held in abeyance pending a new decision issued by the Court.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Potter)
Appellate Government Counsel (Emmons)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Nidal M. Hasan,
Appellant

USCA Dkt. No. 21-0193/AR
Crim.App. No. 20130781

JUDGMENT

This cause came before the Court on appeal from the United States Army Court of Criminal Appeals and was argued by counsel on March 28, 2023. On consideration thereof, it is, by the Court, this 4th day of March, 2024,

ORDERED and ADJUDGED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Nidal M. HASAN, Major
United States Army, Appellant

No. 21-0193
Crim. App. No. 20130781

Argued March 28, 2023—Decided March 4, 2024

Military Judges: Gregory A. Gross and Tara A. Osborn

For Appellant: *Major Bryan A. Osterhage* and *Jonathan F. Potter*, Esq. (argued); *Colonel Michael C. Friess*, *Major Christian E. DeLuke*, *Captain Carol K. Rim*, and *Captain Andrew R. Britt* (on brief); *Captain Roman W. Griffith*.

For Appellee: *Major Jennifer A. Sundook* and *Captain Timothy R. Emmons* (argued); *Colonel Christopher B. Burgess*, *Lieutenant Colonel Jacqueline J. DeGaine*, *Captain Anthony J. Scarpati*, and *Captain A. Benjamin Spencer* (on brief); *Lieutenant Colonel Craig J. Schapira*, *Major Dustin L. Morgan*, and *Captain Karey B. Marren*.

Chief Judge OHLSON delivered the opinion of the Court, in which Judge SPARKS, Judge MAGGS, Judge HARDY, and Judge JOHNSON joined.

Chief Judge OHLSON delivered the opinion of the Court.

Overview of the Case

In the early afternoon of November 5, 2009, Appellant, an Army psychiatrist, walked into the crowded Soldier Readiness Processing (SRP) center at Fort Hood, Texas.[1] He suddenly opened fire with a semiautomatic handgun equipped with two laser sights, killing thirteen people and wounding thirty-one others.[2] He was only stopped when law enforcement officers confronted him outside the building and shot him. As a result of being shot, Appellant is now paralyzed from the waist down and is permanently confined to a wheelchair.

The evidence adduced at trial indicates that in the months leading up to November 5, Appellant carefully planned and prepared for his attack. In late-July 2009, he visited an off-post gun shop and asked the salesperson, "What is the most technologically advanced handgun on the market?" The salesperson recommended a Fabrique Nationale (FN) 5.7, and he confirmed that this handgun model had a high magazine capacity. The salesperson also informed Appellant of the extensive damage a high velocity bullet fired by the FN 5.7 would cause after impacting the human body. Appellant purchased the recommended weapon, along with magazine extension kits to increase the firing capacity to thirty rounds per magazine. He also purchased laser sights and had them mounted on the weapon. Appellant became a regular customer at the gun store,

[1] On May 9, 2023, Fort Hood was renamed Fort Cavazos. *See* Fort Cavazos Redesignation, https://home.army.mil/cavazos/about/fort-cavazos-redesignation (last visited August 17, 2023). However, to maintain consistency with the briefs and case history, we will continue to refer to the site of the attack as Fort Hood.

[2] Appellant shot thirty-one individuals but was charged with thirty-two specifications of attempted premeditated murder because he exchanged gunfire with Officer MT—a civilian police officer—who was not shot during the attack.

returning to buy boxes of ammunition and additional magazines with extension kits.

In October 2009, Appellant began target practice with his FN 5.7 at a local shooting range. He became proficient at hitting targets in the center of mass or in the head at a distance of 100 yards. On one such occasion, Appellant obtained guidance from the firearms instructor on how to practice "speed loading" of the weapon. Also in October, Appellant was informed by his superior that he was selected to deploy to Afghanistan the following month and that he was required to process through the SRP center prior to his deployment. As noted by the United States Army Court of Criminal Appeals (ACCA) in its opinion, "Appellant expressed to a co-worker his reluctance to deploy and stated, 'They've got another thing coming if they think they are going to deploy me.' " *United States v. Hasan*, 80 M.J. 682, 692 (A. Ct. Crim. App. 2020) (en banc).

Appellant visited the SRP center between seven and nine times in the two weeks prior to the attack. A servicemember who witnessed these unscheduled visits to the SRP center testified that they "didn't have a purpose," and he reminded Appellant that he was not supposed to return to the SRP center until the completion of his physical.

In the early afternoon of November 5, 2009, Appellant, concealing his FN 5.7 and nearly 400 rounds of ammunition, entered the SRP center. Numerous soldiers were inside the building. Most of them were either waiting to meet with medical personnel, who were located in cubicles, to see if they were medically cleared to deploy or, for those soldiers returning from deployment, to discuss any medical concerns. Unprompted, Appellant walked up to a civilian data-entry clerk, telling her that she was needed elsewhere. As soon as the clerk departed the area Appellant pulled out his FN 5.7 handgun, yelled "Allahu Akbar!" and began shooting at his fellow soldiers using speed reloading techniques. From his initial position Appellant was able to view the two exits from the building. A witness testified that Appellant was "firing at soldiers running out the front door. He was firing at soldiers running out the back door."

As soldiers tried to take cover in and around the cubicles, Appellant walked across the facility shooting several soldiers in the back as they tried to exit the building. Another witness described the scene:

> I [was] just watching him shoot and at this time the room was filled with gun smoke and I see the weapon that he had, had a green light and a red laser and it's going through the haze and the gunfire just continued to go off. . . . [H]e just kind of just walked back and forth and was just shooting us for what felt like an eternity.

Eventually Appellant left the SRP center to pursue fleeing soldiers. He then tried to enter another building but the door was locked. When law enforcement officers arrived, they located Appellant outside the SRP center building. Appellant refused an order to drop his weapon and a gunfight ensued, resulting in a law enforcement officer being shot multiple times. Appellant stood over the wounded officer and attempted to shoot her again at point-blank range but his weapon malfunctioned. Appellant was then shot in the chest by another law enforcement officer and taken into custody.

On July 6, 2011, the convening authority referred the charges against Appellant to a general court-martial as a capital case. Nearly two years later—and two months before the start of trial—Appellant elected to represent himself during the proceedings. However, standby counsel were present and were prepared to provide assistance if Appellant requested it.

At trial before a panel of officer members sitting as a general court-martial, Appellant made an opening statement in which he immediately acknowledged the following:

> The evidence will clearly show I am the shooter. . . .
>
> . . . .
>
> But the evidence presented during this trial will only show one side. The evidence will show also show [sic] that I was on the wrong side [of]

> America's war on Islam. But then I switched sides, and I made mistakes.

Appellant also informed the panel members during his opening statement that he was "an imperfect Muslim[] trying to establish the perfect religion of Almighty God, as supreme on the land despite the disbeliever's hatred for it," and he "apologize[d] for any mistakes [he] made in this endeavor."

Following opening statements the prosecution elicited multiple days of witness testimony on the merits. However, Appellant did not put on a case-in-chief. He also did not make a closing argument. After this trial on the merits, the panel convicted Appellant of thirteen specifications of premeditated murder, and thirty-two specifications of attempted premeditated murder in violation, respectively, of Articles 118 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918, 880 (2006).

The sentencing phase of the trial lasted four days. Again, although the Government put on a sentencing case, Appellant rested his case without putting on any witness testimony or making any sentencing argument. The panel sentenced Appellant to death, dismissal from the service, and forfeiture of all pay and allowances.

With regard to the submission of clemency matters, Appellant was initially represented by counsel but he ultimately elected to proceed pro se. Upon consideration of Appellant's submission, the convening authority approved the adjudged sentence.

Appellant has been represented by counsel during his appeals. The lower appellate court—ACCA—affirmed the findings and sentence. *Hasan*, 80 M.J. at 721. That court later denied Appellant's motion for reconsideration. *Hasan v. United States*, No. ARMY 20130781, 2021 CCA LEXIS 114, at *1 (A. Ct. Crim. App. Mar. 15, 2021) (en banc) (order) (unpublished).

Because Appellant's affirmed sentence includes death, his case is now before this Court for mandatory review. Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1) (2012).

Appellant assigns forty-nine issues—eleven briefed and thirty-eight unbriefed—and personally asserts another issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Via these issues, he is seeking to reverse the findings and sentence in this case or, in some instances, to obtain other relief. However, after carefully considering his raised issues and the record, we conclude that Appellant is not entitled to any relief. We therefore affirm the judgment of the lower court. We now turn to the issues in their presented order.

Issue I: Whether the Military Judge Erred in Allowing Appellant to Represent Himself Because Appellant's Waiver of Counsel Was Not Voluntary or Knowing and Intelligent

Appellant argues that his waiver of counsel and decision to proceed pro se was involuntary—and therefore invalid under the Sixth Amendment—because he was confronted by a "constitutionally repugnant choice: go to trial with counsel who were diametrically opposed to his fundamental objective or go alone." Brief for Appellant (Final Copy) at 40, *United States v. Hasan*, No. 21-0193 (C.A.A.F. May 5, 2022) [hereinafter Appellant's Brief]. We conclude that the facts and the law do not support Appellant's contention.

I. Background

When Appellant was arraigned in July 2011, he was represented by three military defense counsel: Lieutenant Colonel (LTC) KP, Major (MAJ) CM, and Captain (CPT) JO. Early in the pretrial stage of his court-martial, Appellant released CPT JO, who was replaced by MAJ JM. This team of counsel represented Appellant through more than twenty pretrial sessions.

As trial approached, however, an apparent divergence of views emerged between the preferred trial strategies of Appellant and his counsel. On May 17, 2013, Appellant's defense team presented him with a memorandum explaining their intended trial strategy. The memorandum stated that the defense team intended to argue that Appellant did

not have a "premeditated design to kill" at the time he committed the shootings. Specifically, Appellant's defense team told him that they intended to show that he had been:

> so affected by religious passion that [he] could not or did not consider the consequences of the act with a cool mind. In other words, [he was] so eager to get right with God, so afraid of the Hellfire for both [himself] and [his] parents, and so convinced that [he] had to do something drastic to please God, that [he] believed [he was] taking the right action.

In other words, counsel wanted to try to demonstrate at trial that Appellant was "so consumed by religious passion that [he] believed that if an act pleased God, there was no real choice about whether to do the act," and thus Appellant lacked premeditation in regard to his offenses.

Instead of agreeing to pursue this "religious passion" theory, Appellant wanted to pursue a strategy that would attempt to establish that his attack on his fellow soldiers was justified. Specifically, he desired to argue that because the war in Afghanistan was illegal, by shooting U.S. soldiers preparing to deploy to that country he was actually acting in the defense of others—that is, protecting members of the Taliban such as its leader, Mullah Omar, from imminent harm at the hands of U.S. soldiers. Appellant and his military defense counsel had previously discussed such a strategy. However, after researching the issue, his counsel advised Appellant that this theory did not constitute a legally viable defense under the facts of the case.

After reviewing the memorandum and enclosures presented to him, Appellant wrote at the bottom of the memorandum, in pertinent part: "Based on these documents as well as discussions with [LTC KP] I deem it necessary to represent my self [sic]." The same day, Appellant filed a notice with the court that he wanted to waive counsel and proceed pro se.

At the next Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2012 ed.), session, the military judge engaged in a colloquy

with Appellant to discuss his request. As summarized by the lower court, the military judge:

> established [A]ppellant had discussed the request with his counsel prior to signing it. She then re-advised [A]ppellant of his right to counsel, to include his right to request individual military counsel (IMC)[3] or hire civilian counsel at his own expense. Appellant indicated he understood his right to counsel and still no longer wished to be represented by his three military counsel or any other attorney.

Hasan, 80 M.J. at 694.

After discussing with Appellant his physical and mental condition vis-à-vis representing himself, the military judge ordered the Government to have him medically examined.

At a subsequent session of court, the military judge received the report and testimony of the physician who examined Appellant. The military judge also conducted an extended discussion with Appellant about his wish to proceed pro se, which is typically known as a "*Faretta* colloquy." *Faretta v. California*, 422 U.S. 806 (1975). As summarized by the ACCA:

> Throughout the colloquy, [A]ppellant consistently indicated he understood the military judge, that he understood the risks and limitations, and that he wanted to proceed with his self-representation. He affirmed his belief that he was physically and mentally capable to review the evidence and prepare for trial, and he stated he was confident he would be ready to proceed to trial. Appellant affirmed his decision was not the result of any threats or force and was made of his own free will. Moreover, [A]ppellant expressed a willingness to maintain LTC KP, MAJ CM, and MAJ JM as his standby counsel throughout the trial, so they

[3] "Individual military counsel" is a military counsel of an accused's own selection if that counsel is "reasonably available" as determined under regulations prescribed by the Secretary of the military department in which the accused serves. Article 38(b)(3)(B), (b)(7), UCMJ, 10 U.S.C. § 838(b)(3)(B), (b)(7) (2006).

> could assist him with legal research and provide advice as needed or requested.

Hasan, 80 M.J. at 696.

The following brief excerpts from the lengthy exchange between the military judge and Appellant provide additional insights:

> MJ: . . . . Do you understand that you would be better off with a trained lawyer who is familiar and knows all the procedures, the Rules of Evidence, the Military Rules of Evidence, the Rules for Courts-Martial and the Rules of Law than you would be representing yourself?
>
> ACC: I understand.
>
> MJ: Basically what I'm telling you, Major Hasan, as a general rule, representing yourself is not a good policy.
>
> ACC: You've made that quite clear.
>
> . . . .
>
> MJ: I'm going to advise you again, Major Hasan, I know you said earlier that I've made this perfectly clear, but I'm going to repeat it again. I think it's unwise for you to represent yourself. I think it's an unwise decision and I strongly urge you not to represent yourself. But knowing all that I've told you, do you still want to act as your own lawyer?
>
> ACC: Yes, ma'am.

Ultimately, the military judge was satisfied with Appellant's responses during the colloquy and, in conjunction with her review of Appellant's medical examination as well as Appellant's Rule for Courts-Martial (R.C.M.) 706 sanity board report, found that Appellant's waiver of counsel was knowing, intelligent, and voluntary. She therefore approved his request to proceed pro se. However, the military judge appointed his defense team to serve as standby counsel, as reflected in the following passage from the record of trial:

> MJ: . . . . All three of the currently detailed counsel . . . will remain as standby counsel, with [two of the lawyers] remaining at counsel table, and

> [one of the lawyers] remaining in the spectator gallery. Standby counsel will be noticed in all communications to and from the court. They will attend all proceedings and will be available to Major Hasan for consultation and advice.
>
> Counsel may provide you, Major Hasan, with advice and procedural instructions. They will not do anything without your agreement. However, they are available to act as your lawyer or assist you at any time. At any time during the trial you feel that you could benefit from advice and you want to take a break to talk to your counsel about something[,] let me know and I will permit it. Do you understand that?
>
> ACC: I do.

On July 2, 2013, after the military judge entered not guilty pleas on behalf of Appellant, she sought clarification on the record about whether Appellant still wanted to represent himself because Appellant had mentioned the possibility of retaining a civilian attorney. In response to inquiries from the military judge, Appellant eventually stated, "I want to proceed pro se," but he also sought to reserve the right to retain civilian counsel "if after talking to [that counsel], something fruitful evolves."

At the next session of court on July 9, 2013, Appellant stated that he met with civilian counsel and if the court allowed him to pursue the "defense of others" defense, he would elect to be represented by that civilian attorney. The military judge stated: "The court's ruling is that the defense of others [defense] fails as a matter of law. Understanding that, do you still wish to proceed pro se?" Appellant responded, "Yes, I do."

Prior to the sentencing phase of his trial, the military judge engaged in the following colloquy with Appellant:

> MJ: Do you still wish to proceed pro se, Major Hasan, knowing everything that I've told you throughout the trial about the dangers and disadvantages of self-representation; the nature of the proceedings at this stage of the trial; and the possible punishments you face?

> ACC: I do.
>
> MJ: Do you understand, as I told you on Friday, that this is the stage of the trial where the panel decides whether you should live, or whether you should die?
>
> Do you understand that?
>
> ACC: I understand.
>
> MJ: And you understand that you're staking your life on the decisions that you make?
>
> ACC: I do.
>
> MJ: Is that a free and voluntary choice by you?
>
> ACC: It is.
>
> MJ: Again, I think it is unwise for you to represent yourself, but that is your choice, and you're competent to make that choice. Is that a free and voluntary choice on your part?
>
> ACC: It is.

After this colloquy, the military judge "affirm[ed on the record her] previous findings—the accused may continue to represent himself pro se."

On appeal, Appellant argues that his "choice to proceed *pro se* was no choice at all," so the "waiver of counsel was involuntary." Appellant's Brief at 4, 48. Appellant asserts that he only elected to proceed pro se because his counsel intended to put on a defense that would have conceded guilt whereas he wanted to maintain his innocence by asserting the "defense of others" defense. Specifically, he contends that his "defense team . . . intend[ed] to attack premeditation by relying on 'religious fervor,' " a defense which "contradicted [A]ppellant's deeply held religious beliefs." *Id.* at 49. In Appellant's view, his trial defense team's insistence on pursuing their preferred trial strategy over his objection offered "a constitutionally repugnant choice" and infringed on his "constitutionally 'protected autonomy right' to control the objectives of his defense." *Id.* at 40, 43 (quoting *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018)). As a result, he avers that his waiver of counsel was not truly voluntary but rather the result of "an

impasse with his detailed counsel." *Id.* at 50. Appellant also contends that the military judge failed to perform her "duty . . . to inquire into [A]ppellant's dissatisfaction with counsel before accepting [A]ppellant's waiver" when the conflict between Appellant and his standby counsel became apparent. *Id.*

Arguing that Appellant made a knowing, voluntary and intelligent waiver of counsel, the Government claims that "Appellant's argument is built upon . . . a faulty premise" that he wanted to maintain his innocence. Brief for Appellee at 23, *United States v. Hasan*, No. 21-0193, (C.A.A.F. Oct. 20, 2022) [hereinafter Appellee's Brief]. According to the Government, both Appellant's "defense of others" claim (which the military judge rejected as a matter of law) and trial defense counsel's religious fervor strategy entailed admitting that Appellant committed the shooting at Fort Hood. Therefore, the Government contends, rather than differing about fundamental objectives, Appellant and his counsel merely "differed in strategy: Appellant wanted to argue that the killing was justified, and his detailed counsel wanted to attack one of the elements of the offense, namely premeditation." *Id.* at 24.

The Government also finds it significant that at trial "Appellant did not clearly and vociferously object to his detailed counsel's planned defense," and thus did not state on the record that counsel's strategy violated his religious beliefs. *Id.* at 26. The Government further argues that "Appellant did not have good cause to substitute counsel because his detailed counsel were well-prepared and competent," and even substitute counsel "would not have given Appellant what he wanted: to present a defense that the military judge already ruled could not be presented." *Id.* at 28. The Government's final point is that the military judge had sufficient information to conclude Appellant's waiver of counsel was voluntary.

II. Standard of Review

We review de novo whether an accused voluntarily waived his right to counsel. *See United States v. Rosenthal*,

62 M.J. 261, 262 (C.A.A.F. 2005) (per curiam) (Whether a waiver of a right was "knowing and intelligent" is "a question of law [assessed] under a de novo standard of review."); *see also United States v. Schaefer*, 13 F.4th 875, 886 (9th Cir. 2021) ("Whether a defendant knowingly and voluntarily waives his Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo." (citation omitted) (internal quotation marks omitted)).

III. Applicable Law

A. The Sixth Amendment Right to Counsel

The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend VI. "That right includes the right to waive counsel and to represent oneself." *United States v. Roof*, 10 F.4th 314, 351 (4th Cir. 2021) (citing *Faretta*, 422 U.S. at 834-36). When an accused is represented by counsel, "a defendant has the right to insist that counsel refrain from admitting guilt." *McCoy*, 138 S. Ct. at 1505.

"[I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense . . . ." *Id.* However, decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," and every other decision properly considered to be "[t]rial management" are left to counsel. *Id.* at 1508 (internal quotation marks omitted) (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). Included within counsel's purview is resolving a "strategic dispute[] about whether to concede an element of a charged offense." *Id.* at 1510. "Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* at 1508. "Autonomy to decide . . . the objective of the defense . . . belongs in this latter category." *Id.*

B. Voluntary Waiver of Counsel

"While the Constitution does not force a lawyer upon a defendant, it does require that any waiver of the right to

counsel be knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004) (citations omitted) (internal quotation marks omitted). "The [military's] current standards regarding the right of self-representation based on *Faretta* . . . are set forth in RCM 506(d) . . . ." *United States v. Mix*, 35 M.J. 283, 285 (C.M.A. 1992). This rule provides:

> The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is *voluntary* and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

R.C.M. 506(d) (2008 ed.) (emphasis added).

To find a valid waiver of counsel, the Supreme Court requires that the accused "voluntarily exercise[d] his informed free will." *Faretta*, 422 U.S. at 835. Our precedent provides little guidance on how to determine whether an accused's choice to represent himself was voluntary, but the federal circuit courts have addressed this issue in some detail. "[T]he voluntariness of a waiver is measured by reference to the surrounding circumstances." *Pouncy v. Palmer*, 846 F.3d 144, 161 (6th Cir. 2017). Thus, the focus is often on "mistreatment or coercion of the [accused]," i.e., whether the accused was "forced, threatened, or pressured into waiving his right to counsel." *United States v. Owen*, 963 F.3d 1040, 1049, 1051 (11th Cir. 2020); *Wilkins v. Bowersox*, 145 F.3d 1006, 1012 (8th Cir. 1998) ("a finding of coercion bears upon the voluntary aspect of the waiver"); *see also Moran v. Burbine*, 475 U.S. 412, 421 (1986) (indicating a waiver, in the context of *Miranda*[4] warnings,

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

is "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception").

Aside from this traditional concern, the United States Courts of Appeals have further stated that "the 'Hobson's choice' between proceeding to trial with an unprepared counsel or no counsel at all may violate the right to counsel" because that is no choice at all. *United States v. Washington*, 596 F.3d 926, 938 (8th Cir. 2010); *see also Pouncy*, 846 F.3d at 161; *United States v. Padilla*, 819 F.2d 952, 955 (10th Cir. 1987) ("A defendant forced to choose between incompetent or unprepared counsel and appearing pro se faces a dilemma of constitutional magnitude." (citation omitted) (internal quotations marks omitted)). In contrast, a simple disagreement with counsel about "a certain line of defense" is not enough to establish involuntary waiver of counsel. *Sanchez v. Mondragon*, 858 F.2d 1462, 1466 (10th Cir. 1988).

IV. Discussion

Despite his phrasing of this issue, Appellant does not actually challenge the knowing or intelligent nature of his waiver of counsel. We therefore focus on the voluntariness of Appellant's waiver. And for the reasons cited below, we conclude that Appellant voluntarily waived his right to counsel and validly elected to proceed pro se.

We preliminarily note that the typical hallmarks of a voluntary waiver of counsel are present here. In the colloquy with the military judge, Appellant affirmed that his decision was not the result of any threats or force and was made of his own free will. Further, there is nothing in the record indicating that threats, coercion, or physical or psychological force were involved. Moreover, Appellant did not seek to replace members of the last iteration of his defense team but instead simply "moved to represent himself without complaining to the court that his . . . counsel was incompetent, unprepared, or otherwise unable to provide adequate representation." *United States v. Patterson*, 140

F.3d 767, 776 (8th Cir. 1998). And finally, Appellant signed a document waiving his right to counsel.

But Appellant cites to a different concern. The starting premise of Appellant's involuntary waiver claim before this Court is that if trial defense counsel had continued to represent him, "there would have been a clear constitutional violation under *McCoy*." Appellant's Brief at 48. Specifically, he argues as follows: "Appellant's waiver of counsel was not voluntary. Going into trial, he desired to maintain his innocence. By contrast, his defense team sought to admit his guilt." *Id.* at 40. But Appellant's premise is flawed and his reliance on *McCoy* is misplaced.

To begin with, Appellant's claim that at trial he "desired to maintain his innocence," *id.*, is belied by the record. While Appellant initially might have wanted to maintain his innocence by pursuing a "defense of others" defense, the military judge prohibited him from pursuing that strategy, finding it failed as a matter of law. After that ruling, Appellant made no effort to assert his innocence.[5] Instead, with full knowledge that the military judge had ruled that the "defense of others" defense failed, he still openly admitted that he was the shooter. Indeed, at the very beginning of his opening statement to the panel members, Appellant flatly declared: "The evidence will clearly show

[5] Appellant argues that after "his pleas [of guilty] were refused and he was compelled into a contested trial, he resolved to maintain his innocence." Reply Brief on Behalf of Appellant at 1, *United States v. Hasan*, No. 21-0193 (C.A.A.F. Jan. 3, 2023) (footnote omitted) [hereinafter Reply Brief]. He also challenges the Government's argument that he did not want to maintain his innocence and instead wanted only to pursue a meritless "defense of others" claim as a "false distinction." *Id.* at 2. As a general matter, we agree that there is no legal distinction between one who is factually innocent because he did not commit the actus reus of a crime and one who has a *valid* justification for committing what would otherwise be a criminal act. However, that distinction is not applicable in this case where, under the facts and circumstances, Appellant's claim of justification (defense of others) failed as a matter of law. *See infra* issue raised pursuant to *Grostefon*.

that I am the shooter." Then, after making this damning confession, Appellant made no discernible effort to justify or explain the shootings or to otherwise absolve himself of guilt. For example, with limited exceptions, Appellant did not cross-examine prosecution witnesses; he did not put on a case-in-chief; and he waived closing argument. As can be seen then, Appellant's actions at trial undermine his argument on appeal that he "desired to maintain his innocence." *Id.* at 40, 48.

Next, the facts in *McCoy* are distinguishable from the instant case. In *McCoy*, the defendant wanted to argue that he was not the person who killed his family. 138 S. Ct. at 1506. His counsel, on the other hand, wanted to argue that the defendant did indeed kill his family but that he lacked the criminal intent to be convicted of first-degree murder. *Id.* at 1506 n.1. The Supreme Court held that McCoy's representation by counsel who wanted to pursue a strategy admitting the killings violated his constitutionally "protected autonomy right," noting that a defendant "may wish to avoid, above all else, the opprobrium that comes with admitting" to killing someone. *Id.* at 1508, 1511. But as demonstrated above, in the instant case Appellant had no compunction about admitting that he had shot his fellow soldiers on November 5, 2009. As noted by the Government in its brief, "This case does not present an instance, as was present in *McCoy*, where the appellant desired to deny that he committed the charged acts. . . . Both Appellant and his defense counsel wanted to mount their defenses by admitting that Appellant committed the November 5, 2009 shooting." Appellee's Brief at 24.

Moreover, the Supreme Court's broader holding in *McCoy* that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty," 138 S. Ct. at 1505, is inapplicable to the instant case. As discussed at greater length *infra* in Issue IV, neither Appellant nor his trial team were legally empowered to plead guilty in this case.

And finally, upon close inspection Appellant's argument fails when he asserts that he faced " 'a Hobson's choice' " when he was forced to decide between accepting his counsel's objectionable defense strategy or proceeding pro se. Appellant's Brief at 47 (citation omitted). In support of his position, Appellant states that his trial team's "planned defense" would have gone against Appellant's wishes by "contradict[ing A]ppellant's deeply held religious beliefs" and "paint[ing him] as a religious fanatic." *Id.* at 49. However, after he informed the trial court of his intent to waive counsel and represent himself, the military judge engaged in the following exchange with Appellant:

> MJ: Have you tried to talk to any other lawyer about your case?
>
> ACC: No.
>
> MJ: Would you like to talk to another lawyer about this case?
>
> ACC: Not at this point. I would like to reserve the option to have feedback from another lawyer if I choose so, but not at this point.
>
> MJ: At this point you don't wish to talk to another lawyer about this case?
>
> ACC: That's correct.
>
> MJ: Do you wish to talk to another lawyer about this colloquy that we're having now about representing yourself?
>
> ACC: No, ma'am.
>
> MJ: Have you understood everything that I've told you and everything that I've asked you?
>
> ACC: Yes, ma'am.

This exchange demonstrates that Appellant's waiver was not exclusively linked to his trial defense team's legal abilities, preparedness, or religious fervor defense because Appellant denied interest in having *any* counsel represent him or talking to *any* counsel about his case.[6] Simply

[6] Because we conclude that Appellant's waiver of counsel was not exclusively tied to his disapproval of his trial defense

stated, by rejecting the military judge's offer to explore obtaining new counsel, Appellant foreclosed his ability to successfully argue on appeal that he was confronted with "a constitutionally repugnant choice: go to trial with counsel who were diametrically opposed to his fundamental objective or go alone." *Id.* at 40.

Similarly, in arguing against the voluntariness of his waiver of counsel, Appellant's contention that the military judge failed in her duty "to inquire into [A]ppellant's dissatisfaction with counsel before accepting [A]ppellant's waiver" misses the mark.[7] *Id.* at 50. It is true that the military judge disclaimed any interest in wanting to know *why* Appellant was dissatisfied with counsel. ("I don't want to know why you don't want to be represented by your counsel anymore, but is that a strategic decision on your part?") However, the Supreme Court and this Court have not "specif[ied] what procedural undertakings [are] necessary to satisfy" whether an accused has waived counsel. *Mix*, 35 M.J. at 286. In *Tovar*, the Supreme Court, while discussing the related issue of whether waiver of counsel was intelligent, enunciated: "We have not . . . prescribed any formula

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counsel's religious fervor defense and because he disclaimed wanting *any* counsel, we reject his argument that the military judge was required to appoint substitute counsel.

[7] Appellant identifies the following events as creating a duty on the part of the military judge to inquire further into dissatisfaction with counsel: (1) the precipitating circumstances that led to Appellant's dissatisfaction with counsel before accepting Appellant's waiver; (2) the facts that led counsel to defy court orders to provide assistance; (3) when counsel "declared [A]ppellant was working in concert with [the] prosecution"; and (4) when Appellant "clearly vacillated on his *pro se* status" on the eve of trial. Appellant's Brief at 50. But since we find no duty to inquire in the first place, the military judge was not required to reopen the colloquy. *See United States v. Hantzis*, 625 F.3d 575, 580-81 & n.2 (9th Cir. 2010) (citing cases for the proposition that "no federal appellate court has held that renewed *Faretta* warnings are required at each subsequent court proceeding").

or script to be read to a defendant who states that he elects to proceed without counsel." 541 U.S. at 88.

This Court has previously recognized that the federal circuit courts "are split as to the exact extent of the inquiry necessary to ensure" waiver of counsel by the trial judge and has declined to identify "what type of inquiry is required." *Mix*, 35 M.J. at 286. In *Mix*, we were satisfied that the military judge conducted the appropriate waiver inquiry to determine that the accused's waiver of counsel was knowing, intelligent, and voluntary because the military judge advised appellant "on several occasions of the benefits of a lawyer and the disadvantages of representing oneself." *Id.* This Court proposed questions to ask an accused in future cases, *id.* at 286, 289-90, and indeed those questions were incorporated into the Military Judges' Benchbook, *see* Dep't of the Army, Pam. 27-9, Legal Services, ch. 2 § 2–7–2 (Jan. 1, 2010). Notably, military case law and the Benchbook do not direct the military judge to inquire about the nature of the dissatisfaction with counsel. *See id.* Therefore, under military law, the military judge did not have a duty to inquire into the reasons behind Appellant's dissatisfaction with counsel.

Appellant identifies cases from the United States Courts of Appeals for the Third and Tenth Circuits that seemingly do impose such a duty.[8] *See, e.g., United States v. Peppers*, 302 F.3d 120, 132 (3d Cir. 2002); *Sanchez*, 858 F.2d at 1466. But notably, Appellant has not identified any other federal circuit courts that have adopted this position. Our independent research has identified two more circuits that also have ostensibly imposed such a duty. *United States v. Wright*, 923 F.3d 183, 188-89 (D.C. Cir. 2019); *United States v. Seale*, 461 F.2d 345, 359 (7th Cir. 1972). However, we are not required to follow these circuit courts on this point. *See United States v. Tovarchavez*, 78 M.J.

[8] Appellant does cite a United States Court of Appeals for the Ninth Circuit case as well—*Garcia v. Bunnell*, 33 F.3d 1193, 1199 (9th Cir. 1994)—but that case was about conflicts of interest, not conflicts of strategy or trial objectives.

458, 466 (C.A.A.F. 2019) (acknowledging this Court can give "*persuasive* weight to the decisions of the federal circuit courts of appeal" (emphasis added)). And as we explained above, the Supreme Court and military law have not imposed a duty in a *Faretta* colloquy to inquire into any disagreement between an accused and his counsel. Accordingly, given Appellant's unwavering position on self-representation and in light of the other points raised above, the military judge did not need to inquire further into why Appellant wished to proceed pro se.

The circumstances of this case demonstrate that Appellant "voluntarily elected to [represent himself] in order to pursue his own unique vision of how the case should be defended." *United States v. Volpentesta*, 727 F.3d 666, 676 (7th Cir. 2013). We thus "reject his current efforts to characterize as 'involuntary' a choice that was entirely of his own making." *Id.*

Issue II: Whether the Total Closure of the Court over Appellant's Objection Violated His Right to a Public Trial

At the outset, it is important to note that the reference to the "total" closure of the court does not refer to the closure of the courtroom during *all* of Appellant's court-martial proceedings. Rather, it refers to the fact that the military judge closed the courtroom to *all* spectators—as well as to the bailiffs and Government counsel—during one thirty-four minute Article 39(a), UCMJ, session.[9]

[9] *See United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013) ("Whether a closure is total or partial . . . depends not on how long a trial is closed, but rather who is excluded during the period of time in question."). Here, the only people present in the courtroom for the closed proceeding were the military judge, the court reporter, Appellant, and his three standby counsel. *See also United States v. Allen*, 34 F.4th 789, 797 (9th Cir. 2022) ("A total closure of the courtroom means that '*all* persons other than witnesses, court personnel, the parties and their lawyers are excluded for the duration of the hearing.'" (citation omitted)); *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015) ("a total closure involves excluding all persons from the courtroom

Appellant challenges this decision by the military judge, arguing that her ruling violated both the Sixth Amendment and R.C.M. 806. He essentially makes three criticisms of the military judge's closure decision: (1) she failed to make findings *before* closing the courtroom; (2) her findings, once made, were inadequate and conclusory; and (3) she failed to consider reasonable alternatives to the courtroom closure. Appellant further claims that this improper closure constitutes structural error, which warrants automatic reversal.

We will assume without deciding that the military judge did not comply with the relevant constitutional and regulatory standards when she briefly closed Appellant's court-martial. However, as explained below, under the circumstances of this case any noncompliance with these standards by the military judge does not entitle Appellant to the remedy that he seeks—reversal of the findings and sentence and a retrial.

I. Background

During trial, Appellant's conduct led standby counsel[10] to believe that Appellant was "working in concert . . . with the prosecution towards a death sentence." Because standby counsel concluded that "providing even procedural assistance" under these circumstances was "contrary to [counsel's] professional obligations," they filed a motion—which they served on Government counsel—seeking to "withdraw from assisting [Appellant] in any manner." Included in this motion was an enclosure containing counsel's entire mitigation case. Before Government counsel had the opportunity to review this enclosure, however, the military judge sealed the motion and all its enclosures.

The military judge then held an Article 39(a), UCMJ, session on the motion. At the outset, Appellant requested

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for some period" (citing *Judd v. Haley*, 250 F.3d 1308, 1316 (11th Cir. 2001)).

[10] There were three standby counsel at the time of the court closure—LTC KP, LTC CM, and MAJ JM.

"an in camera hearing" to discuss the motion. Despite recognizing "the sensitivities here," the military judge began the hearing in open court while trying to limit the public discussion of details of the conflict between standby counsel and Appellant. In doing so, she indicated that she would "revisit" Appellant's request "in just a moment."

In open court, the military judge first elicited the views of standby counsel. Counsel stated that it had become "clear that [Appellant's] goal [was] to remove impediments or obstacles to the death penalty, and [he was], in fact, encouraging or working towards a death penalty." Appellant immediately objected to this belief as "a twist of the facts." The military judge asked standby counsel not to go "into specifics in this forum," and she sought to clarify counsel's motion.

After standby counsel expressed their views, the military judge had the following exchange with Appellant:

> MJ: Major Hasan, do you have anything that you would like to present to the court [on] this matter ex parte? And if so, I'm going to give you the opportunity to do that in writing.
>
> ACC: I have—I'd like to do that right now, ma'am, because I—
>
> MJ: Right now, we're not in an ex parte setting, and I want to you give that opportunity. . . .
>
> ACC: It is done now, ma'am. I wanted it to start ex parte, but in regards to—
>
> MJ: Hold on there a minute, Major Hasan. I was very careful here not to go into any type of specifics in there, so I'm giving you the opportunity to present matters to me ex parte, and I want you to do that in writing.
>
> ACC: I object, and I'd like to do that briefly, if I may?
>
> . . . .
>
> MJ: Are you specifically waiving any privileges—I don't know what you're planning on going into here—but are you specifically waiving any

> privileges, and you want to discuss this matter in a non-ex parte setting?
>
> ACC: Yes, ma'am.
>
> MJ: Is anybody forcing you to make that decision?
>
> ACC: No, ma'am.
>
> MJ: I'm giving you the opportunity to present your argument, or anything else that you want me to consider, in an ex parte forum.
>
> ACC: I understand. I don't think it is what you think it is, ma'am. I just want to clarify about [LTC KP's] assertion of me seeking the death penalty.
>
> MJ: I would prefer that you give that to me in writing.
>
> ACC: I object, ma'am.
>
> MJ: You're not going to give me anything in writing?
>
> ACC: No, ma'am. Your Honor, [LTC KP] has made an assertion— . . . . and I feel compelled to clarify the issue.
>
> MJ: You objected to what [LTC KP] said is what you're telling me?
>
> ACC: It isn't accurate, and I'd like to clarify that.
>
> MJ: Hold on. I'm going to conduct the rest of this hearing as an ex parte hearing. I'm going to clear the courtroom. That includes you, Bailiff.

As indicated below, the military judge later stated on the record that her purpose in temporarily closing the courtroom was to protect attorney work product and attorney-client communications. However, she did not make any findings before she closed the courtroom.

During the closed hearing, while discussing enclosures to the trial defense counsel's motion, Appellant requested of the military judge, "Please unseal everything." Appellant elaborated:

> The part of the unsealing, ma'am, is that if we had done this in camera before all this began, that would've been my preference, but now that the

> whole idea that I'm seeking the death penalty is out, I feel compelled to address that, not just in front of you, but in front of the media that's hearing this. This is my reputation, my principles at stake here, and I don't want anybody to get a misrepresentation of—they might think, 'Hey, this guy is crazy because he is seeking the death penalty.' I feel compelled to clarify that and say, hey, I'm not crazy, this is just a matter of principle. The Mujahideen, this is what we do. This is what we are. There's [sic] others like me that believe the same.

This closure of the courtroom lasted thirty-four minutes out of a seventeen-day trial (from opening statements to the announcement of the sentence) and covered thirteen pages of a more than two-thousand-page trial transcript.

The following day, the military judge explained her rationale for closing the proceedings as follows:

> I closed the court yesterday to the public and had an *ex parte* 39(a) session. I do that on very rare occasions, and I do it pursuant to Rule for Court-Martial 806. In this particular instance, I believed that we needed to do that to address some issues that arose between standby counsel and [Appellant], and issues relating to the release of privileged attorney work product, attorney/client, and other privileged communications. There was substantial probability that an overriding interest [in] retaining the confidentiality of those communications would be prejudiced if the proceedings remained open, and I believed that other means to address the issue were inadequate.

On July 6, 2022, almost nine years after the closed Article 39(a), UCMJ, session occurred, this Court unsealed the transcript of that session.[11]

[11] The delay in unsealing this portion of the transcript is explainable by the following facts. The military judge believed the transcript contained privileged material and did not unseal it for that reason. During oral argument before the lower appellate court, appellate defense counsel was asked whether Appellant consented to the disclosure of the concealed material, and

II. Standard of Review

This Court reviews whether a military judge properly closed courtroom proceedings for an abuse of discretion. *United States v. Ortiz*, 66 M.J. 334, 338 (C.A.A.F. 2008). Although Appellant raised this issue for the first time in this Court, the parties agree that this abuse of discretion standard applies to the instant case. In this situation, we concur.

III. Applicable Law

"In all criminal prosecutions, the accused shall enjoy the right to . . . a public trial." U.S. Const. amend. VI.[12] "Without question, the [S]ixth-[A]mendment right to a public trial is applicable to courts-martial." *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (footnote omitted); *see also United States v. Short*, 41 M.J. 42, 43 (C.A.A.F. 1994) ("The Sixth Amendment right to a public trial is applicable to courts-martial."). In addition to the Sixth Amendment, there is a regulatory right to open courts-martial. R.C.M. 806(a) (2008 ed.) ("Except as

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defense counsel declined to give a responsive answer on Appellant's behalf. And then, it was not until May 2022 that Appellant filed a motion with this Court asking that the transcript pages from the closed hearing be unsealed. We granted that motion two months later, thereby making the material public. *United States v. Hasan*, 82 M.J. 422, 422-23 (C.A.A.F. 2022) (order).

[12] The First Amendment also gives the public the right of access to criminal trials. *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (per curiam) (citing *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U. S. 501, 501 (1984)). "There can be no doubt that the general public has a qualified constitutional right under the First Amendment to access to criminal trials." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). "[W]hen an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied." *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997). However, the Supreme Court has not decided "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive," labeling this issue "an open question." *Presley*, 558 U.S. at 213.

otherwise provided in this rule, courts-martial shall be open to the public.").

Conducting criminal trials in public is of paramount constitutional concern. Public trials ensure that judges and prosecutors act professionally; they reduce the chances of arbitrary and capricious decision-making; they encourage witnesses to come forward; they discourage perjury; and they enhance public confidence in the court system. *See Waller v. Georgia*, 467 U.S. 39, 46 (1984) (noting that with a public trial, "the public may see [the accused] is fairly dealt with and not unjustly condemned" and the public "may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions" (citation omitted) (internal quotation marks omitted)). As our predecessor court stated, "public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public." *Travers*, 25 M.J. at 62.

Despite this general rule, both the Sixth Amendment and R.C.M. 806 make exceptions to the right to have a public trial. *Waller*, 467 U.S. at 45 ("the right to an open trial may give way in certain cases to other rights or interests"); R.C.M. 806(a) (2008 ed.) ("Except as otherwise provided in this rule, courts-martial shall be open to the public."). "Nonetheless, 'the exclusion must be used sparingly with the emphasis always toward a public trial.' " *Short*, 41 M.J. at 43 (quoting *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977)).

In *Waller*, the Supreme Court's seminal Sixth Amendment case on the right to a public trial, the Court announced the following standard for closing a trial:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

467 U.S. at 48 (citing *Press-Enter. Co.*, 464 U. S. at 511-12).[13]

R.C.M. 806 mirrors the *Waller* test as follows:

> Courts-martial shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure.

R.C.M. 806(b)(2) (2008 ed.).[14]

IV. Discussion

It is important to note that the military judge was presented with a difficult situation here. Appellant was proceeding pro se, and the military judge was trying to protect Appellant from publicly disclosing information that might

[13] Although the *Waller* test specifically deals with when a *party* seeks closure, we conclude that this test equally applies to a military judge's sua sponte decision to close a courtroom. *See United States v. Candelario-Santana*, 834 F.3d 8, 23 (1st Cir. 2016) (applying the W*aller* test where "Government did not request a closure"); *Tucker v. Superintendent Graterford SCI*, 677 F. App'x 768, 770 (3d Cir. 2017) (applying *Waller* test after noting that the trial judge closed the courtroom following "an off-the-record discussion with counsel in chambers"); *United States v. Honken*, 438 F. Supp. 2d 983, 986 (N.D. Iowa 2004) (applying the *Waller* test when determining whether the court would sua sponte close a hearing on the motion for an anonymous jury).

[14] The parties agree that the same standard applies to both the constitutional and the R.C.M. court closure claims. We concur. *See* R.C.M. 806(b)(2) Discussion (2008 ed.) ("A session may be closed over the objection of the accused or the public upon meeting the constitutional standard set forth in this Rule."); *Manual for Courts-Martial, United States*, Analysis of the Rules for Courts-Martial app. 21 at A21-48 (2008 ed.) ("The rules on closure now in subsection (b)(2) and the Discussion were amended in light of military case law that has applied the Supreme Court's constitutional test for closure to courts-martial.").

be damaging to his own defense. Her concern was heightened because: the issue under discussion involved matters pertaining to attorney-client privilege; the standby counsel's motion contained privileged information; and Appellant's stance on whether he waived his privilege regarding such matters was confusing. Nevertheless, we will assume without deciding that the military judge abused her discretion in briefly closing Appellant's court-martial. Upon doing so, however, we conclude that Appellant is not entitled to have his findings and sentence set aside.

In *Weaver v. Massachusetts*, the Supreme Court stated that this "constitutional violation—the courtroom closure—has been treated . . . as a structural error." 582 U.S. 286, 290 (2017).[15] Importantly however, in *Waller* the Supreme Court stated that when there has been "a violation of the public-trial guarantee. . . .[,] the remedy should be appropriate to the violation" and warned against imposing a remedy that "would be a windfall for the defendant, and not in the public interest." 467 U.S. at 49-50 (footnote omitted). Such a pronouncement runs contrary to the notion that a conviction obtained in the face of a public trial violation should be automatically overturned without further analysis. Moreover, the United States Court of Appeals for the Second Circuit has underscored that "the [Supreme] Court has never said, much less ruled, that any conviction following an erroneous closure must be vacated." *Jordan v. Lamanna*, 33 F.4th 144, 153 (2d Cir. 2022).

At oral argument, Appellant argued that *Weaver*, 582 U.S. at 290, and *Presley*, 558 U.S. at 209, overruled this aspect of *Waller*. Our reading of those cases indicates otherwise. *Presley*, 558 U.S. at 211-16, did not address this issue, and *Weaver*, 582 U.S. at 296-97, did not explicitly

[15] R.C.M. 806 does not specify a remedy for a violation of its requirement that "[c]ourts-martial shall be open to the public." Because the same standard applies under both the Constitution and the rule to determine whether a public trial violation has occurred, we hold that the remedy for a violation of R.C.M. 806 must also be the same.

overrule this key facet of *Waller*. And we pointedly note, "overruling by implication is disfavored." *United States v. Pack*, 65 M.J. 381, 383-84 (C.A.A.F. 2007) (citing *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005); *State Oil Co. v. Khan*, 522 U.S. 3, 19 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Indeed, the Supreme Court has stated that its decisions, such as in *Waller*, "remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

Moreover, the Supreme Court has acknowledged that not *all* structural errors merit automatic reversal. *Weaver*, 582 U.S. at 297 (noting that "despite the structural aspect of the violation" in *Waller*, "the Court did not order a new trial"). Indeed, the Court stated that "in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant *generally* is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.' " *Id.* at 299 (emphasis added) (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)); *see also id.* at 305 ("When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial *generally* will be granted as a matter of right." (emphasis added)); *State v. Schierman*, 438 P.3d 1063, 1081 n.15 (Wash. 2018) ("Thus, *Waller* illustrates the fact that a new trial is not always the remedy for the structural error of courtroom closure. *See also Weaver* . . . , [582] U.S. [at 297] . . . (noting that *Waller* did not grant the remedy of a new trial 'despite the structural aspect of the violation')."). Therefore, in this case where we assume that the military judge erred in closing the Article 39, UCMJ, session, we look to the Supreme Court's foundational case on this topic—*Waller*—and adhere to its ruling that when there has been "a violation of the public-trial guarantee. . . .[,] the remedy should be appropriate to the violation," and a remedy should not be imposed that "would be

a windfall for the defendant, and not in the public interest." *Waller*, 467 U.S. at 49-50 (footnote omitted).[16]

In this context, Appellant claims that "the only appropriate result is reversal." Appellant's Brief at 67. We disagree. Such a remedy would be grossly disproportionate to the violation. This is true for a number of reasons.

First, the closure of the Article 39(a) session was brief. As indicated above, it lasted only thirty-four minutes, and it covered only thirteen pages in the transcript.

Second, the closed hearing did not involve witness testimony, the admission of evidence, or any other matter directly related to the findings or sentence in this case.

Third, the military judge explored reasonable alternatives to closing the hearing. She initially kept the hearing open and instructed Appellant and his counsel not to discuss privileged material. It was only when she grew concerned that this approach may not work that she ultimately closed the hearing. The military judge also sought to protect the privileged material by having Appellant submit his concerns in writing—but he refused. Specifically, as noted above, the following exchange occurred:

> MJ: Major Hasan, do you have anything that you would like to present to the court [on] this matter ex parte? And if so, I'm going to give you the opportunity to do that in writing.
>
> . . . .
>
> ACC: I object . . . .

[16] We recognize this Court stated in *Ortiz* that an "erroneous deprivation of the right to a public trial is structural error, which requires this Court to overturn Appellant's conviction without a harmlessness analysis." 66 M.J. at 342. However, as we have explained, the Supreme Court made clear in *Waller* that not all public trial structural errors lead to automatic reversal. 467 U.S. at 49-50. Therefore, to the extent that *Ortiz* required automatic reversal of a conviction for a Sixth Amendment public trial violation, we overrule *Ortiz* and adopt the approach provided in *Waller*.

> . . . .
>
> MJ: I would prefer that you give that to me in writing.
>
> ACC: I object, ma'am.
>
> MJ: You're not going to give me anything in writing?
>
> ACC: No ma'am . . . .

Fourth, the military judge placed her reasons for closing the hearing on the record—albeit after the fact rather than before the fact.

Fifth, contrary to Appellant's assertions, these findings by the military judge were not inadequate. It is clear from the record—both before the hearing was closed and in the subsequent findings—that the military judge was motivated by a concern for protecting Appellant's rights. These concerns by the military judge were heightened by the fact that there was an apparent rift between Appellant and his standby counsel, and Appellant—who was proceeding pro se—had no legal training that would help him discern whether the disclosure of potentially privileged material in open court would be harmful to his defense. Moreover, the military judge's ex post explanation for the closure of the courtroom was clear. She stated that the Article 39(a) hearing involved "issues relating to the release of privileged attorney work product [and] attorney/client[] and other privileged communications." She further stated as follows: "There was substantial probability that an overriding interest of retaining the confidentiality of those communications would be prejudiced if the proceedings remained open, and I believed that other means to address the issue were inadequate."

And sixth, this Court has now unsealed the transcript of the closed session and the public can readily see what happened during that hearing.[17] Specifically, the public now knows that during the closed session the military

[17] Even Appellant acknowledges that the release of the transcript was a reasonable alternative, at least at the trial level.

judge acted professionally and did not engage in arbitrary or capricious decision-making, and that neither the military judge nor standby counsel infringed the rights or interests of Appellant in any way, thereby enhancing public confidence in the court system. *See Waller*, 467 U.S. at 46; *Press-Enter. Co.*, 464 U.S. at 512; *cf. Weaver*, 582 U.S. at 304 (finding that the trial at issue was not fundamentally unfair in the ineffective assistance of counsel context when counsel did not object to the court closure because, in part, "there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself").

Therefore, because reversal of the findings and sentence in this case would not "be appropriate to the violation" and would constitute a "windfall" for Appellant that would not be "in the public interest," *Waller*, 467 U.S. at 50, we decline to impose the remedy sought by Appellant.

Issue III: Whether the Military Judge Erred by Failing to Disqualify Lieutenant Colonel KG as a Panel Member

Appellant challenges the military judge's failure to sua sponte excuse LTC KG from serving as a panel member. Appellant claims that LTC KG exhibited actual and implied bias through his panel questionnaires, his voir dire responses, and the content of a bumper sticker affixed to his vehicle. Thus, although Appellant did not challenge LTC KG for cause and did not exercise his peremptory challenge to remove LTC KG or anyone else from his court-martial panel, he now asserts on appeal that the military judge erred by failing to "disqualify" LTC KG and argues that he "must be granted a rehearing before an impartial panel." Appellant's Brief at 68, 84. Despite Appellant's contentions, we hold that the military judge did not err by declining to exercise her discretionary authority to sua sponte excuse LTC KG under R.C.M. 912(f)(4) (2008 ed.).

I. Background

LTC KG was selected by the convening authority to serve as a prospective panel member at Appellant's court-

martial. LTC KG twice submitted answers to a panel member questionnaire. In his first set of responses LTC KG gave answers that were concerning. Among other things, he agreed he was "affected . . . in a personal way" by the shootings, he knew a significant number of details about the facts of the case, he said he was angry about the Fort Hood attack, he had a bumper sticker on his car reading "Major League Inf[i]del," and most importantly, he admitted that he was not confident that he could be impartial and that he already had an impression that Appellant was guilty.

Approximately nine months later and unprompted by either party, LTC KG filled out the panel member questionnaire a second time. His stated reason for doing so was as follows: "When I first filled [out the questionnaire] nine months ago, I was in the throes of battalion command and had [a] darker view of issues and [was] under a considerably greater level of stress." In his second set of responses, LTC KG gave different answers to several questions. Although he generally moderated his responses compared to the first questionnaire, when he filled out the second questionnaire LTC KG agreed with the statement that soldiers who kill fellow soldiers "should not be given the same rights as other criminal defendants." Despite these circumstances, during voir dire Appellant—who was proceeding pro se—did not challenge LTC KG for cause or use a peremptory challenge to strike him from the panel. In fact, when questioned by the military judge about this matter, Appellant agreed that he was specifically waiving all challenges for cause against a group of members that included LTC KG.[18]

[18] In a December 29, 2023, petition for reconsideration, Appellant correctly noted that we misstated a fact. Specifically, in our original opinion we wrote that in LTC KG's *first* questionnaire, "he agreed with the statement that soldiers who kill fellow soldiers 'should not be given the same rights as other criminal defendants.' " However, LTC KG actually expressed this opinion in his *second* questionnaire. Nevertheless, this factual error does not alter our analysis because this answer to a single question

II. Applicable Law

When an accused believes there are grounds for challenging a member following voir dire, the accused "shall state [his or her] challenges for cause." R.C.M. 912(f)(2) (2008 ed.). Ordinarily, an accused waives a ground for challenge "if the [accused] knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner." R.C.M. 912(f)(4) (2008 ed.). "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie." *Id.* Under this rule, "[a] military judge has the discretionary authority to sua sponte excuse [a] member but has no duty to do so." *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015). A military judge's "decision whether or not to excuse a member sua sponte is subsequently reviewed for an abuse of discretion." *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004); *see also United States v. Akbar*, 74 M.J. 364, 397 (C.A.A.F. 2015).

III. Discussion

It is essential to underscore at the outset of this discussion that, as we held in *McFadden*, a military judge has no *duty* to exercise his or her authority to excuse a panel member who has not been challenged by either party. 74 M.J. at 90. This holding is based squarely on the plain language of the applicable Rule for Courts-Martial. As we explained

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does not change our general point that LTC KG could still be perceived by the military judge as having been rehabilitated given his other questionnaire responses and his voir dire responses, most notably LTC KG's assurances during individual voir dire that he could decide the case "based solely on the evidence admitted in court," could follow the judge's instructions, and knew of no reason why he could not be impartial. And importantly, it does not change our conclusion that "a military judge has no *duty* to exercise his or her authority to excuse a panel member who has not been challenged by either party," and that in the instant case, the military judge did not abuse her discretionary authority.

in *McFadden*, R.C.M. 912(f)(4) states that a military judge "*may*, in the interests of justice, excuse a member." (Emphasis added.) *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion."); Bryan A. Garner, *Garner's Dictionary of Legal Usage* 568 (3d ed. 2011). Thus, the exercise of that authority is discretionary. In the course of deciding whether a military judge abused that discretion, it is necessary for this Court to review the facts that were before the trial court.

Here, the military judge was aware of a number of important points. To begin with, she knew she had fully apprised Appellant about: the panel selection process; Appellant's ability to ask questions of members during voir dire; Appellant's ability to challenge members for cause; and Appellant's ability to exercise a peremptory challenge. She also knew that Appellant seemingly understood this process because he submitted general voir dire questions; withdrew some of these questions; requested individual voir dire of members;[19] asked questions of a number of prospective panel members—including LTC KG; requested and was granted the right to recall a particular member for additional questions; and joined the Government in successfully seeking the excusal of a member of the venire. Furthermore, Appellant recognized "a clear discrepancy" between a specific prospective member's answers on his questionnaire and his answers during voir dire. By taking these steps, Appellant demonstrated to the military judge his knowledge of the voir dire process, as well as his willingness to avail himself of the protections afforded by that process as he saw fit.

Further, the military judge knew that although Appellant was proceeding pro se, he had standby counsel

[19] Appellant even asked the military judge to provide a prospective panel member with that member's "thesis" on the Afghanistan insurgency so that, prior to Appellant's questioning, the member could refresh his recollection about what he had written.

who could instruct him on how to challenge prospective panel members. And importantly, she also knew that Appellant had been provided with the services of a self-selected, government-funded jury consultant on whom Appellant could rely.

Next, the military judge knew that in light of LTC KG's self-initiated reassessment of his responses to the panel member questionnaire and his answers during voir dire, LTC KG could be perceived as having "rehabilitated" himself for court-martial purposes and as having displayed a welcome ability to reconsider any reflexive positions he had previously taken in regard to this case. Specifically, LTC KG affirmed during individual voir dire with the military judge that he could decide the case "based solely on the evidence admitted in court," could follow the judge's instructions, and knew of no reason why he could not be impartial.

Also, the military judge knew that Appellant had unequivocally chosen not to challenge LTC KG for cause or to use a peremptory challenge to remove him from the court-martial panel. Indeed, the military judge directly addressed this point *twice* with Appellant. After LTC KG and one set of panel members participated in individual voir dire, Appellant had the following exchange with the military judge:

> MJ: Major Hasan, do you have any challenges for cause?
>
> ACC: I do not.
>
> MJ: Are you specifically waiving any challenges for cause of the remaining members?
>
> ACC: Yes, ma'am.

And later, when the military judge gave Appellant another chance to challenge members for cause, Appellant did not take this opportunity to challenge LTC KG (or any other member). Instead, he responded, "No, ma'am," to the military judge's question, "[D]id you have any challenge for cause of any member?"

When deciding whether to exercise her discretionary authority to excuse LTC KG under R.C.M. 912(f)(4), the military judge could properly consider all of these indications that Appellant had made an informed and intentional decision not to challenge LTC KG. As a consequence, she also could properly consider the fact that an accused's judgment about whom he wants to sit in judgment of him at trial can be highly personal and, perhaps, idiosyncratic. As the United States Court of Appeals for the Eleventh Circuit has recognized, "The selection of a jury is by nature a subjective process which relies heavily on the instincts of the attorneys [or a pro se accused], the atmosphere in the courtroom, and the reactions of the potential jurors to questioning." *United States v. Williams*, 936 F.2d 1243, 1246 (11th Cir. 1991); *see also United States v. Turner*, 674 F.3d 420, 436 (5th Cir. 2012) (acknowledging "the subjective nature of jury selection"). Moreover, we note that this Court must be circumspect in using a cold record to second-guess a military judge's decision not to sua sponte excuse a panel member whom both parties apparently wanted to sit on the case. *Cf. Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."). Taking these factors into account, we find no basis for this Court to conclude that the military judge abused her discretion in declining to exercise her discretionary authority to sua sponte excuse LTC KG. After all, under an abuse of discretion standard, there "must be more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Black*, 82 M.J. 447, 451 (C.A.A.F. 2022) (citation omitted) (internal quotation marks omitted). Here, the military judge's action did not meet these criteria.

In light of the circumstances discussed above, we conclude that the military judge did not abuse her discretion

when she declined to exercise her discretionary authority to sua sponte excuse LTC KG under R.C.M. 912(f)(4).

Issue IV: Whether Article 45(b)'s Prohibition Against Guilty Pleas to Capital Offenses Is Constitutional

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Issue V: Assuming Arguendo that Article 45(b) Is Constitutional, Whether its Application in this Case Nonetheless Constituted Reversible Error

At the time of Appellant's trial, Article 45(b), UCMJ, prohibited an accused from pleading guilty to "any charge or specification alleging an offense for which the death penalty may be adjudged."[20] Appellant raises both a constitutional challenge to this article and a challenge to this Court's statutory interpretation of this provision. Specifically, Appellant argues that "Article 45(b)'s prohibition on guilty pleas to capital offenses is an impermissible restriction on a competent accused's right of autonomy to make his defense." Appellant's Brief at 84. Even if this prohibition is constitutional, he argues that "its application to [A]ppellant's offers to plead guilty in the alternative to *non-capital* offenses constituted reversible error" because the decision in *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989), was "poorly reasoned." *Id.* at 100-01. We conclude that Appellant is not entitled to relief.

[20] 10 U.S.C. § 845(b) (2012). Article 45(b) now provides: "A plea of guilty by the accused may not be received to any charge or specification alleging an offense *for which the death penalty is mandatory*." 10 U.S.C. § 845(b) (2018) (emphasis added). Thus, this amendment "permit[s] an accused to enter a guilty plea in a capital case in which the death penalty is not mandatory." David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016,* 49 St. Mary's L. J. 1, 58 (2017). According to the R.C.M. 910(a)(1) Discussion (2019 ed.), "There are no offenses under the UCMJ for which a sentence of death is mandatory."

I. Background

After referral of the charges in this case, Appellant filed notice with the trial court of his intent to plead guilty, proposing three options. Under the first option, he offered to plead guilty as charged to premeditated murder and attempted premediated murder. Under the second option, he offered to plead guilty to unpremeditated murder and attempted premeditated murder. And under the third option, he offered to plead guilty to unpremeditated murder and attempted unpremeditated murder.

The military judge rejected Appellant's offer to plead guilty as charged to premediated murder and attempted premeditated murder, ruling that such a plea was "contrary to Article 45(b) and . . . [thus option one was] not legally permissible."

Regarding Appellant's offer to plead guilty to unpremeditated murder and attempted premeditated murder, the military judge ruled it was "not legally permissible under *United States v. Dock* at 26 MJ 620 [(A.C.M.R. 1988)], 28 MJ 117 [(C.M.A. 1989)], and also, the case of *United States v. McFarlane* at [8 C.M.A. 96,] 23 CMR 320 [(1957)], because of the concept of transferred premeditation. It would be possible for the accused to be convicted of the charged capital offense without presenting any additional evidence . . . . [A]nd therefore, option two is not legally permissible."

The military judge also rejected Appellant's offer to plead guilty to unpremeditated murder and attempted unpremeditated murder. She reasoned as follows:

> [T]he court believes that accepting a plea to option number three would be the functional equivalent to pleading guilty to a capital offense. If the government did not put on any additional evidence beyond the accused's plea, could the accused be found guilty of a capital offense under Article 120 [sic], subparagraph one? Strictly speaking, no, but practically speaking, because of the facts and context of this case, the answer would be yes. The court also relies on *United States v. Simoy*, 46 MJ

> 592, an Air Force Court of Criminal Appeals case from 1996, 50 MJ 1, Court of Appeals for the Armed Forces, 1998.
>
> The offense[] of attempted unpremeditated murder requires both the intent to kill, and an act that is more than mere preparation, and demonstrates the accused's resolve to commit the offense. The difference between that and the premeditated design to kill is very slight. You couple that with a number of acts that form the basis for the attempted murders and murders that happened in sequence, the four corners of the record will be that the accused is functionally admitting to a capital offense in violation of Article 45.
>
> So, in other words, it is not the elements so much, but the factual predicate in this particular case, that is, the killing of 13 people over a period of time, the elements themselves will not support premeditation, but the facts supporting the elements would, and therefore, accepting a plea to option number three would be the functional equivalent to pleading guilty to a capital offense in violation of Article 45 of the Uniform Code of Military Justice.

(Second set of brackets in original.)

Responding to a motion for reconsideration, the military judge "adhere[d] to [her] original ruling" and denied the defense request "to accept a plea of guilty to unpremeditated murder and attempted unpremeditated murder." However, in seeking to address Appellant's expressed concerns, during the sentencing phase of the trial the military judge repeatedly offered to instruct the panel that Appellant had desired to plead guilty to the charged offenses but was not permitted to do so by operation of law. Appellant nevertheless expressly declined that instruction and affirmatively asked the military judge to "[n]ot instruct [the panel] at all."

II. Issue IV: Constitutional Challenge to Article 45(b), UCMJ[21]

Appellant argues that Article 45(b)'s prohibition against guilty pleas to capital offenses, runs afoul of the " 'protected right of autonomy' to maintain innocence or admit guilt" described in *McCoy*, 138 S. Ct. 1500. Appellant's Brief at 84. Appellant also argues that "this Court should overturn *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) and its progeny, and find Article 45(b)'s prohibition unconstitutional" because of two intervening Supreme Court decisions—*McCoy* and *Weiss v. United States*, 510 U.S. 163 (1994). Reply Brief at 41. Appellant maintains that this denial of his offer to plead guilty resulted in structural error, entitling him to a rehearing.

A. Standard of Review

"The constitutionality of an act of Congress is a question of law that we review de novo." *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012).

B. Discussion

This Court has repeatedly affirmed the constitutionality of Article 45(b), UCMJ. *See Akbar*, 74 M.J. at 400 (rejecting the appellant's contention that "the panel's consideration of mitigation evidence was unconstitutionally limited by the [Article 45(b)] prohibition against guilty pleas in capital cases" and citing *United States v. Gray*, 51 M.J. 1, 49 (C.A.A.F. 1999); *United States v. Loving*, 41 M.J. 213, 292 (C.A.A.F. 1994); and *Matthews*, 16 M.J. at 362-63). Indeed, in *Matthews*, our predecessor court stated:

> [W]e are unaware of any constitutional right to plead guilty in capital cases. Furthermore, in light of the special treatment given to capital cases by courts and legislatures and the irreversible effect of executing a capital sentence, we do not believe that Congress acted arbitrarily by providing in the

[21] Appellant raised this issue for the first time before the ACCA in the form of a motion for reconsideration. Thus, the lower court declined to consider it. *Hasan*, 2021 CCA LEXIS 114, at *1-2.

> Uniform Code that an accused [servicemember] cannot plead guilty to a capital charge.

16 M.J. at 362-63.

Nevertheless, Appellant argues that *Weiss* and *McCoy* undermine our precedent on this issue. We find these arguments unpersuasive.

In *Weiss*, the Supreme Court adopted the following standard for determining whether a due process challenge to a facet of the military justice system should prevail: "the factors militating in favor of [the challenged aspect of the military justice system] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-78 (internal quotation marks omitted) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

Attempting to apply the *Weiss* holding to his case, Appellant identifies the following "weighty considerations," which he asserts militate in favor of this Court striking down Article 45, UCMJ, as unconstitutional on due process grounds: (1) a guilty plea may spare an accused from death by demonstrating that he has taken responsibility; (2) a not guilty plea may have dire consequences; (3) a guilty plea may spare an accused and his family from protracted courtroom proceedings; and (4) a guilty plea respects an accused's right to autonomy to make a strategic choice to acknowledge his crime.

These "weighty considerations" are not unique to this case. Further, although *Weiss* was decided in 1994, as recently as 2015 this Court specifically upheld the constitutionality of Congress's decision under Article 45(b), UCMJ, to prohibit guilty pleas to any charges or specifications alleging offenses for which the death penalty may be adjudged. *Akbar,* 74 M.J at 400. And yet despite this precedent, and despite the fact that Appellant's *Weiss* analysis, standing alone, is not compelling, Appellant has failed to engage in a stare decisis analysis. *United States v. Cardenas*, 80 M.J. 420, 423 (C.A.A.F. 2021) (listing the stare decisis factors for overturning precedent). This Court finds no reason to overturn our precedent in this area of the law,

and being offered no stare decisis analysis by Appellant, we conclude that his reliance upon *Weiss* is misplaced.

Turning to *McCoy*, Appellant asserts that the Sixth Amendment right of autonomy recognized in that case undermines our precedent upholding the constitutionality of Article 45(b).[22] *See Cardenas*, 80 M.J. at 423 (stating that "we are not bound by precedent when there is a significant change in circumstances"); *cf. United States v. Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996) (noting that "an intervening decision of . . . the Supreme Court of the United States" would authorize a lower court to depart from this Court's precedent).

In *McCoy*, "the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." 138 S. Ct. at 1505. However, "the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant 'committed three murders. . . . [H]e's guilty.' " *Id.* (alterations in original). The Supreme Court held "that a defendant has the right to insist that counsel refrain from admitting guilt." *Id.* The Court explained that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *Id.*

Despite this seemingly expansive language highlighted by Appellant, many federal courts interpreting and

[22] Laying the groundwork for his "right of autonomy" argument under *McCoy*, Appellant also argues that the Supreme Court's opinion in *Faretta*, 422 U.S. 806, was "anchored in 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.' " Appellant's Brief at 92 (quoting *Weaver*, 137 S. Ct. at 1907). He further argues that courts have applied *Faretta* "beyond self-representation to both restrict the imposition of pleas on unwilling defendants and uphold pleas that were freely requested." *Id.* Be that as it may, we do not read *Faretta* or its progeny as being so broad as to disturb our long-established precedent that upholds the constitutionality of Article 45(b).

applying the *McCoy* holding have limited it to the narrow set of circumstances presented in that case. *See, e.g.*, *Kellogg-Roe v. Gerry*, 19 F.4th 21, 28 (1st Cir. 2021) (declining to extend *McCoy* beyond the facts of that case); *United States v. Rosemond*, 958 F.3d 111, 123 (2d Cir. 2020) ("[W]e read *McCoy* as limited to a defendant preventing his attorney from admitting he is guilty of the crime with which he is charged."); *see also Roof*, 10 F.4th at 353 (approvingly citing the prior-quoted language from *Rosemond*).

Moreover, the language in *McCoy* suggesting that the decision of "whether to plead guilty"—when pleading guilty is a possibility—is "reserved for the client," is dicta. 138 S. Ct. at 1508. The actual holding of *McCoy* is that "it is unconstitutional to allow defense counsel to *concede guilt* over the defendant's intransigent and unambiguous objection." *Id.* at 1507 (emphasis added). That circumstance did not occur in the instant case. Further, McCoy was allowed to enter the plea of his choice—not guilty—and the harm came from his counsel's admissions—purportedly on McCoy's behalf—that were *inconsistent with that plea*. *Id.* at 1506–07. Again, that circumstance did not arise in the instant case. Further still, *McCoy* concerned the prerogative of an *attorney* to determine the scope of appropriate objectives of representation by unilaterally deciding whether a guilty plea should be entered on a client's behalf. But the issue here concerns whether *Congress* has the power to decide whether an accused may enter a guilty plea.

Additionally, the Supreme Court's concerns in *McCoy* were of a different nature than the concerns expressed by Appellant in the instant case. Stated differently, the interests implicated by a counsel telling a jury that the accused is guilty against the accused's wishes is simply of a different kind than the interests implicated by Congress refusing to allow an accused servicemember to plead guilty to a certain subset of offenses. The Supreme Court recognized that an accused in McCoy's position "may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not

worth living and prefer to risk death for any hope, however small, of exoneration." *Id.* at 1508. In Appellant's case, neither of these interests is present because Appellant *wanted* to plead guilty. Regardless, this is a policy consideration for Congress to consider, not a constitutional or legal issue for this Court to decide.

In analyzing this issue, perhaps the most important point is that the Constitution expressly grants Congress power over the military justice system. Article I, § 8, cl. 14 states: "The Congress shall have the power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . . ." *See Chappell v. Wallace*, 462 U.S. 296, 301 (1983) ("It is clear that the Constitution contemplated that the Legislative Branch [would] have plenary control over . . . regulations, procedures and remedies related to military discipline . . . ."). And as we have repeatedly held, Congress legislated within the confines of this constitutional grant of authority when it enacted Article 45, UCMJ.

The intent of Congress in enacting Article 45 is apparent; it sought to protect the interests of accused servicemembers, not circumscribe them. *See United States v. Chancelor*, 16 C.M.A. 297, 299, 36 C.M.R. 453, 455 (1966) ("During the hearings on the Uniform Code of Military Justice, there was considerable concern expressed regarding the entry of guilty pleas in courts-martial, and Congress made clear the nature of the safeguards which they intended to surround the receiving of such a judicial confession."). This Court has long observed that Congress could decide that "[t]he 'unique circumstances of military service require[] specific statutory protections for members of the armed forces' " due to "the subtle and not so subtle pressures that apply to military life and might cause members of the armed forces to feel compelled to" relinquish their constitutional rights. *United States v. Gilbreath*, 74 M.J. 11, 16-17 (C.A.A.F. 2014) (second alteration in original) (discussing Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2012)) (quoting *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000)). Thus, Congress was exercising its constitutional authority to make rules for the armed forces when it

prohibited guilty pleas in capital cases under Article 45(b), UCMJ.

Moreover, as the Supreme Court itself has clearly stated, "[t]here is, of course, no absolute right to have a guilty plea accepted," nor, more generally, to enter any guilty plea that a defendant might wish to enter. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. McCrimmon*, 60 M.J. 145, 152 (C.A.A.F. 2004) ("An accused does not have a constitutional right to plead guilty[,] . . . . [a]s the Constitution guarantees only a right to plead not guilty . . . ."). Rather, the sovereign is free to delineate when and under which circumstances certain pleas may be entered. *See North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970) ("A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence." (citation omitted)).

In this case, Appellant was merely compelled by Congress to have the Government prove his guilt beyond a reasonable doubt. This was not a violation of his Sixth Amendment rights—particularly when any detriment to Appellant would have been allayed by the military judge's offer to instruct the panel members during sentencing that Appellant had sought to plead guilty during findings but was prohibited from doing so by operation of law. In sum, considering the long history of the legislative regulation of the entry of pleas, Congress's authority under the Constitution to regulate military justice, and the Supreme Court's Sixth Amendment precedent, the dicta in *McCoy* cannot be read as suggesting that there is a constitutional right to plead guilty. *See Weiss*, 510 U.S. at 177 (stressing that judicial deference " 'is at its apogee' when reviewing congressional decisionmaking" concerning regulations and procedures related to military justice (quoting *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981))). Therefore, Appellant's argument that *McCoy* requires us to overrule our

precedents that have consistently upheld Article 45(b)'s prohibition against guilty pleas for capital offenses is without merit.

III. Issue V: Statutory Challenge to Article 45(b), UCMJ

In the alternative, Appellant contends that by prohibiting his proffered guilty pleas to *non*capital offenses, the military judge "caused the wholesale deprivation of [A]ppellant's regulatory right to plead guilty to these noncapital offenses[,] . . . result[ing] in structural error." Appellant's Brief at 101. Specifically, he advocates for overruling our predecessor court's decision in *Dock*, 28 M.J. 117, to the extent that it prohibits, under certain circumstances, a capital accused from pleading guilty to noncapital offenses. Appellant notes that the military judge relied on *Dock* to reject Appellant's offer to plead guilty to unpremeditated murder, as well as to either attempted premeditated murder or attempted unpremeditated murder.

In *Dock*, this Court's predecessor interpreted Article 45(b) to mean that " 'it is not just the pleas that are looked to but the four corners of the record to see if, for all practical purposes, the accused pled guilty to a capital offense.' " 28 M.J. at 119 (alteration in original removed) (internal quotation marks omitted) (first quoting *United States v. Dock*, 26 M.J. 620, 623 (A.C.M.R. 1988) (en banc); and then citing *United States v. McFarlane*, 8 C.M.A. 96, 100, 23 C.M.R. 320, 324 (1957)). In *Dock*, because the "appellant's pleas, *taken within the context of th*[*e*] *case*, constituted a plea of guilty to . . . a capital offense," those pleas "were taken in violation of Article 45(b), . . . and should have been rejected as required by Article 45(a), UCMJ." *Id.* (second alteration in original) (emphasis added) (internal quotation marks omitted) (quoting *Dock*, 26 M.J. at 623).

A. Standards of Review

"This Court reviews matters of statutory interpretation[, such as the interpretation of Article 45,] de novo." *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022). Deviation from the requirements of Article 45(b) is reviewed for harmless error. *See Matthews*, 16 M.J. at 363

(finding "no prejudice to appellant from the judge's refusal to accept a plea of guilty to this crime"). And this Court reviews whether there is harmless error de novo. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). Finally, this Court has the discretion to overrule its own precedent. *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018) (although "adherence to precedent is the preferred course," stare decisis "is not an inexorable command" (citations omitted) (internal quotation marks omitted)).

B. Applicable Law

As discussed above, at the time of Appellant's court-martial Article 45(b), UCMJ, provided, in relevant part, that "[a] plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." The analogous Rule for Court-Martial, R.C.M. 910(a)(1) (2008 ed.), contained nearly identical language: "A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial."

In *non*capital cases, however—both at the time of Appellant's court-martial and up until the present day—R.C.M. 910 *has* generally permitted an accused to plead "not guilty to an offense as charged, but guilty of a lesser included offense." R.C.M. 910(a)(1) (2008 ed.); *see also* R.C.M. 910(a)(1)(B) (2019 ed.). The rule's discussion then goes on to state: "A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged." R.C.M. 910(a)(1) Discussion (2008 ed.). When a guilty plea has been made and accepted, "a finding of guilty of the charge or specification may . . . be entered immediately without vote," and "[t]his finding shall constitute the finding of the court." Article 45(b), UCMJ. It is this regulatory right to which Appellant cites when arguing that the military judge erred by preventing him from pleading guilty to *non*capital offenses, resulting in structural error.

Under the doctrine of horizontal stare decisis, "an appellate court must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." *United States*

v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018) (alteration in original removed) (internal quotation marks omitted) (quoting *United States v. Quick*, 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J., joined by Ohlson, J., dissenting)). However, "[a]pplying stare decisis is not an inexorable command, and we are not bound by precedent when there is a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis." *Cardenas*, 80 M.J. at 423. "Stare decisis is most compelling where courts undertake statutory construction as is the case here." *Blanks*, 77 M.J. at 242 (internal quotations marks omitted).

To determine whether to depart from stare decisis, this Court applies the following factors: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id.* (citation omitted) (internal quotation marks omitted). "The party requesting that we overturn precedent bears a substantial burden of persuasion." *Andrews*, 77 M.J. at 399 (citation omitted) (internal quotation marks omitted). In addition, a "party must present a 'special justification' for us to overrule prior precedent." *Blanks*, 77 M.J. at 242 (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015)).

C. Discussion

On its face, *Dock* controls the disposition of the instant issue and Appellant has not met his burden of persuading us that *Dock* should be overturned. First, although reasonable minds could differ about whether *Dock* was poorly reasoned, and although there is little case law that demonstrates military courts' application of *Dock*,[23] its holding is

[23] In *United States v. Simoy*, 46 M.J. 592, 620 (A.F. Ct. Crim. App. 1996), *rev'd in part on other grounds* 50 M.J. 1 (C.A.A.F. 1998), the United States Air Force Court of Criminal Appeals found that the military judge did not abuse his discretion by applying *Dock* to prohibit the appellant's pleas of guilty to conspiracy to commit robbery, attempted murder, and armed robbery in a capital felony murder case due to the "substantial risk" that Article 45(b) might be violated. However, as Appellant

not unworkable. Indeed, the military judge's analysis in Appellant's case exemplifies this point. She applied *Dock* without difficulty and persuasively reasoned that if Appellant were permitted to plead guilty to unpremeditated murder and attempted premeditated murder, under the facts of this case, "[i]t would be possible for [Appellant] to be convicted of the charged capital offense without presenting any additional evidence." Similarly, the military judge readily identified that accepting pleas of guilty from Appellant to unpremeditated murder and attempted unpremeditated murder where "the factual predicate in this particular case [was] the killing of 13 people over a period of time . . . would be the factual equivalent to pleading guilty to a capital offense in violation of Article 45 of the [UCMJ]."

Appellant complains that "[a]t the time of a guilty plea, the record's 'four corners' have not yet been developed." Appellant's Brief at 113. However, this point is of little concern. Article 45(a) states in pertinent part, "[i]f an accused . . . after a plea of guilty sets up matter inconsistent with the plea, . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty." In essence, military judges have a duty to correct a guilty plea, so they are obligated to correct guilty pleas entered in contravention of Article 45(b). Appellant also complains that an accused would have no recourse "if, after the record develops, there is no *de facto* plea." Appellant's Brief at 113. However, an accused in that position would have appellate recourse.

Second, we reject Appellant's argument that our precedent in *Dock* should be overturned because *McCoy*'s purported constitutional right of autonomy to concede guilt at trial constitutes an "intervening event." As we have explained, the holding of *McCoy* dealt with a different problem than the one allegedly present in this case—that of

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highlights, at trial in this case the Government argued that *Simoy* is "an anomaly in Article 45(b) jurisprudence and has little precedential value." Reply Brief at 51 (internal quotation marks omitted).

counsel overriding a criminal defendant's choice to plead not guilty as opposed to the *sovereign's* ability to compel a criminal defendant to plead not guilty. 138 S. Ct. at 1505. Therefore, *McCoy* does not serve as an intervening event that would undermine *Dock*.

Third, it is unclear whether the expectations of servicemembers would be undermined if we were to overrule *Dock*. *Cf. Quick*, 74 M.J. at 337 (noting in the context of the authority of Courts of Criminal Appeals to order sentence-only rehearings that "it is difficult to quantify the expectations of servicemembers"). However, servicemembers theoretically have relied on this Court's Article 45(b) de facto guilty plea precedents, like *Dock*, to protect their right to not be induced into pleading guilty in capital cases, as this right "has become an established component of the military justice system." *Id.*

Fourth, contrary to Appellant's contention, we believe that departing from *Dock* would undermine the public's confidence in the law. *Dock* has been binding precedent of this Court for thirty-four years, and in turn, it is based on a sixty-five-year precedent—*McFarlane*. This Court has observed that: "Just as overturning precedent can undermine confidence in the military justice system, upholding precedent tends to bolster [the public's] confidence in the law." *Andrews*, 77 M.J. at 401.

Also, the Supreme Court has recognized that "long congressional acquiescence . . . enhance[s] even the usual precedential force we accord to our interpretations of statutes." *Watson v. United States*, 552 U.S. 74, 82-83 (2007) (citation omitted) (internal quotation marks omitted). For many years, Congress did not disturb *Dock*'s de facto guilty plea interpretation of Article 45(b). Although Congress recently amended Article 45(b), it did so only for cases referred to courts-martial on or after January 1, 2019. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5542(a), (c)(2), 130 Stat. 2000, 2967-68 (2016). That the legislative body with the constitutional power to make rules for the armed forces chose to not retroactively apply that amendment to Article 45(b) is a factor that

members of the public would consider in assessing their confidence in the law. *See Middendorf*, 425 U.S. at 43 ("we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces").

Thus, these factors weigh against overruling *Dock*. However, even if we were to hold that *Dock* was wrongly decided and that Article 45(b)'s prohibition against an accused pleading guilty to a lesser included offense is contrary to the plain language of Article 45(b), UCMJ, Appellant is entitled to no relief because he suffered no prejudice under either the harmlessness standard or the harmlessness beyond a reasonable doubt standard.[24] Indeed, application of a prejudice analysis results in an unequivocal result: Appellant was not prejudiced by the military judge's application of Article 45(b).

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[24] Appellant argues that if *Dock* was wrongly decided, the military judge's error in refusing to take Appellant's guilty pleas to lesser included offenses was structural error because the military judge's refusal infringed on his protected autonomy interests recognized in *McCoy*. However, as discussed above, we have determined that *McCoy* does not disturb *Dock*. Also, structural errors "affect the entire conduct of the [proceeding] from beginning to end" while "discrete defects in the criminal process . . . are not structural because they do not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (first alteration in original) (citations omitted) (internal quotation marks omitted). Consistent with these definitions, prohibiting an accused from pleading guilty is not a structural error. Furthermore, the Supreme Court has stated that "[o]nly in a 'very limited class of cases' has the Court concluded that an error is structural, and 'thus subject to automatic reversal' on appeal." *Id.* at 2099-2100 (quoting *Neder*, 527 U. S. at 8). And in *Matthews*, 16 M.J. at 363, a case that predated *Dock*, this Court's predecessor applied a prejudice analysis to a military judge's refusal to accept a plea to premeditated murder and rape in a capital case, thereby demonstrating in an analogous situation, that we have not considered the prohibition of a guilty plea to a capital offense to constitute structural error.

With regard to findings, even if the military judge should have allowed Appellant to plead guilty to the lesser included offenses, Appellant could not have been prejudiced by this alleged error because the only result was that Appellant's guilt was subjected to adversarial testing. And through that testing, Appellant was found guilty.

With regard to sentencing, although we recognize in a capital case an accused may benefit from pleading guilty as part of a concerted effort to accept responsibility and to demonstrate contrition for his or her heinous criminal conduct, that scenario simply does not apply here. Appellant demonstrated no remorse during his opening statement and did not put on a sentencing case or give a sentencing argument. And importantly, he went so far as to affirmatively reject the military judge's offer to instruct the panel members that he attempted to plead guilty but was not permitted to do so by operation of law. Under these circumstances, we conclude that even if the military judge's application of *Dock* constituted error, Appellant experienced no prejudice.

Issue VI: Whether the Prosecutor's Sentencing Argument Impermissibly Invited the Panel to Make its Determination on Caprice and Emotion[25]

Appellant asserts that the trial counsel engaged in prosecutorial misconduct during his sentencing argument. Specifically, Appellant cites the trial counsel's reference to a victim's pregnancy at the time of the shooting, his purported appeal to the members' emotions, and his use of first-person plural pronouns while addressing the members. For the reasons provided below, we conclude that Appellant is not entitled to the new sentencing hearing which he seeks.

I. Background

Over Appellant's objection at trial, the military judge admitted evidence that Private E-2 (PV2) FV, one of the soldiers whom Appellant had killed, was pregnant at the

[25] This issue was not raised before the ACCA.

time of the offense.[26] Specifically, in order to establish that Appellant acted with premeditation when he killed her, the Government offered evidence that Appellant shot PV2 FV after she screamed "My baby! My baby!"[27] The military judge ruled that PV2 FV's shouts of "My baby!" were admissible as res gestae evidence.[28] In the course of doing so, she conducted a Military Rule of Evidence 403 balancing test.

In its opening statement, the Government drew attention to PV2 FV's screams of "My baby, my baby." Likewise, during the merits phase of the trial, various witnesses of the shooting testified that they heard her shouts. PV2 FV's supervisor and a medical examiner also testified, and they confirmed that PV2 FV was pregnant at the time of the attack.

After Appellant was convicted, PV2 FV's father was called as a witness during the Government's sentencing case. He testified in relevant part: "That man did not just kill 13 [people]—he killed 15. He killed my [unborn] grandson, and he killed me, slowly." Additionally, the Government placed PV2 FV's pregnancy into evidence at sentencing by recalling her supervisor to testify to his efforts to

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[26] The Government did not charge Appellant with the unborn child's death.

[27] In essence, the trial counsel's argument was as follows: PV2 FV's pleas of "My baby! My baby!" were intended to communicate, "Don't shoot me. I'm pregnant." The fact that Appellant shot PV2 FV after this plea showed that the act was premeditated.

[28] Res gestae is defined as "[t]he events at issue, or other events contemporaneous with them." *Black's Law Dictionary* 1565 (11th ed. 2019). This Court has explained, "Res gestae evidence is vitally important in many trials. It enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation." *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992) (footnote omitted) (citation omitted).

keep her in Iraq, where she had been deployed, after learning of her pregnancy.

During the Government's sentencing argument, trial counsel summarized the lives of the victims Appellant killed, how they died, and their loved ones' discovery of their deaths. In this context, trial counsel said the following about PV2 FV:

> [PV2 FV] —a mother's thoughts [sic] not for herself, not for her own life, but for that of her unborn child. [PV2 FV], 21, whose final words were, "My baby! My baby!" A single bullet punctured her lungs and her heart; a single bullet ended her life, and that of her unborn child, and broke her father's heart.
>
> Death is fickle. A single bullet—two lives lost, and a father's changed forever.

Trial counsel later emphasized, "[Appellant] ignored pleas for help, cries of terror, *the cries of a mother*." (Emphasis added.)

Counsel concluded the Government's sentencing argument as follows:

> For his crimes, he should forfeit his life.
>
> There is a price to be paid for the mass murder he perpetrated on 5 November. There is a price to be paid for what he did, for the lives he took, the lives he horrifically changed, and the pain and sorrow he wrought.
>
> You should, however, have mercy in your sentence. It should speak to the 13 souls *who have departed our formation*. You should *reserve your emotion for their souls*, and your compassion for their families, and your mercy for their memory.
>
> For the accused, he should be given an accounting; he should be given a reckoning—a reckoning for his crimes, and for his crimes, he should pay a price.
>
> . . . He will never be a martyr because he has nothing to give.

> Do not be misled. Do not be confused. Do not be fooled. He is not giving his life. *We are taking his life.* This is not his gift to God; this is his debt to society. This is not a charitable act; this is the cost of his murderous rampage. He will not now, and he never will be, a martyr. He is a criminal. He is a cold-blooded murderer. On 5 November, he did not leave this earth; he remained to pay a price. He remained to pay a debt—the debt he owes is his life.

(Emphasis added.)

At no time did Appellant object to the Government's sentencing argument, and he did not present a sentencing case or argument of his own.

Subsequently, the military judge instructed the members that Appellant "is to be sentenced only for the offenses of which he has been found guilty." She later added, "You are advised that the arguments of the trial counsel, and his recommendations, are only his individual suggestions, and may not be considered as the recommendation or opinion of anyone other than such counsel." The military judge continued:

> You also heard testimony from the father of one of the victims that he and his unborn grandchild were victims of the accused's crimes. You may only consider this as evidence of the emotional impact on the victim's family. You must bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty.

Appellant now argues that "[t]he gratuitous and *repeated* references to a victim's pregnancy" as well as "the specific call to the panel to use their *emotion* for those who have left 'our formation' " amounted to improper argument and constituted plain error. Appellant's Brief at 117. Appellant also argues that the trial evidence of PV2 FV's pregnancy was unnecessary for its professed purpose—to prove premeditation—and that most such references were irrelevant. He alleges that "the government repeatedly put her pregnancy in evidence in a calculated and impermissible effort to emotionally charge the panel," so that trial counsel

could "circle[] back during sentencing to" argue a " 'single bullet—two lives lost.' " *Id.* at 126.

In response, the Government argues that "trial counsel fairly and appropriately argued the aggravating factors from evidence adduced at trial." Appellee's Brief at 94. Specifically, the Government contends that it was fair and accurate commentary for trial counsel to note during sentencing argument that Appellant had killed a pregnant woman and her unborn child. Furthermore, the Government asserts that the trial counsel did not "impermissibly invite the panel to impose the death penalty based on sheer emotion," and that it was not erroneous for the trial counsel to use first-person personal pronouns in the context which he did. *Id.* at 99.

In the alternative, the Government asserts that if any of the trial counsel's sentencing arguments constituted error, those errors were harmless. In support of this position, the Government contends that the severity of any misconduct was minimal, the military judge's sentencing instructions cured any error, and "the egregiousness of Appellant's crimes and the great weight of the evidence supporting [his] sentence demonstrate that any error in the sentencing argument was not prejudicial." *Id.* at 105. Thus, the Government argues, even "if this Court finds error, it should still be confident that Appellant was sentenced on the basis of the evidence alone." *Id.* at 94.

II. Standard of Review

When an appellant challenges trial counsel's sentencing argument for the first time on appeal, this Court reviews for plain error. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021). Under this standard of review, an appellant ordinarily bears the burden not only of establishing that there is error and that the error is clear or obvious, but also that the error materially prejudices a substantial right. *Id.* at 19-20. However, in those instances where a clear or obvious error rises to the level of a constitutional violation, the burden shifts to the government to "show

that the error was harmless beyond a reasonable doubt." *Tovarchavez*, 78 M.J. at 462 n.6.

III. Applicable Law

Under this Court's precedent:

> Prosecutorial misconduct occurs when trial counsel overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.

United States v. Hornback, 73 M.J. 155, 159-60 (C.A.A.F. 2014) (alteration in original) (citations omitted) (internal quotation marks omitted). "During sentencing argument, 'the trial counsel is at liberty to strike hard, but not foul, blows.' " *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). Trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence," but "may not . . . inject his personal opinion into the panel's deliberations, inflame the members' passions or prejudices, or ask them to convict the accused on the basis of criminal predisposition." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citations omitted) (internal quotation marks omitted).

Trial counsel's argument must be " 'viewed in context' " because "it is improper to 'surgically carve' out a portion of the argument with no regard to its context." *Baer*, 53 M.J. at 238 (citations omitted); *see also id.* (" 'If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.' " (quoting *Dunlop v. United States*, 165 U.S. 486, 498 (1897))).

In capital cases, "[t]he penalty phase . . . is undertaken to assess the gravity of a particular offense and to

determine whether it warrants the ultimate punishment." *Monge v. California*, 524 U.S. 721, 731-32 (1998). The Supreme Court has long recognized that "capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle v. Parks*, 494 U.S. 484, 493 (1990). In this regard, " '[i]t is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' " *Monge*, 524 U.S. at 732 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

"In the plain error context, we determine whether the cumulative effect of an improper sentencing argument impacted 'the accused's substantial rights and the fairness and integrity of his trial.' " *Akbar,* 74 M.J. at 394 (quoting *Halpin*, 71 M.J. at 480). To perform this inquiry, we "examine[] 'whether trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone.' " *Id.* (quoting *Halpin*, 71 M.J. at 480). In assessing prejudice for improper sentencing argument, this Court "balance[s (1)] the severity of the improper argument, [(2)] any measures by the military judge to cure the improper argument, and [(3)] the evidence supporting the sentence." *United States v. Marsh*, 70 M.J. 101, 107 (C.A.A.F. 2011) (citing *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007)). This Court has "reiterat[ed] that in cases of improper argument, each case must rest on its own peculiar facts." *Baer*, 53 M.J. at 239.

IV. Discussion

As an initial matter, we reject Appellant's contention that the military judge erred by admitting into evidence the fact that PV2 FV was pregnant and that she shouted "My baby! My baby!" The evidence of PV2 FV's pregnancy and her screams was properly admitted as res gestae.[29]

[29] We acknowledge that the alternative rationale provided by the Government for why this evidence was admissible seems to be a closer call, but there is an insufficient basis for us to conclude that the military judge abused her discretion by admitting

The witnesses of the shooting who testified they heard PV2 FV's shouts were merely relaying to the members their observations. The only potentially problematic witnesses were PV2 FV's supervisor who testified as to her reason for redeployment, and the medical examiner who confirmed her pregnancy. However, the supervisor's testimony was relevant for the purpose of explaining why PV2 FV was at the Soldier Readiness Processing center on November 5, and the medical examiner's testimony merely confirmed what the members had already heard—that PV2 FV was pregnant.

Moreover, regardless of the merits of admitting this evidence during findings, in the context of the issue presented we note that PV2 FV's pregnancy was relevant for sentencing as evidence in aggravation. R.C.M. 1001(b)(4) (2008 ed.) states in part: "Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused."[30] And "it is appropriate for trial counsel 'to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.' " *Sewell*, 76 M.J. at 18 (quoting *Baer*, 53 M.J. at 237).

Appellant contends that trial counsel's "multitude [of] references to PV2 FV's pregnancy" was "a calculated and impermissible effort to emotionally charge the panel" and constituted prosecutorial misconduct in sentencing argument. Appellant's Brief at 126. However, "[v]ictim impact testimony is admissible in capital cases to inform the panel about 'the specific harm caused by [the accused].' " *Akbar*, 74 M.J. at 393 (second alteration in original) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). And the death of her unborn child was "directly relat[ed] to or

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this evidence for "the limited purpose of its relevance, if any, to premeditation and the intent to kill."

[30] R.C.M. 1004(b) (2008 ed.) provides that "the provisions [of] R.C.M. 1001" apply to capital cases.

result[ed] from" the offense of PV2 FV's killing, of which Appellant was convicted. R.C.M. 1001(b)(4) (2008 ed.).

Additionally, Appellant's claim that "the members were led to believe there was an unnamed, fourteenth victim on the charge sheet," is unpersuasive. Appellant's Brief at 126. As a general matter, the military judge instructed the panel that Appellant was "to be sentenced only for the offenses of which he has been found guilty," and there was no "fourteenth victim" whom Appellant was found guilty of killing. Moreover, the members were explicitly instructed by the military judge that, despite the testimony of PV2 FV's father that "he and his unborn grandchild were victims" of Appellant's crimes, the members could "only consider this as evidence of the emotional impact on the victim's family . . . . [And were required to] bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty." Absent evidence to the contrary, we presume the members understood and followed the military judge's instructions on this issue. *See United States v. Piolunek*, 74 M.J. 107, 111 (C.A.A.F. 2015). For these reasons, trial counsel did not commit misconduct by referencing PV2 FV's pregnancy during his sentencing argument.

Appellant also contends that it was error for the trial counsel to argue: "You should reserve your emotion for [the victims'] souls, and your compassion for their families, and your mercy for their memory." Appellant asserts that this was an improper appeal to emotion that is impermissible during sentencing. Although it is true that the trial counsel used the term "emotion" during this portion of his sentencing argument, it cannot be said that he improperly urged the panel members to use their emotions when devising a proper sentence for Appellant. To the contrary, the trial counsel urged the panel members to "*reserve*" their emotions for other purposes, and he grounded his overall sentencing argument on the following proposition: "[M]embers of the panel, because of what [Appellant] did, because of who he did it to, because of where he did it, and because of when he did it, the just and appropriate sentence in this case is death." (Emphasis added.) Stated differently, the

trial counsel asked the panel members to sentence Appellant "for his crimes." Thus, in its totality, this line of argument was appropriate.[31]

Finally, we will assume without deciding for purposes of this appeal that trial counsel's use of first-person plural pronouns ("our" and "we") were improper when he referred to Appellant's victims as those "who have departed *our* formation" and when he stated "*we* are taking his life." (Emphasis added.) *See People v. Wheeler*, 871 N.E.2d 728, 748 (Ill. 2007) ("[I]t is improper for a prosecutor to utilize closing argument to forge an 'us-versus-them' mentality that is inconsistent with the criminal trial principle that a jury fulfills a nonpartisan role . . . .").

Turning to the issue of prejudice, we will assume without deciding that—because this was a capital case—the trial counsel's improper arguments were of a constitutional dimension.[32] As a consequence, the Government has the burden of proving "the error was harmless beyond a reasonable doubt . . . on plain error review." *United States v. Palacios Cueto*, 82 M.J. 323, 334 (C.A.A.F. 2022).

For the following reasons, we conclude that the Government has met this burden. First, the record before us demonstrates that this improper argument was isolated,

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[31] Appellant also argues that the context of the Government's sentencing argument included "heavy undertones of war." Appellant's Brief at 129. However, we agree with the Government that it was Appellant who set this tone in his opening statement, making such remarks as, "And the dead bodies will testify that war is an ugly thing," and "[t]he evidence will show . . . that I was on the wrong side [of] America's war on Islam. But then I switched sides." Under these circumstances, to the extent the Government's sentencing argument contained "undertones of war," we find such commentary was not impermissible within the context of the entire proceedings.

[32] As Appellant emphasizes in his brief, "Some courts have tested improper arguments in capital cases for constitutional error because such error implicates an accused's Eighth Amendment right to a reliable death judgment." Appellant's Brief at 124 (citing *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002)).

and it was not severe. *See Norwood*, 81 M.J. at 20 (finding no severe conduct where the improper argument "only made up a few lines of [the] rebuttal argument"). Second, although the military judge did not take any measures to cure these fleeting improper comments, the evidence properly before the panel members included many aggravating circumstances such as Appellant's murder of thirteen active duty or retired soldiers, his attempted murder of thirty-two other people (many of whom were grievously wounded), and the violation of the oaths he had taken as both an Army officer and a physician. *See Akbar*, 74 M.J. at 394. This evidence in aggravation was particularly damaging to Appellant's case in light of the fact that he offered no evidence in extenuation or mitigation, and he delivered no sentencing argument to the panel members.

Because of the relevant law and the facts of this case, we conclude that Appellant is not entitled to a new sentencing hearing.

Issue VII: Whether the Continued Forcible Shaving of Appellant Is Punishment in Excess of the Sentence He Received at His Court-Martial and Violated Article 55 and the Eighth Amendment

Appellant identifies as "a devout Muslim who earnestly believes that the wearing of a beard is an important tenet of his faith." Appellant's Brief at 130. Appellant asserts in his briefs that he was forcibly shaved before and after trial and that he was punished by personnel at the U.S. Disciplinary Barracks (USDB) for defying orders to shave. According to Appellant, these alleged forcible shavings violated Article 55, UCMJ,[33] and the Eighth Amendment of the Constitution which prohibit the infliction of cruel and unusual punishment, violated the prohibition against imposing punishment in excess of that adjudged at trial, and violated the Religious Freedom Restoration Act (RFRA),[34] which prohibits the government from

[33] 10 U.S.C. § 855 (2012).

[34] 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

"imping[ing] on the free exercise of religion without having a compelling governmental interest in doing so." *Id.* at 130. We are not persuaded.

I. Background

After Appellant's sentence was adjudged on August 28, 2013, he periodically filed requests for exemptions to the grooming standards under the applicable Army regulations on religious grounds. For example, in September of 2013, Appellant asked for an exception to the grooming policy because of his religious beliefs as a practicing Muslim. The Deputy Chief of Staff of the Army denied Appellant's request. In his memorandum to Appellant, Lieutenant General (LTG) Bromberg stated: "Though an inmate, you nonetheless interact with Soldiers who abide by these standards, and who know that you are an officer. Granting you an exception would erode the values, discipline, and team identity that arises from the even-handed application of grooming standards throughout the Army."

In December of 2016, Appellant submitted another request for an exemption from the grooming policy. After meeting with Appellant, a military chaplain wrote in a memorandum-for-record that although there is no religious law requiring Muslim men to wear beards, many Muslim men regard it as an important religious practice. The military chaplain also determined that Appellant's request appeared to stem from Appellant's "genuine religious belief and personal understanding of his faith." Appellant's request on that occasion was denied—in accordance with the recommendations of Appellant's chain of command—by the Senior Official Performing the Duties of the Assistant Secretary of the Army (Manpower and Reserve Affairs).

As of July 19, 2021, however, Appellant has been allowed to wear a beard in observance of his Islamic faith, but it must be no longer than a quarter inch in length. Appellant claims in his briefs that because he wants to let his beard grow longer than the authorized length in order to follow his sincerely held religious beliefs, he is forcibly shaved every other week. He also claims that every time he

is forcibly shaved "he receives further demerits and is denied benefits as a result." Appellant's Brief at 147.

II. Discussion

Appellant's Article 55 and Eighth Amendment claims fail because the record before us provides no information or description about what these "forcible" shavings allegedly entailed. Thus, we have no basis to divine whether the "force" complained of consisted merely of Appellant's involuntary acquiescence to the Army's grooming policy as he unwillingly shaved himself, or whether the alleged incidents of forcible shaving involved some type of physical coercion by USDB personnel. Because the record does not contain this crucial evidence, we find no proper basis to provide relief to Appellant.[35] *See United States v. Ellis*, 47 M.J. 20, 22 (C.A.A.F. 1997) (finding appellant was not entitled to relief as there was "no evidence" to support his claim).[36]

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[35] For the reasons stated in his concurrence in *United States v. Pullings*, 83 M.J. 205, 214-22 (C.A.A.F. 2023) (Hardy, J., concurring in the judgment), Judge Hardy agrees that Appellant is not entitled to relief on his Article 55 and Eighth Amendment claims.

[36] In his petition for reconsideration, counsel argues that we overlooked a declaration in the record where Appellant stated: "I have been forcibly shaved on a routine basis and continue to be forcibly shaved. Additionally, as a result of my attempts to wear a beard, I have been placed in a disciplinary segregation (DS) status. Because of this status, amenities such as TV and radio, have been taken away from me." Counsel concludes that our original opinion's statement that the record before this Court was devoid of any evidence that Appellant had been forcibly shaved is therefore incorrect. In addressing this point, we note that during the prior proceedings Appellant's counsel did not include Appellant's declaration in the joint appendix submitted to this Court, nor did they quote this document or cite to it in their briefs. Moreover, we note that this document was simply appended to a motion that was filed with, and subsequently granted by, the lower court in 2018 and was a single page in a 126-volume record of trial. Nevertheless, we agree with Appellant's counsel that this document now merits our attention. However, as explained in the text of this revised opinion,

Similarly, Appellant's argument that we should remand this case to the ACCA because the lower court erred in conducting its sentence appropriateness review is unavailing. Courts of Criminal Appeals are empowered to review prison condition claims "if the record contains information about those conditions." *United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) (internal quotation marks omitted) (quoting *United States v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020)). And an appellant can properly add material to the record about prison conditions in the course of filing a clemency petition with the convening authority. *See Jessie*, 79 M.J. at 444. But here, Appellant did not present to the convening authority any claim regarding confinement facility policies, despite submitting a 450-page handwritten clemency submission. Therefore, within the parameters of *Jessie*, nothing *in the record* before the ACCA raised an issue regarding the purported shavings. Accordingly, the ACCA did not err in declining to provide relief to Appellant. *See Willman*, 81 M.J. at 361 ("This Court has never held, or even suggested, that outside-the-record materials considered to resolve an appellant's cruel and unusual punishment [or unlawful increase in sentence] claims became part of the entire record" for sentence appropriateness claims.).

Additionally, Appellant's claim that the denial of his requested exception from the Army's grooming policy unlawfully increased his sentence cannot succeed because the shaving requirement was a "collateral administrative consequence[] of a sentence" rather than "punishment for purposes of the criminal law." *United States v. Guinn*, 81 M.J. 195, 200 n.3 (C.A.A.F. 2021) (internal quotation marks omitted) (quoting *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007)). And similar to our analysis above in the context of Article 55 and the Eighth Amendment, Appellant's related claim that being forcibly shaved unlawfully increased his sentence does not merit scrutiny because he

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Appellant still cannot succeed on his Article 55 and Eighth Amendment claims.

has not documented the nature of these purported "forcible shavings."

To the extent the record before us does document the rejection of Appellant's requests for a religious accommodation from the Army's beard policy, and to the extent these rejections rise to the level of a RFRA violation, Appellant still is not entitled to relief from this Court. Simply stated, stand-alone RFRA claims and the resulting denial of prison privileges are not justiciable in this Court because our statutory mandate does not extend to the resolution of such matters. *See* Article 67(c), UCMJ (2012) (limiting review "with respect to the findings and sentence" of a court-martial).

To the extent that Appellant seeks to argue that a RFRA violation automatically constitutes an Article 55 and/or Eighth Amendment violation—both of which *are* justiciable in this Court—we note that the analytical frameworks are different. *Compare United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016) ("To establish a prima facie RFRA defense, an accused must show by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that [the accused] sincerely holds."), *and* 42 U.S.C. § 2000bb-1(a) (generally prohibiting the government from "substantially burden[ing] a person's exercise of religion"), *with United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (stating that for Article 55 or Eighth Amendment claims, an appellant must show "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ" (alteration in original) (footnotes omitted) (internal quotation marks omitted)).

As a result, even if we were to assume that Appellant's rights under RFRA were violated, that fact standing alone does not serve as a sufficient basis to conclude that his Eighth Amendment and Article 55 claims are meritorious.

Stated differently, we do not adopt Appellant's apparent argument that the alleged RFRA violation here—the denial of an exception to the Army's grooming policy—was, standing alone, "an objectively, sufficiently serious act or omission resulting in the denial of necessities" that automatically constituted a violation of the Eighth Amendment. *Lovett*, 63 M.J. at 215. As highlighted by the Government in its brief, the defense has pointed to no federal court decision that has predicated an Eighth Amendment violation upon a deprivation of religious liberty. Indeed, as the Ninth Circuit opined, "[A]n institution's obligation under the [E]ighth [A]mendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir. 1982) (first alteration in original) (citation omitted) (internal quotation marks omitted). We also emphasize that Appellant has not demonstrated "a culpable state of mind" from prison officials that amounts to "deliberate indifference" to his health and safety. *Lovett,* 63 M.J. at 215. At bottom, Appellant needed to show more to succeed on this claim on appeal, and he failed to do so.

In sum, in light of the absence of any descriptions about what Appellant's "forcible" shavings allegedly entailed, Appellant is not entitled to relief on his Article 55 and Eighth Amendment claims. Further, in terms of Appellant's argument that the requirement to comply with the Army's grooming policy constituted punishment in excess of his sentence, that claim fails because the shaving requirement was a collateral administrative consequence of Appellant's sentence. And finally, Appellant's stand-alone RFRA claim is not justiciable by this Court because resolving such an issue would extend beyond this Court's statutory mandate.

Issue VIII: Whether Appellant Was Deprived [of] His Right to Counsel During Post-Trial Processing[37]

Although initially represented by counsel during the clemency process, Appellant ultimately opted to represent himself during post-trial proceedings. He now asserts that he was deprived of his right to counsel during this period. In determining the merits of his claim, we will assume that Appellant's decision to proceed pro se during post-trial clemency proceedings was valid only if he knowingly, voluntarily, and intelligently waived the right to counsel. Upon doing so, we conclude that Appellant's waiver was valid.

I. Background

After Appellant was convicted of his offenses, the military judge and standby counsel advised Appellant of his post-trial rights. Key among these rights was Appellant's ability to submit matters for the convening authority's consideration when he was deciding whether to approve the findings and sentence.

After his sentence was announced, Appellant stated that he wanted one of his standby counsel, "Lieutenant Colonel [KP]," to represent him during post-trial matters. On January 29, 2015, an Article 39(a), UCMJ, session was held to discuss Appellant's post-trial representation. At that session, Appellant reiterated his desire to have LTC KP serve as his post-trial representative. However, in his brief before this Court, Appellant vaguely states that LTC KP subsequently "left the case," and a civilian defense counsel entered an appearance. Appellant's Brief at 148.

The staff judge advocate (SJA) subsequently prepared an SJA recommendation (SJAR) advising the convening authority to approve the adjudged sentence. In response, the civilian defense counsel prepared to submit matters for the convening authority's consideration under R.C.M. 1105 and R.C.M. 1106. However, on February 13, 2017, shortly

[37] This issue was not raised before the lower court.

before his post-trial submissions were due, Appellant presented a handwritten letter to the SJA stating:

> Effective immediately, I Nidal Hasan the accused . . . am representing myself soley [sic] in the matter of the submission of post-trial matters pursuant to Rules for Court-Martial (R.C.M.) 1105 and 1106. In this capacity my only submission to the . . . convening authority . . . is a piece entitled "Mans [sic] Duty to His Creator and the Purpose of Life" . . . . Please don't involve any lawyers for as I have clearly stated above I am representing myself and understand the consequences. . . . The presiding judge (Colonel [Osborn]) allowed me to represent myself during the trial so you should not hesitate to do so now in these post-trial matters.

The SJA responded to the letter by writing Appellant's civilian defense counsel:

> Given that we have yet to receive any formal notice of your release as counsel to the Accused, I forward a copy of the Accused's letter, enclosed, to you and ask that you immediately clarify what matters the Convening Authority should consider before taking Action.
>
> It has now been over a year since matters were originally due in this case. I will advise the Convening Authority to take initial Action. I ask that you provide a response to this office on or before March 2, 2017.

The civilian defense counsel's response is not in the record before us. However, in a reply letter from March 13, 2017, the SJA indicated she had received an email from the civilian defense counsel on March 2. In that reply letter to the civilian defense counsel, the SJA confirmed:

> In accordance with the Accused's and your request, the only post-trial defense matters the Convening Authority will consider, prior to taking initial Action, are: the Accused's handwritten manuscript . . .; and the Accused's one-page handwritten letter to the Staff Judge Advocate, dated 13 February 2017. These matters constitute the entirety of the defense's post-trial submission,

> pursuant to RCM 1105 and 1106 and Article[s] 38(c) and 60 of the UCMJ.

According to Appellant, there is no indication that any other pertinent communications occurred, whether between the SJA and Appellant or between the SJA and Appellant's counsel, about waiving his post-trial right to counsel.

Before this Court, Appellant now argues that the SJA needed to inquire further into whether Appellant knowingly waived his right to counsel for post-trial proceedings. Citing no legal authority, he asserts that this "inquiry must, at the very least, naturally lie somewhere between the thorough colloquy for waiver at trial and thorough advisement on appeal." Appellant's Brief at 150. Appellant maintains that the inquiry that actually occurred in this case was insufficient to ensure that his purported waiver of counsel in the post-trial period was "knowing, intelligent, and voluntary" because the "SJA relied on a handwritten note alleging waiver, made no follow up with counsel or the [A]ppellant, and, in fact, continued to engage with [the civilian defense counsel] as if [A]ppellant were still represented." *Id.* at 150-51.

II. Standard of Review

Whether the right to post-trial counsel was validly waived is a question of law we review de novo. *See Rosenthal*, 62 M.J. at 262; *Mix*, 35 M.J. at 286. Although Appellant raises this issue for the first time in this Court, the parties are in agreement that this de novo standard of review applies in this instance, and we concur.

III. Discussion

In prior cases, we have not identified any particular standard that applies when an accused seeks to waive the right to counsel and proceed pro se in the clemency process. *See United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000); *cf. Mix*, 35 M.J. at 286 (declining to "decide what type of inquiry is required" to determine whether an accused may proceed pro se at trial). However, for purposes of this appeal we will assume that an accused's decision to

proceed pro se during post-trial clemency proceedings is valid only if the accused knowingly, voluntarily, and intelligently waived the right to counsel. *See Faretta*, 422 U.S. at 835; *see also Tovar*, 541 U.S. at 87-88; *Knight*, 53 M.J. at 342 (requiring, at a minimum, that an accused's waiver of counsel during the post-trial stage of his or court-martial, to include the submission of clemency matters, be "knowing"). This inquiry into whether a waiver was knowing, voluntary, and intelligent is case specific.

Similarly, in prior cases we have not clearly defined the specific steps or inquiries that a military judge or a staff judge advocate must make before an accused may validly waive his or her right to post-trial counsel. *See Mix*, 35 M.J. at 286 (declining to decide the "exact extent of the inquiry necessary to ensure a knowing and intelligent waiver" of counsel at trial by a military judge); *cf. Tovar*, 541 U.S. at 88 ("We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel."). Rather, we have engaged in a case specific review of the record to determine whether there were sufficient indicia of a waiver of post-trial representation.

Upon engaging in this inquiry in the instant case, we conclude there are five key points which collectively demonstrate that Appellant's waiver of his right to counsel was valid.

First, the military judge advised Appellant on post-trial matters, and Appellant signed a "Post-Trial and Appellate Rights" form acknowledging that standby counsel had advised him of these rights. The record therefore shows that Appellant knew his post-trial rights and their importance, to include Appellant's ability to submit matters for the convening authority's consideration when he was deciding whether to approve the findings and sentence. *Cf. United States v. Palenius*, 2 M.J. 86, 91-92 (C.M.A. 1977) (faulting defense counsel for not advising the appellant of the "powers of the [the lower appellate court] and of the defense counsel's role in causing those powers to be exerted").

Second, in a letter to the SJA, Appellant stated the following: "Effective immediately, I . . . am representing myself . . . . Please don't involve any lawyers for as I have clearly stated above I am representing myself and *understand the consequences* . . . ." (Emphasis added.)[38] Appellant further wrote, "The presiding judge (Colonel [Osborn]) allowed me to represent myself during the trial so you should not hesitate to do so now in these post-trial matters." Appellant thus acknowledged he understood the consequences of self-representation. *Cf. Palenius*, 2 M.J. at 91 (stating that the accused must be aware "of the consequences of proceeding or of permitting his appeal to proceed without the assistance of an attorney").

Third, the SJA prudently contacted Appellant's civilian defense counsel to confirm Appellant's waiver. *See United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994) (requiring the SJA to notify "defense counsel of appellant's complaint [of counsel's effectiveness] so that the issue of further representation [can be] resolved"). Although defense counsel's response is not in the record before us, the SJA sent a follow-up letter notifying Appellant's counsel as follows: "In accordance with the Accused's and your request, the only post-trial defense matters the Convening Authority will consider" is Appellant's pro se material. Significantly, civilian counsel then withdrew his counseled memorandum and attachments.

Fourth, the SJA reported in her SJAR that Appellant "further states that he is fully aware of the consequences of representing himself, and requests that the Convening Authority should allow him to do so, as he was allowed to do so during his trial." This shows that the SJA did not

[38] This was not a hollow claim. As reflected in Issue I above, the military judge repeatedly informed Appellant of the consequences of proceeding pro se at trial. Although Appellant is correct that "clemency is a wholly different stage of the proceeding[s]," Appellant's Brief at 151, many of the same considerations explained to Appellant at trial applied to the post-trial process as well.

have any reason to question Appellant's sincerity with respect to the waiver.

Fifth and finally, Appellant has not pointed to any record evidence or produced any affidavits suggesting that his waiver of the right to counsel during post-trial proceedings was anything other than voluntary, knowing, and intelligent. Rather, the record before us reveals that Appellant willingly submitted a handwritten letter not only stating that he wished to proceed pro se but also that he understood the consequences of forgoing his post-trial right to counsel, and his counsel then withdrew representation without any indication that Appellant objected.

All of these factors collectively provide us with a sufficient basis to conclude that Appellant's waiver was knowing, intelligent, and voluntary. Accordingly, we find Appellant validly waived his post-trial right to counsel.

Issue IX: Whether then-Colonel Stuart Risch Was Disqualified from Participating [in] this Case as the Staff Judge Advocate

Appellant argues that the SJA was disqualified from participating in this case because a reasonable person would impute to him a personal interest in the outcome of Appellant's prosecution. We disagree. Moreover, even if we were to conclude that the SJA *was* disqualified, we hold that Appellant has failed to demonstrate prejudice.

I. Background

Then-Colonel (COL) Risch[39] was the SJA in Appellant's case during the resolution of a number of pretrial matters. COL Risch lived with his family at Fort Hood and was on

[39] "Then-COL Risch" became the Deputy Judge Advocate General of the Army while Appellant's case was pending before the ACCA. At that time, he was a Major General (MG). He was then promoted to Lieutenant General and became the Judge Advocate General of the Army. For ease of reference, we will henceforth refer to him as COL Risch or MG Risch, as applicable, to reflect his rank during the time frames relevant to Issue IX and Issue X.

the installation the day of the attack. Further, according to a defense trial motion: COL Risch's wife was at home when the shootings began and COL Risch called his family to ensure their safety; after receiving assurances from his wife that his family was not in danger, COL Risch briefed the III Corps Commanding General about the incident; and COL Risch remained involved in the case in the days and weeks after the shooting and attended various briefings about the event itself and the status of the investigation.

In addition, two members of the Office of the Staff Judge Advocate (OSJA)—CPT NF and a civilian paralegal—were present at the Soldier Readiness Processing center when the shooting occurred. Although members of the OSJA were initially concerned about the safety of CPT NF and the civilian paralegal, neither of them was injured during the attack. Years later, CPT NF provided a declaration regarding his interaction with COL Risch on the evening of the attack:

> After [COL Risch] inquired into my well-being, I briefed him as to what I had witnessed . . . .
>
> Several days later, COL Risch spoke to myself and [the civilian paralegal] who had rendered first aid that day. He mentioned that he had toured the medical SRP building the evening of 5 November, that it was a difficult experience that would make it hard to sleep at night or words to that effect . . . . He suggested that we seek behavioral health assistance as necessary.

More than a year and a half after the attack at Fort Hood, in a three-page memorandum dated July 6, 2011, COL Risch provided Article 34, UCMJ,[40] advice to the convening authority. In this memorandum, COL Risch provided his legal conclusions that each specification alleged an offense under the UCMJ, the allegation of each offense was warranted by the evidence in the report of investigation, and the court-martial would have jurisdiction over the accused and the alleged offenses. COL Risch also noted

[40] 10 U.S.C. § 834 (2006).

that the company commander, the special court-martial convening authority, and the Article 32, UCMJ, investigating officer[41] recommended trial by general court-martial, and that the special court-martial convening authority and the investigating officer further recommended a capital referral. Consistent with this advice, COL Risch recommended that the convening authority refer the case to a general court-martial as a capital case.

As a preface to this advice, COL Risch clarified that the convening authority was "not required to take any specific action or to dispose of the charges in any particular manner," but rather that any "action taken [was] to be made within [the convening authority's] sole, independent discretion." Further, COL Risch spelled out in the memorandum the steps the convening authority should take if he decided "to refer the case as non-capital." After considering the SJA's advice "as well as the requests, written materials, and presentations made . . . by the defense," the convening authority approved the SJA's recommendation of a capital referral.

Both prior to and subsequent to his recommendations to the convening authority, COL Risch also gave advice on a variety of other matters, including: (1) panel selection; (2) the Government's requests for expert funding; and (3) various defense requests.[42] COL Risch recommended

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[41] 10 U.S.C. § 832 (2006).

[42] COL Risch gave advice on defense requests for: access to classified material, a meeting with the convening authority, appointment of a media analysis expert, a jury consultant, appointment of an expert military-religious consultant, appointment of an expert physiatrist, additional funding for mitigation support, additional funding for a psychologist, appointment of a forensic pathologist, appointment of Defense-Initiated Victim Outreach services, temporary duty assignment funds, appointment of an expert neurologist to conduct testing on the accused, funds for an expert to provide in-court testimony, additional funding for the services of the defense's social science methodology expert, appointment of an expert consultant on religious conversion, appointment of an expert on social science methodology, additional

granting some of these defense requests, denying others, and partially granting and denying others still. From the record before us, it appears that COL Risch recommended granting all the government's requests for funding.

Appellant claims that COL Risch should have been disqualified from participating as the SJA in this case. Specifically, Appellant contends that a reasonable person would impute to COL Risch a personal interest in the outcome of the case because: the shootings caused COL Risch to reasonably fear for his family; COL Risch feared for the safety of "a member of his OSJA family"; COL Risch "personally investigated the scene" the night of the attack; and finally, COL Risch was "part of the Fort Hood community that, itself, was a victim of the attack." Appellant's Brief at 156-59.

As to prejudice, Appellant argues that we should presume prejudice because COL Risch's pretrial advice probably had *some* bearing on the convening authority's decision to refer this case as capital. Alternatively, Appellant claims that the harmless beyond a reasonable doubt standard should apply to our analysis because the participation of a disqualified SJA in the processing of a case "is akin to apparent unlawful command influence." *Id.* at 160.[43]

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funding for the services of the defense's digital forensic examiner, and funding of a crime scene analyst.

[43] In a footnote to his brief, Appellant argues that we should review COL Risch's "pretrial advice under a quasi-judicial standard." Appellant's Brief at 158 n.40. According to Appellant, when "acting in a quasi-judicial capacity, persons are held to a similar standard of impartiality as a military judge." *Id.* Appellant argues the test is objective: "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Id.* (citing *Nichols v. Alley*, 71 F.3d 347, 350-51 (10th Cir. 1995)). For its part, the Government agrees with the lower court that "no case law 'supports the assertion that the SJA, in providing pretrial advice, must be held to the same standard of impartiality as a military judge.' " Appellee's Brief at 136 n.32 (citation omitted). We too find no support for Appellant's position. Furthermore, we note that even

II. Standard of Review

The issue of whether an SJA is disqualified from participating in court-martial proceedings is a question of law which we review de novo. *United States v. Chandler*, 80 M.J. 425, 429 (C.A.A.F. 2021).

III. Applicable Law

Article 34 and R.C.M. 406 govern pretrial advice by an SJA. *See* R.C.M. 406(b) Discussion (2008 ed.) ("The [SJA] is personally responsible for the pretrial advice . . . . unless disqualified . . . ."). At the relevant time, R.C.M. 406(a) (2008 ed.) required the SJA to give "consideration and advice" "[b]efore any charge [could] be referred for trial by a general court-martial." *See also* Article 34(a), UCMJ. R.C.M. 406(b) also specified that the SJA's pretrial advice "shall include" the SJA's conclusions with respect to "whether each specification alleges an offense under the code," "whether the allegation of each offense is warranted by the evidence indicated in the report of investigation," and "whether a court-martial would have jurisdiction over the accused and the offense," as well as the SJA's "[r]ecommendation of the action to be taken by the convening authority." R.C.M. 406(b)(1)-(4) (2008 ed.); *see also* Article 34(a)(1)-(3), UCMJ. This Court's predecessor noted that "the review by a legal advisor is a valuable pretrial protection to an accused. Generally speaking, it assures full and fair consideration of all factors." *United States v. Smith*, 13 C.M.A. 553, 557, 33 C.M.R. 85, 89 (1963).

When challenging an SJA's authority to provide pretrial advice, an appellant "has the initial burden of making a prima facie case" that the SJA was disqualified. *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004). Article

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adopting the "objective standard" urged by Appellant there are no grounds to question COL Risch's pretrial advice. As discussed *infra*, we are "confident that an objective, disinterested observer would decide that the" capital referral "was a foregone conclusion." *United States v. Bergdahl*, 80 M.J. 230, 244 (C.A.A.F. 2020) (plurality opinion) (discussing unlawful command influence).

6(c), UCMJ, provides grounds for disqualification in a case when the SJA "acted" as a member, military judge, trial counsel, defense counsel, or investigating officer in "the same case." 10 U.S.C. § 806(c) (2006); *see also* R.C.M. 406(b) Discussion (2008 ed.); R.C.M. 1106(b) (2008 ed.). Our precedent also provides for the disqualification of an SJA:

> when (1) he or she displays a personal interest or feeling in the outcome of a particular case; (2) there is a legitimate factual controversy with defense counsel; or, (3) he or she fails to be objective, such that it renders the proceedings unfair or creates the appearance of unfairness.

Chandler, 80 M.J. at 429 (citations omitted) (internal quotation marks omitted); *see also United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997) (recognizing the SJA must "be, and appear to be, objective"); *United States v. Willis*, 22 C.M.A. 112, 114, 46 C.M.R. 112, 114 (1973) (cautioning that an SJA "may become so deeply and personally involved as to move from the role of adviser to the role of participant"). "In determining whether an SJA is disqualified, this Court will consider 'the action taken, the position of the person that would normally take that action, and the capacity in which the action is claimed to have been taken.' " *Chandler*, 80 M.J. at 429 (quoting *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010)). We note, however, that even if this Court concludes that an SJA was disqualified from providing pretrial advice, that alone is not sufficient for relief. There must be prejudice. *See Stefan*, 69 M.J. at 258 ("We have not held that recommendations prepared by a disqualified officer [are] void. Rather, we test for prejudice . . . ." (first alteration in original) (citation omitted) (internal quotation marks omitted)).

IV. Discussion

For the reasons set forth below, we conclude Appellant has not met his initial burden of making a prima facie case that COL Risch was disqualified from serving as the SJA in this case. Moreover, even if we *were* to conclude that

COL Risch was disqualified, there is no basis to conclude that Appellant was prejudiced. Accordingly, we decline to grant Appellant relief on this issue.

A. **SJA Disqualification**

Appellant claims that COL Risch was disqualified because he "was 'so closely connected' " to this case that he had a personal interest in its outcome. Appellant specifically cites the following points: "the shootings caused [COL Risch] to reasonably fear for his family"; COL Risch's close colleague "was directly involved in the attack"; COL Risch "personally investigated the scene" on the night of the offense; and COL Risch "was part of the Fort Hood community that, itself, was a victim of the attack." Appellant's Brief at 156-58. We are unpersuaded.

First, Appellant claims that a reasonable person would impute to COL Risch a personal interest in the outcome of this case because as soon as COL Risch was notified of the attack, "he immediately called his wife to ensure the safety of her and his family who resided on post." *Id.* at 156. However, as it turned out, no member of COL Risch's family was harmed in the attack or was ever in direct danger. And the mere fact that COL Risch checked on his family's well-being during the unfolding of a dynamic situation does not, standing alone, call into question COL Risch's ability to be impartial when providing legal advice in this case. Concern for the safety of one's family may be relevant in some circumstances, but it is not itself disqualifying. *See, e.g.*, *Hasan*, 71 M.J. at 419 (identifying the military judge's and his family's presence "at Fort Hood on the day of the shootings" as "not disqualifying" in and of itself).

Second, Appellant claims that COL Risch had a personal interest in the outcome of this case because "he feared for the safety of CPT [NF], a member of his OSJA family, who was directly involved in the attack." Appellant's Brief at 156. Indeed, Appellant claims this was "the most disqualifying fact." Reply Brief at 62. Appellant analogizes the facts of his case to that of *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). In *Nix*, our predecessor court

found a special court-martial convening authority was disqualified from forwarding charges when, shortly before trial, he married a woman with whom Nix was suspected of having a romantic relationship. *Id.* at 7-8. But the facts of *Nix* are distinguishable. To begin with, *Nix* dealt with a convening authority, not an SJA as is the case here, and their roles and their authority in the pretrial process are dissimilar. Further, the spousal relationship at issue in *Nix* is entirely different than the relationship between a supervisor and his subordinate. Moreover, CPT NF was uninjured during the attack,[44] and he was not a named victim. And finally, COL Risch's natural concern for the safety of a subordinate is hardly "antithetical to the integrity of the military justice system as to disqualify him from participation." *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976). As appropriately noted by the Government, "it is wholly unremarkable that COL Risch expressed concern for the well-being of his subordinates." Appellee's Brief at 135.

Third, Appellant claims that COL Risch was disqualified because he "personally investigated the scene [of the attack] that very night." Appellant's Brief at 157. At the outset, it is important to note that despite the wording used in Appellant's brief, there is nothing in the record that indicates that COL Risch served as an investigator of this crime. And the fact COL Risch visited the crime scene does not, by itself, give reason to doubt his objectivity under *Chandler*. Indeed, it is notable—as the ACCA pointed out—that COL Risch was *required* to expose himself to disturbing images and witness accounts in order to effectively

[44] In his reply brief, Appellant suggests that CPT NF was a target of the attack. Reply Brief at 62 (claiming that rounds were fired in CPT NF's direction and that, according to Appellant's own statements, "every soldier was a target"). We acknowledge that CPT NF *could have been* injured. However, CPT NF stated that while "[r]ounds were fired in my direction," "whether [Appellant] was aiming at me I do not know." Importantly, in his own words, CPT NF stated he "was uninjured" during the attack.

perform "his role as SJA under R.C.M. 406 . . . pursuant to Article 32, UCMJ." *Hasan*, 80 M.J. at 706.

Appellant further argues that COL Risch's comments to CPT NF after visiting the scene of the attack "evidenced an emotional disturbance" that "underscores the point" about COL Risch's disqualification. Appellant's Brief at 157. We are not convinced. COL Risch's purported comments—that visiting the SRP center building "was a difficult experience that would make it hard to sleep at night"—do not suggest a level of personal interest that is disqualifying. Setting aside possible concerns about the accuracy of these reported comments by COL Risch,[45] we find, like the lower court, that they were mere "expression[s] of empathy." *Hasan*, 80 M.J. at 706. And without more, there is nothing necessarily incompatible with expressing empathy at the time of an incident and later being objective when performing legal duties.

In arguing this ground for disqualification, Appellant likens COL Risch's actions to the facts in *Brookins v. Cullins*, 23 C.M.A. 216, 49 C.M.R. 5 (1974), a case where the convening authority witnessed the offense at issue and our predecessor court found, for a number of reasons, that he was disqualified. But we do not find *Brookins* on point. To begin with, we do not accept Appellant's premise that visiting a crime scene is akin to witnessing an offense. Next, even if the two were comparable, the *Brookins* Court specifically stated that it "need not decide whether merely witnessing the commission of an offense is sufficient to disqualify the convening authority." *Id.* at 218, 49 C.M.R. at

[45] In May 2018, CPT NF had a conversation with a member of Appellant's appellate defense team in which CPT NF described what COL Risch purportedly said after visiting the SRP center building. That same day, CPT NF wrote a statement memorializing his conversation with the member of Appellant's defense team. However, we note that this statement was written nearly *nine years* after the attack. Perhaps acknowledging this significant lapse in time, CPT NF qualified that he was not quoting COL Risch but rather was stating that COL Risch had used "words to that effect."

7. And finally, Appellant does not make it clear why *Brookins*, a case analyzing grounds for disqualifying a convening authority, should be extended here to apply to an SJA. *Cf. United States v. Brocato*, 4 F.4th 296, 302-03 (5th Cir. 2021) (stressing that in the context of recusal for federal civilian judges, "each recusal case '. . . must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence' " (quoting *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995))).

For his final argument, Appellant claims that COL Risch had a personal interest in the outcome of the case because he "was part of the Fort Hood community that, itself, was a victim of the attack." Appellant's Brief at 158. We acknowledge the personal impact the Fort Hood shootings may have had on COL Risch. However, the record before us is insufficient to establish that COL Risch actually "display[ed] 'a personal interest or feeling in the outcome of [Appellant's] case.' " *Chandler*, 80 M.J. at 429 (quoting *United States v. Sorrell*, 47 M.J. 432, 433 (C.A.A.F. 1998)). Accordingly, Appellant cannot succeed on this argument.

Appellant argues that when considering the four points that he raises, we should take a "totality of the circumstances" approach. Appellant's Brief at 158. We agree. But even considering all four alleged circumstances together, we do not find a sufficient basis to conclude that a reasonable person would impute to COL Risch a personal interest in the outcome of this case. Accordingly, we find COL Risch was not disqualified.

B. Prejudice

We deem it prudent to now turn our attention to the issue of whether Appellant would merit relief even if COL Risch was disqualified from serving as the SJA in this case. In his initial brief, Appellant focuses the prejudice discussion on COL Risch's Article 34 pretrial advice and his advice regarding member selection. In doing so, Appellant argues that this Court should depart from its disqualification case law and presume prejudice or, in the alternative,

assess this alleged error for harmlessness beyond a reasonable doubt. Appellant specifically urges this Court to extend the rule from *Nix*, which seemed to hold that courts "must assume the [special court-martial convening authority's] recommendation influenced the [general court-martial] convening authority's decision to refer the charges to a general court-martial." 40 M.J. at 8. Alternatively, Appellant argues that "the prejudice standard should be harmless beyond a reasonable doubt because the participation of a disqualified officer in the processing of appellant's case is akin to apparent unlawful command influence." Appellant's Brief at 160.

We decline Appellant's invitation to depart from our precedent in regard to these two points. Simply stated, Appellant's arguments are squarely foreclosed by *Stefan*, 69 M.J. at 258, which rejected a presumption of prejudice for disqualified SJAs and did not apply a harmless beyond a reasonable standard. As articulated by the *Stefan* Court, "We have not held that recommendations prepared by a disqualified officer [are] void. Rather, we test for prejudice under Article 59(a) . . ., which requires material prejudice to the substantial rights of the accused." *Id.* (first alteration in original) (citation omitted) (internal quotation marks omitted); s*ee also id.* (rejecting the appellant's request to presume prejudice because even though the SJA was disqualified under Article 6(c), "these kinds of [disqualification] errors are amenable to being tested for prejudice"); *Taylor*, 60 M.J. at 194-95 (assessing the SJA's error in failing to recuse for prejudice); *Sorrell*, 47 M.J. at 434 (same).

We further note that Appellant's analogy to the unlawful command influence context is misplaced. The SJA's role is to provide legal advice, and it would be the rarest of circumstances where an SJA would be senior in rank to a convening authority and could thus unlawfully influence the convening authority's decision-making. Indeed, COL Risch demonstrably was not senior in rank to the convening authority in the instant case. Moreover, the lack of any recommendations by COL Risch that were inexplicably adverse to Appellant undermines any appearance of

partiality claim that has previously resulted in relief in the command influence context. *See United States v. Horne*, 82 M.J. 283, 289 (C.A.A.F. 2022) ("[T]he lack of personal prejudice is still a 'significant factor in determining whether the unlawful command influence created an intolerable strain on the public's perception of the military justice system.' " (quoting *United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021))). Accordingly, contrary to Appellant's assertions, we must engage in a typical prejudice analysis when assessing whether a disqualified SJA's pretrial advice and advice on member selection merits relief.

Turning to the pretrial advice in the course of our prejudice analysis, we note that Appellant does not take issue with COL Risch's conclusions that the specifications alleged offenses under the UCMJ, that the facts supported those specifications, that a court-martial would have jurisdiction over Appellant and his offenses, or that an aggravating factor was present. Nor does Appellant identify any other aspect of COL Risch's Article 34 pretrial advice as being problematic or evincing bias that improperly influenced his recommendations. In fact, a review of the record evidence makes "it impossible to believe that anyone else would have recommended action other than was recommended by" COL Risch. *Smith*, 13 C.M.A. at 559, 33 C.M.R. at 91; *see also Stefan*, 69 M.J. at 259 (finding no prejudice in part because given the circumstances of the case, "including the host of offenses committed by [a]ppellant and the seriousness of some of his crimes, there is nothing that would suggest that another SJA would have made a different recommendation" (footnote omitted)); *cf. United States v. Tittel*, 53 M.J. 313, 314 (C.A.A.F. 2000) (agreeing with the lower court that "[i]n light of the serious nature of the charges facing the appellant" it was "unlikely that any competent authority would not have referred this case to a special court-martial" (citation omitted) (internal quotation marks omitted)); *Tovarchavez*, 78 M.J. at 462 n.5 ("In the context of nonconstitutional errors, courts consider whether there is a '*reasonable probability* that, but for the error, the outcome of the proceedings *would have been*

different.' " (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016))). In other words, Appellant has not demonstrated any prejudice resulting from an act or omission of COL Risch in his Article 34 pretrial advice.

Similarly, Appellant has not adequately demonstrated prejudice arising from COL Risch's performance of any other pretrial functions. *See United States v. Moorefield*, 66 M.J. 170, 171 (C.A.A.F. 2008) (per curiam) (noting the appellant had "not shown that anything [the SJA] did or did not do in the course of the second court-martial prejudiced him"). For example, Appellant fails to articulate with any specificity how COL Risch's purported "personal interest" in this case, or his purported lack of objectivity, influenced his advice. Therefore, under these facts and circumstances, we are unable to discern any prejudice that would merit relief even if we concluded that COL Risch was disqualified from serving as the SJA.

As to the selection of members, Appellant has not described COL Risch's role in, nor pointed to anything in the record regarding, the member selection process. Our own review of COL Risch's memoranda reveals that his member selection advice was "boilerplate" in nature, simply laying out the law governing panel selection and advising the convening authority as to the number of members to be selected as well as excusal conditions and various other administrative details. Consequently, Appellant has failed to show how these memoranda, or any other actions COL Risch may have taken in the panel selection process, were prejudicial.

To conclude, we hold that Appellant has not demonstrated COL Risch was disqualified from serving as the SJA in Appellant's case. In addition, we find that even if COL Risch was disqualified, Appellant did not suffer prejudice. Therefore, Appellant is not entitled to relief on this issue.

Issue X: Whether the Judges of the Army Court of Criminal Appeals Should Have Been Recused Because They Were Supervised by then-Major General Stuart Risch While His Error as the Staff Judge Advocate Was Pending Litigation Before Them

Appellant argues that the judges of the ACCA abused their discretion when they failed to recuse themselves from this case. In support of his argument, Appellant cites the fact that the ACCA judges were supervised by MG Risch at the same time they had pending before them an issue involving then-COL Risch's failure to recuse himself as the staff judge advocate. Appellant asserts that a reasonable person would question the impartiality of the ACCA judges under these circumstances. However, for the reasons provided below, we conclude that the ACCA judges did not abuse their discretion when they declined to recuse themselves. Moreover, we conclude that even if the ACCA judges were disqualified from hearing Appellant's case, setting aside the lower court's opinion as requested by Appellant is not warranted. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

I. Background

As discussed *supra*, at the time of Appellant's attack in 2009, COL Risch served as the staff judge advocate for III Corps and Fort Hood. Following the shooting, COL Risch provided pretrial advice to the convening authority, including Article 34 advice regarding the referral of charges. *See Hasan*, 80 M.J. at 704.

Subsequently, MG Risch became the Deputy Judge Advocate General of the Army after Appellant's case was docketed at the ACCA. Several ACCA judges recused themselves from Appellant's case while it was pending review. *Id.* at 690 n.1. In 2018, three ACCA judges were assigned to the case—Chief Judge Berger, Judge Schasberger, and Judge Hagler. MG Risch served as the rater for Chief Judge Berger, and as the rater and senior rater for the other ACCA judges. However, three other

ACCA judges—Senior Judge Brookhart, Chief Judge (IMA[46]) Krimbill, and Judge Rodriguez—were assigned to the court in the summer of 2019, and it is these three judges who were responsible for the court's published opinion in this case. *Hasan*, 80 M.J. at 690. MG Risch initially served as their rater as well.

During the pendency of the ACCA appeal, Appellant filed three motions to disqualify the various ACCA judges who presided over Appellant's appeal because of MG Risch's rating relationship with them. The first motion was filed on July 11, 2018, and was denied by the ACCA on August 17, 2018. Appellant later submitted a motion for reconsideration, which the ACCA denied on December 6, 2018.

In the summer of 2018, Appellant submitted a motion to the ACCA requesting "funding for expert assistance to conduct a nationwide survey." In relevant part, Appellant wanted to "assess public opinion on the question of perceived partiality of [COL] Risch in providing pre-trial advice and perceived partiality of [the ACCA] in assessing MG Risch's conduct." The ACCA denied this motion.

Also in the summer of 2018, Appellant filed a motion with the ACCA seeking a "protective order directing [MG] Risch" and others "to preserve and maintain any and all correspondence related to *United States v. Hasan* and any and all correspondence about the attack itself." Appellant noted that this motion was related to the "allegation of error regarding MG Risch's potential bias . . . that may have affected the pre-trial advice," and reasoned that the "correspondence may reveal further evidence of alleged bias." The ACCA denied this motion.[47]

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[46] An IMA is an individual mobilization augmentee. This is a reservist who "support[s] an operational requirement for" the Army. *United States v. Shea*, 76 M.J. 277, 279 n.2 (C.A.A.F. 2017); *see also* Dep't of the Army, Reg. 140-145, Individual Mobilization Augmentation Program para. 1-6 (Mar. 21, 2022).

[47] In his July 11, 2018, motion seeking the recusal of the ACCA judges, Appellant also averred that a motion previously

Following the ACCA litigation on the first motion to recuse, Appellant filed a petition for extraordinary relief in the nature of a writ of mandamus with this Court seeking the recusal of the ACCA judges. *Hasan v. United States Army Court of Criminal Appeals*, 78 M.J. 189, 189-90 (C.A.A.F. 2018) (filing). In a summary disposition, this Court denied Appellant's petition because:

> Petitioner has failed to demonstrate that he cannot obtain relief through alternative means. He may still make an administrative request to remedy the alleged source of bias, and of course, he is entitled to raise this issue in the ordinary course of appellate review. Further, Petitioner has failed to demonstrate a clear and indisputable right to the writ as the harm he asserts is entirely speculative at this stage of the proceedings.

Hasan v. United States Army Court of Criminal Appeals, 79 M.J. 29, 30 (C.A.A.F. 2019) (summary disposition).

Appellant filed his third recusal motion with the ACCA on August 14, 2020. This motion sought the recusal of those judges of the court who would hear oral arguments and issue the written opinion in this case "on the grounds that MG Risch is the senior rater for [those] judges." The ACCA denied that motion on September 9, 2020. The Army Court stated that it would "provide the basis for this ruling in conjunction with [its] decision on [A]ppellant's assigned errors," but it never did so.

On July 29, 2020, Appellant submitted a request to the Judge Advocate General of the Army, who at that time was LTG Charles Pede, seeking a modification of the rating scheme for those ACCA judges who were presiding over his case. In a response dated September 16, 2020, LTG Pede stated that although he determined there was "no conflict of interest" regarding MG Risch's rating relationship with the ACCA judges, he decided that "out of an abundance of

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submitted to the ACCA for investigative assistance was predicated, in part, on Appellant's desire to investigate MG Risch's "other than official interest" in the case. The ACCA denied this motion as well.

caution, and to moot any concerns" he—LTG Pede—would serve "as both the rater and senior rater" for any ACCA judge who reviewed the merits of Appellant's case.

The ACCA heard oral argument in Appellant's case on October 15, 2020, and issued its opinion affirming the findings and sentence on December 11, 2020.

Before this Court, Appellant argues that "a reasonable person would . . . question the impartiality of the Army Court when litigation was pending before them regarding their supervisor." Appellant's Brief at 163. Appellant further argues that MG Risch's eventual removal as the rater of the ACCA judges failed to resolve the conflict because the Army Court "operated under the conflict for more than three years in which it issued numerous rulings that directly and substantively affected the resolution of this case," including rulings involving MG Risch. *Id.* at 163-64. Appellant maintains that LTG Pede's removal of MG Risch as the ACCA judges' rater did not "retroactively resolve" the conflict and that "the Army Court's opinion did not address the conflict at all" despite that court's assurances to "the parties that it would disclose the reason(s) in its final opinion for not disqualifying themselves." *Id.* at 164. Ultimately, Appellant asserts that after applying the three factors from *Liljeberg*, setting aside the lower court's opinion is required as a result of the ACCA recusal error.

In response, the Government argues that when LTG Pede removed MG Risch from the ACCA judges' rating chain—as requested by Appellant—the recusal issue became moot. Moreover, the Government contends that there was no need for the ACCA judges to recuse themselves because "[a] reasonable person with knowledge of all the facts regarding [MG] Risch's involvement in this case would have no doubts about the impartiality of" the ACCA judges. Appellee's Brief at 139 (footnote omitted). The Government points to two factors to support this point: (1) MG Risch was no longer in the rating chain of the ACCA judges by the time they heard oral argument or issued their opinion; and (2) even before this change in the rating chain, the sole issue that came before the ACCA involving COL Risch did

not challenge his legal advice or his ethical conduct. Finally, the Government asserts that, even if recusal was warranted, the *Liljeberg* factors favor upholding the ACCA's decision.

II. Standard of Review

An "appellate judge's decision on recusal is reviewed for an abuse of discretion." *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001); *United States v. Hamilton*, 41 M.J. 32, 39 (C.M.A. 1994). "A[n] [appellate] judge's ruling constitutes an abuse of discretion if it is 'arbitrary, fanciful, clearly unreasonable or clearly erroneous,' not if this Court merely would reach a different conclusion." *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015) (quoting *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013)).

III. Applicable Law

Whether an appellate military judge must recuse himself or herself from sitting on a given case is assessed according to the standards laid out in R.C.M. 902. *United States v. Mitchell*, 39 M.J. 131, 142 (C.M.A. 1994). In relevant part, that rule provides that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a) (2019 ed.); *see also* R.C.M. 902(c)(1) (2019 ed.) (" 'Proceeding' includes . . . appellate review . . . ."). "The standard for deciding the Manual judicial-disqualification question is . . . . whether a reasonable person *who knew all the facts* might question these appellate military judges' impartiality." *Mitchell*, 39 M.J. at 143. This requirement for recusal "enhances public confidence in the judicial system by ensuring that judges avoid the appearance of partiality." *Jones*, 55 M.J. at 319.

"The tension created by the placement of the military judiciary within the officer personnel structure requires military judges to be sensitive to particular circumstances that may require consideration of recusal." *United States v. Norfleet*, 53 M.J. 262, 268 (C.A.A.F. 2000). "Each . . . case must be assessed on its own merits." *Id.* at 270. The mere "fact that military judges may issue rulings adverse to the

interests of superior officers, however, does not in itself preclude those judges from exercising independence in their judicial rulings." *Id.* at 268. Also, standing alone, "preparation of fitness reports for appellate military judges by senior judge advocates does not create a circumstance in which the impartiality of a judge might reasonably be questioned under RCM 902(a)." *Id.* at 269 (citing *Mitchell*, 39 M.J. at 131).

However, there may be "facts and circumstances [that] call for" recusal. *Id.* at 270. After all, "judicial officials may have relationships which cast suspicion upon their fairness or impartiality." *Id.* Most relevant to the present case is this Court's statement that questions may arise about the impartiality of appellate military judges if they "review[] a case where the Judge Advocate General or the Assistant Judge Advocate General, prior to their appointment, acted as a military trial judge, trial counsel, defense counsel, or *staff judge advocate* in that case." *Mitchell*, 39 M.J. at 145 n.8 (emphasis added). "There may be cases in which the ruling by a military judge on an issue would have such a significant and lasting adverse direct impact on the professional reputation of a superior for competence and integrity that recusal should be considered." *Norfleet*, 53 M.J. at 271.

When appellate military judges err in failing to recuse themselves in a case, we test for prejudice using the *Liljeberg* factors. *See United States v. Witt*, 75 M.J. 380, 384 (C.A.A.F. 2016); *United States v. Roach*, 69 M.J. 17, 20-21 (C.A.A.F. 2010).

> In *Liljeberg*, the Supreme Court considered three factors to determine whether a remedy is warranted for a judge's failure to recuse himself [or herself]: (1) the "risk of injustice to parties in the case"; (2) the "risk that the denial of relief will result in injustice in other cases"; and (3) the "risk of undermining public confidence in the judicial process."

United States v. Rudometkin, 82 M.J. 396, 398 (C.A.A.F. 2022) (quoting *Liljeberg*, 486 U.S. at 864).

IV. Discussion

We conclude that the ACCA judges did not abuse their discretion by declining to recuse themselves from this case. But even if they did abuse their discretion, setting aside the lower court's opinion is not warranted under *Liljeberg*.[48]

A. Recusal

We acknowledge that Appellant's basic premise—a reasonable person would question the ACCA judges' impartiality when they decided issues pertaining to errors allegedly committed by their then-superior officer and rater—is facially appealing. However, in resolving recusal issues of this nature, the key is whether "a reasonable person *knowing all the facts and circumstances* . . . could question [the judges'] impartiality or independence in reviewing appellant's case." *Mitchell*, 39 M.J. at 144. And here, the attendant facts and circumstances demonstrate that the ACCA judges who handled this case did not abuse their discretion by declining to recuse themselves. We specifically highlight two points in our analysis.

First, in terms of the rulings made by the ACCA judges during the time when MG Risch still served as their rater,[49] a reasonable person would know certain key facts. To begin with, it is true that the Army Court denied a defense request for "expert funding to conduct a survey . . .

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[48] We disagree with the Government's contention that because MG Risch was removed as the rater of the ACCA judges, the recusal issue is moot. The ACCA decided motions on issues pertaining to MG Risch before he was removed as the judges' rater—thereby calling the validity of those decisions into question—and "an issue is moot [only] if resolving it 'would not result in a material alteration of the situation for the accused or for the Government.' " *United States v. Napoleon*, 46 M.J. 279, 281 (C.A.A.F. 1997) (quoting *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981)).

[49] As noted earlier, MG Risch had been removed from the ACCA judges' rating chain by the time the Army Court held oral argument and issued its opinion in this case.

relating to . . . whether members of the public would draw negative connotations from then-[COL] Risch['s] actions as the SJA and for his relationship with the court." Appellant's Brief at 37. However, this defense request was, to say the least, novel. Moreover, it was ancillary not only to the question of the guilt or innocence of the accused but also to the question of whether this case was properly handled procedurally. Therefore, a reasonable person would conclude that the decision by the ACCA judges to deny this request was inevitable and not a result of them trying to curry favor with MG Risch.

Similarly, the defense request for "a protective order directing . . . [MG] Risch" and others "to preserve and maintain any and all correspondence related to *United States v. Hasan* and any and all correspondence about the attack itself" was unusual if not unprecedented in military justice. Indeed, the only authority cited by Appellant in support of this motion was *United States v. Campbell* which is not on point because it dealt with a "post-trial dispute over discovery relevant to an appeal." 57 M.J. 134, 138 (C.A.A.F. 2002). Therefore, once again a reasonable person would understand that the ACCA judges' handling of this matter was not predicated on their rating relationship with MG Risch.

Second, the sole assignment of error at the ACCA involving MG Risch did not challenge the substance of his legal advice. Rather, the alleged error was simply that MG Risch should have been disqualified from providing Article 34, UCMJ, pretrial advice to the convening authority. A reasonable person would conclude that these circumstances did not rise to the level where the ACCA judges would have been concerned that their decision on this issue "would have such a significant and lasting adverse direct impact on the professional reputation of a superior for competence and integrity" that their disqualification under R.C.M. 902 was mandated. *Norfleet*, 53 M.J. at 271.

Accordingly, the ACCA judges did not abuse their discretion when they declined to recuse themselves.

B. *Liljeberg* Analysis

Even if we were to hold that the ACCA judges did abuse their discretion when they declined to recuse themselves from this case, the three *Liljeberg* factors show that vacatur of the lower court's opinion is not warranted. *See United States v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2011) ("not every judicial disqualification requires reversal" and the *Liljeberg* factors "determine whether [an appellate] military judge's conduct warrants" a remedy).

We turn to the factors in order. First, the risk of injustice to Appellant was low. As the Government notes, "When the judges heard argument in this case and issued their opinion, MG Risch was no longer their rater." Appellee's Brief at 148. As for Appellant's contention that the ACCA judges "operated under [a] conflict for more than three years in which it issued numerous rulings that directly and substantively affected the resolution of this case," Appellant's Brief at 164, most of these rulings were unrelated to MG Risch. And as discussed above, it is unlikely that the motions related to MG Risch would have been favorably ruled upon by any appellate military judge.

Second, in terms of whether denying relief in this case will result in injustice in *future* cases, we concur with this Court's observation in *United States v. Butcher*: "It is not necessary to [vacate the lower court's opinion] in order to ensure that [appellate] military judges exercise the appropriate degree of discretion in the future." 56 M.J. 87, 93 (C.A.A.F. 2001).

Third, the risk of undermining public confidence in the military judicial process by denying relief is low. As the Government notes, in light of the tenuous nature of the substantive arguments by Appellant, the remedy of vacatur would simply serve to "undermine the public's confidence in the certainty of military appeals courts' judgments." Appellee's Brief at 149-50.

Therefore, upon assessing the *Liljeberg* factors, even if the ACCA judges abused their discretion by declining to recuse themselves, the proposed remedy requested by

Appellant of setting aside the lower court's opinion is not warranted. Accordingly, Appellant is entitled to no relief on this issue.

Issue XI: Whether the Convening Authority Was Disqualified to Perform the Post-Trial Review of Appellant's Case After Awarding Purple Heart Medals to the Victims of Appellant's Offenses[50]

Appellant asserts that he was denied his "substantial right to an individualized, legally appropriate, and careful post-trial review of his convictions and sentence" by the convening authority. Appellant's Brief at 168. Specifically, he argues that LTG Sean MacFarland was disqualified from performing the post-trial review of this case because LTG MacFarland awarded Purple Heart medals to the victims of Appellant's offenses and gave remarks at the ceremony, thereby demonstrating that he "could not give [A]ppellant's case a fair review or protect the integrity of the process." *Id.* at 169. Accordingly, Appellant asserts that he was "denied his substantial right to an impartial review of his case, and [that] this Court should remand [A]ppellant's case for a new convening authority action." *Id*. at 170.

Contrary to Appellant's contentions, we hold that it was not plain error for LTG MacFarland to conduct the post-trial review of Appellant's case.

I. Background

Prior to Appellant's trial, a bill was introduced in Congress that would have authorized the Army to award Purple Heart medals to Appellant's victims. H.R. Rep. No. 112-479, pt. 1, at 164 (2012).[51] The Army opposed this legislation because, among other reasons, it believed the bill "would undermine the prosecution of" Appellant "by materially and directly compromising [Appellant's] ability to

[50] As discussed *infra*, Appellant did not raise this issue before the lower court.

[51] The bill also would have awarded the Purple Heart medal to the victims of an unrelated June 2009 attack on a recruiting station in Little Rock, Arkansas. H.R. Rep. No. 112-479, at 164.

receive a fair trial." However, in December 2014, after Appellant's conviction and sentencing, Congress passed subsequent legislation that authorized the military to award the Purple Heart medal to active duty service members "who [were] killed or wounded in an attack by a foreign terrorist organization" under such circumstances as existed in this case. 10 U.S.C. § 1129a(a)-(b) (2018); *see also* Dep't of the Army, Reg. 600-8-22, Personnel-General, Military Awards para. 2-8(b)(10) (Mar. 5, 2019). After the passage of this legislation, "the Secretary of the Army determined that servicemembers injured or killed in the Fort Hood attacks were eligible for the Purple Heart if they met the other regulatory criteria." *Berry v. Esper*, 322 F. Supp. 3d 88, 89 (D.D.C. 2018).

Appellant states that on April 10, 2015, LTG MacFarland awarded Purple Heart medals to the victims of the Fort Hood attack and made public remarks "regarding the victims, identifying their deaths and injuries as a sacrifice, construing their actions as courageous, brave, selfless, and valorous, and conjecturing that [A]ppellant would have inflicted greater calamity given the opportunity." Appellant's Brief at 169.[52]

Almost two years later, in March 2017, LTG MacFarland, in his capacity as the convening authority, approved the findings and the sentence in Appellant's case. Prior to that action, Appellant had submitted an approximately 450-page handwritten document addressing such topics as his understanding of Islam, his view of the world and the meaning of life, and "mans [sic] duty to his creator." In doing so, he explicitly informed the convening authority: "[T]his submission is not a plea for mercy."

Appellant submitted his initial appellate brief to the ACCA in November 2019, more than two and a half years

[52] Appellant does not provide any joint appendix or record citations documenting the ceremony. For its part, the Government merely refers to an Army press release that is not part of the record.

after the award ceremony at issue. However, he did not raise this issue before the Army court.

II. Standard of Review

The standard of review for this issue depends on whether the issue was waived, forfeited, or preserved. The Government argues that Appellant waived the issue. If the Government is correct, then we cannot review the issue at all. *United States v. Rich*, 79 M.J. 472, 476 (C.A.A.F. 2020). However, before deciding whether a waiver occurred, we must address two important preliminary questions.

The first question is whether the Government is asserting that Appellant *intentionally waived* the issue or instead is asserting that the issue *was waived by operation of law*. An intentional waiver occurs when a party intentionally relinquishes or abandons a known right. *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) (citing *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)). In contrast, a "waiver by operation of law happens when a procedural rule or precedent provides that an objection is automatically waived upon the occurrence of a certain event and that event has occurred." *Id.* (citing *United States v. Swift*, 76 M.J. 210, 217-18 (C.A.A.F. 2017)). The Government's brief does not expressly identify the type of waiver that it contends occurred in this case. We nonetheless conclude that the Government is asserting that Appellant intentionally waived the issue. We reach this conclusion because the Government principally relies on *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002), a case in which an appellant intentionally waived a disqualification issue, and because the Government does not cite any legal rule that provides that a failure to raise an issue constitutes waiver. Accordingly, we consider only whether Appellant expressly waived the issue and do not consider whether the waiver might have occurred by operation of law.[53]

[53] For example, we do not consider whether waiver by operation of law occurred under R.C.M. 1105(d)(1) or (2) (2008 ed.), which address the failure to submit matters to the convening authority that might affect the convening authority's decision

The second preliminary issue concerns the Government's theory of how the intentional waiver occurred. On this point, the Government's brief is clearer. The Government asserts that Appellant waived the issue because he "makes no claim that he was unaware of [the convening authority's] role in the Purple Heart ceremony," and yet he made no mention of this issue in his submissions to the convening authority under R.C.M. 1105 and 1106. Appellee's Brief at 154. Accordingly, we consider only this specific theory of intentional waiver and we do not consider other possible theories of waiver.[54]

Having addressed these two preliminary issues, we now turn to the question of whether Appellant has intentionally waived the disqualification issue in the manner the Government alleges. This is "a legal question that this Court reviews de novo." *Day*, 83 M.J. at 56. We are aided in deciding this issue by two precedents. In *Gudmundson*, an appellant argued for the first time on appeal that the convening authority should have been disqualified from approving the findings and sentence because he had testified at a suppression hearing. 57 M.J. at 495. This Court held that the appellant had waived the objection because, having been present at the suppression hearing, the appellant clearly knew of the possible ground for disqualification but "he chose to not raise the disqualification issue at trial or in his post-trial submission to the convening authority." *Id.* In contrast, this Court in *United States v. Fisher* confronted a situation where the appellant argued for the first time on appeal before the CCA that the convening authority should have recused himself because the convening authority had made a statement disparaging defense counsel as unethical. 45 M.J. 159, 160, 163 (C.A.A.F. 1996). The Court held

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whether to disapprove any findings of guilty or to approve the sentence.

[54] For example, we do not consider the possibilities that Appellant expressly waived the argument based on anything he or his counsel said in their submissions to the convening authority or by not raising the issue on appeal to the ACCA.

that the appellant had not waived the issue because there was "no evidence or other indication that [the] appellant, herself, was aware of [the convening authority's] statement and made a knowing and intelligent waiver of her right to contest his qualifications to take the action on her court-martial." *Id.* at 163.

We think that this case is much closer to *Fisher* than *Gudmundson*. The Government has cited nothing in the record establishing Appellant was aware that the convening authority had awarded Purple Heart medals to the victims of the shooting. Instead, as noted above, the Government only asserts that Appellant "makes no claim that he was unaware of [the convening authority's] role in the Purple Heart ceremony." Appellee's Brief at 154. Under *Fisher*, this assertion is insufficient to establish an intentional waiver. We therefore conclude that Appellant did not waive the disqualification issue.

The next question is whether Appellant forfeited the issue or preserved it. If an issue is forfeited, we review it for plain error. *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013). But if Appellant preserved the issue, we must review de novo his claim that the convening authority was disqualified from taking post-trial action on his court-martial. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). In the instant case, Appellant argues that we should review the issue de novo. We disagree. Although we accept as true Appellant's assertion that at the time he filed his submission with the convening authority he did not know about the Purple Heart awards ceremony, he makes no similar representation regarding his filing with the lower court. Specifically, Appellant does not claim that at the time he filed his brief with the ACCA he was unaware of—or, using reasonable diligence, could not have been aware of—the Purple Heart awards ceremony. Further, we note that this ceremony took place approximately two and a half years before Appellant filed his initial brief with the lower court. And, to demonstrate the perils of considering an issue such as this one that was not considered below, we note that Appellant did not include in the record any

documentation of the Purple Heart ceremony or the specifics of LTG MacFarland's participation in it.

Under these circumstances, we hold that Appellant has forfeited this issue because he failed to raise it in a timely manner before the court below. *See Rich*, 79 M.J. at 475 ("[F]orfeiture is the failure to make the timely assertion of a right . . . ." (citation omitted) (internal quotation marks omitted)). As a consequence, it is appropriate for this Court to apply a plain error standard of review. *United States v. King*, 83 M.J. 115, 120-21 (C.A.A.F. 2023) (applying plain error review under circumstances of forfeiture).

III. Applicable Law

The version of Article 60, UCMJ, in effect at the time of Appellant's court-martial authorized the convening authority to set aside or change a finding of guilty and to "approve, disapprove, commute, or suspend the sentence in whole or in part." Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2) (2012). The applicable version of Article 60 further stated: "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority." Article 60(c)(1), UCMJ; *see also* R.C.M. 1107(b)(1) (2012 ed.).

This Court has identified two circumstances in which a convening authority is disqualified from taking this type of discretionary post-trial action: (1) the convening authority "is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused"; or (2) the convening authority displays "an inelastic attitude toward the performance of their post-trial responsibility." *Davis*, 58 M.J. at 102 (citations omitted). Stated differently, "[w]here a convening authority reveals that the door to a full and fair post-trial review process is closed, . . . the convening authority must be disqualified." *Id.* at 103. When disqualification occurs, a different person authorized under the UCMJ is designated to exercise the powers outlined in Article 60. R.C.M. 1107(a) Discussion (2012 ed.).

If a disqualified convening authority takes post-trial action on a case, this constitutes error. In order to obtain relief, however, an appellant must make a "colorable showing of possible prejudice" resulting from the error. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (internal quotation marks omitted) (quoting *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997)). "By definition, assessments of prejudice during the clemency process are inherently speculative. Prejudice, in a case involving clemency, can only address possibilities in the context of an inherently discretionary act." *Taylor*, 60 M.J. at 195 (internal quotation marks omitted) (quoting *United States v. Lowe*, 58 M.J. 261, 263 (C.A.A.F. 2003)).

IV. Discussion

Because a plain error standard of review applies in this instance, Appellant first has the burden of showing that it was "clear or obvious" error for LTG MacFarland to exercise his discretionary authority under Article 60 as the convening authority in this case. *See United States v. Adams*, 81 M.J. 475, 479 (C.A.A.F. 2021) (citation omitted) (internal quotation marks omitted). We conclude that Appellant has not met that burden. Specifically, Appellant has failed to establish that LTG MacFarland had a personal interest in the case, was biased against the accused, or had an "inelastic attitude" regarding the exercise of his post-trial discretionary authority. *Davis*, 58 M.J. at 102.

We underscore again that Appellant has failed to include in the record a transcript—or even excerpts or press clippings—of LTG MacFarland's remarks. But even assuming LTG MacFarland made the comments attributed to him by Appellant, these statements standing alone do not establish that LTG MacFarland was disqualified from subsequent participation as the convening authority in Appellant's case. Rather, we agree with the Government, which makes the following point:

> In presenting the medals, LTG MacFarland was performing an administrative act in his capacity as Commander of III Corps and Fort Hood. Although LTG MacFarland made statements

> valorizing the victims of the shooting, none of the statements indicated that he had the kind of personal connection with the case or bias that would be disqualifying.

Appellee's Brief at 156.

Appellant contends that LTG MacFarland's participation in the awards ceremony is self-evident "clear or obvious error" because the Army itself previously opposed a pretrial awards ceremony on the grounds that it could "materially and directly compromis[e Appellant's] ability to receive a fair trial." However, we perceive an important distinction between a pretrial event—where future panel members could have been affected—and a post-trial event. Simply stated, in the latter scenario the concern about Appellant receiving "a fair trial" no longer existed. Thus, rather than look to the Army's previous concerns under dissimilar circumstances, we must instead look to LTG MacFarland's statements themselves in order to discern any evidence of personal interest, bias, or "inelastic attitude" that merited his disqualification from serving as the post-trial convening authority. Even Appellant's own characterization of LTG MacFarland's remarks do not rise to that level. Accordingly, there is an insufficient basis to conclude that Appellant has met his burden of demonstrating clear or obvious error here.

Even if we were to conclude that LTG MacFarland's participation under Article 60 was clear or obvious error, Appellant fails in his effort to demonstrate prejudice. Appellant expressly stated in his post-trial submission to the convening authority that he was not seeking "mercy" (i.e., clemency) from him. As the Government convincingly argues, "An accused who fails to seek clemency from the convening authority has no basis for asserting [on appeal] that the convening authority prejudiced him by not granting him any." Appellee's Brief at 161.

Accordingly, based on the record before us, we cannot conclude Appellant has established plain error for his claim that LTG MacFarland was disqualified from conducting the post-trial review of his case.

Grostefon Issue: Whether the Military Judge Erred in Preventing Appellant from Presenting a Defense of Others Defense

Pursuant to *Grostefon*, Appellant, through his counsel, personally asks us to consider whether the military judge erred in preventing Appellant from presenting at trial a "defense of others" defense. To resolve this issue, we first must determine whether Appellant's proposed defense was reasonably raised by his proffered evidence. Upon doing so, we conclude that there was no proffered evidence to support a finding that the members of the Fort Hood community who were attacked by Appellant wrongfully posed an imminent threat to anyone in Afghanistan. Accordingly, we hold that the military judge did not err in denying Appellant the opportunity to argue this proposed defense.

I. Background

On June 4 and 10, 2013, Appellant submitted memoranda in support of his proposed "defense of others" defense (or, as he sometimes referred to it, "the Defense of thirds"). Appellant's essential claim was that the war in Afghanistan was an illegal American invasion. The Taliban was, according to Appellant, "the innocent victim of an unlawful attack by the United States military and did not have a duty to retreat." Appellant argued that because the American presence in Afghanistan was illegal under international law, personnel of the United States military were "fair game" for the Taliban, including "uniformed soldiers in a designated deployment site getting ready to deploy to Afghanistan." Therefore, according to Appellant, "an armed individual that sympathizes with the illegality of the attack on the Taliban and attacks targets in its defense would be permissible." Appellant requested that the military judge "accept the Defense of thirds" as Appellant's defense and "give instructions to the panel accordingly."

The military judge ruled that even taking "as true the facts proffered by [Appellant], the proposed defense of others does not apply as a matter of law." The military judge recognized that the "principles of self-defense . . . apply to

the defense of another." However, she concluded that this defense "was not at issue under any set of circumstances [presented here] because the victims in Fort Hood, Texas, posed no imminent or immediate threat of death or grievous bodily harm to anyone in Afghanistan." Thus, the military judge concluded that the "law does not support a defense of others under the facts and circumstances of this case."

Before this Court, Appellant maintains his actions were undertaken in defense of members of the Taliban because he "apprehended, on reasonable grounds, that death or grievous bodily harm" was about to be inflicted wrongfully upon them by the United States military. Appellant's Brief at A1-A2. Appellant argues the victims of his attack posed "an imminent threat to Taliban members" for two reasons: (1) "military personnel already represented an imminent danger" as the "United States had already engaged—and continued to engage—in an illegal attack against the Taliban"; and (2) "those pending deployment to support the United States operations constituted an imminent threat to the Taliban." *Id.*

II. Standard of Review

The question of whether a special defense applies under the circumstances of a case is a matter of law, which we review de novo. *United States v. Tokash*, 282 F.3d 962, 967 (7th Cir. 2002) ("The legal sufficiency of a proffered defense is a question of law and therefore is reviewed *de novo*."); *see also United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017) (reviewing de novo whether a defense was "reasonably raised by the evidence").

III. Applicable Law

"Defense of another may excuse [criminal] liability . . . ." *United States v. Ravenel*, 26 M.J. 344, 351 (C.M.A. 1988); *see also* R.C.M. 916(a) (2008 ed.) (defense of another does not deny "that the accused committed the objective acts constituting the offense charged," but "denies, wholly or partially, criminal responsibility for those acts"). Military law recognizes "defense of another" as a special

"defense to homicide." R.C.M. 916(e)(5) (2008 ed.). This defense requires that the object of the defendant's protection have a right to self-defense in their own right and the accused did "not use more force than the person defended was lawfully entitled to use under the circumstances." *Id.*; *see also United States v. Lanier*, 50 M.J. 772, 777-78 (A. Ct. Crim. App. 1999) (noting that accused who claims the special defense of defending another "steps into the shoes of the defended person"). Therefore, the "principles of self-defense . . . apply to defense of another." R.C.M. 916(e)(5) (2008 ed.).

In cases of homicide, an individual has a right to self-defense where they "[a]pprehended, on reasonable grounds, that death or grievous bodily harm was *about to be* inflicted *wrongfully* on" that individual, and that the individual "[b]elieved that the force [the individual] used was necessary for protection against death or grievous bodily harm." R.C.M. 916(e)(1)(A)-(B) (2008 ed.) (emphasis added). In other words, the right to self-defense arises where an individual believes that a *wrongful* use of force is *imminent*. *See United States v. Bransford*, 44 M.J. 736, 738 (C.A.A.F. 1996) (equating "about to be" with "imminent"); *see also United States v. Yanger*, 67 M.J. 56, 58 (C.A.A.F. 2008) (finding the "possibility of self-defense was resolved" in part when the appellant "did not apprehend, reasonably or otherwise, imminent bodily harm"); *Black's Law Dictionary* 898 (11th ed. 2019) (defining "imminent" as "threatening to occur immediately; dangerously impending" or "[a]bout to take place").

The test for whether this special defense may be raised at trial is whether the accused proffers *some* evidence of the elements of the defense. *United States v. Johnson*, 416 F.3d 464, 468 (6th Cir. 2005) (stating that when an affirmative defense is raised in a pretrial motion, "if the defendant's proffered evidence is legally insufficient to support a . . . defense, the trial judge should not allow its presentation to the jury"); *Tokash*, 282 F.3d at 967 ("[W]here the evidence proffered . . . is insufficient as a matter of law to support the affirmative defense a pre-trial ruling precluding the

presentation of the defense at trial is appropriate."); *cf. United States v. Feliciano*, 76 M.J. 237, 240 (C.A.A.F. 2017) (requiring the military judge to instruct on a defense when " 'there is some evidence in the record, without regard to credibility, that the members could rely upon if they choose' " (quoting *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012))).

IV. Discussion

Appellant asserted before the military judge that he attacked his fellow soldiers at the Fort Hood SRP center because he was protecting members of the Taliban—located in Afghanistan—from imminent harm. Similarly, he argues before this Court that American military personnel posed an "immediate danger" to Afghan fighters because the United States "had already engaged—and continued to engage—in an illegal attack on the Taliban." Appellant's Brief at A2. However, the military judge found that any alleged threat was simply too remote for the "defense of others" defense to apply here. We agree.

The time and distance separating Fort Hood from Afghanistan is obvious. Therefore, there were no objectively "reasonable grounds" to believe that any of Appellant's victims were "about to" inflict harm on members of the Taliban. Without any proffer of evidence on this threshold issue of whether there was an imminent threat, Appellant's special defense of "defense of others" was not supported by "some evidence."[55] Accordingly, the military judge did not

[55] *See Tokash*, 282 F.3d at 967 ("To entitle a defendant to present an affirmative defense to the jury, his proffer must meet the minimum standard as to each element of the defense . . . . [and] must present more than a scintilla of evidence that demonstrates that he can satisfy the legal requirements for asserting the proposed defense." (citations omitted) (internal quotation marks omitted)); *Harris v. Scully*, 779 F.2d 875, 879 (2d Cir. 1985) (stating the trial judge properly denied a defense of others jury instruction because "no version of the events warrants an inference that petitioner reasonably believed that, at the time of the killing, [the victim] was using or was about to use deadly physical force against" others).

err in refusing to allow Appellant to present a defense to the contrary. R.C.M. 916(e)(1)(A) (2008 ed.).

Appellant counters that the understanding of imminence should carry the same meaning here as was purportedly used by the United States to justify the targeted killing of Anwar al-Aulaqi (alternatively spelled "al-Awlaki"). Even if we were to assume there is some relevance to this line of argument, we are in no position to second guess the justification given by the United States that al-Aulaqi posed a continued and imminent threat. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47 (D.D.C. 2010) ("[T]he D.C. Circuit has expressly held that the question whether an organization's alleged 'terrorist activity' threatens 'the national security of the United States' is 'nonjusticiable.' " (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 182 F.3d 17, 23 (D.C. Cir. 1999))); *see also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) ("It is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action."). However, assessing whether Appellant can be held criminally liable for his actions falls squarely within our purview. And on that score, it is axiomatic that when it comes to defense of others, one must *reasonably* believe that others are in *immediate* danger of *unlawful* bodily harm. We find there is no support in the record for Appellant to claim he reasonably believed members of the Taliban were in immediate danger of unlawful bodily harm from his victims at the SRP center. For these reasons, the military judge properly excluded the "defense of others" defense.[56]

[56] Appellant cites *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), to argue that regardless of whether the "defense of others" defense was permissible, the military judge erred by prohibiting him from "providing his version of events." Appellant's Brief at A10-A11. However, as we recently noted in *United States v. Beauge*, 82 M.J. 157 (C.A.A.F. 2022), the *Holmes* Court stated "only rules which 'infring[e] upon a weighty interest of the accused *and* are arbitrary or disproportionate to the

Unbriefed Issues

In our Briefing Order, *United States v. Hasan*, 81 M.J. 238, 239 (C.A.A.F. 2021), we invited Appellant to raise "systemic issues previously decided by this Court but raised to avoid waiver." We stated that these systemic "issues may be listed without argument as an exception to Rule 24(a)" of this Court's Rules of Practice and Procedure, but we directed Appellant to "cite pertinent authority to support the position taken." *Id.* Appellant's opening brief with this Court includes the eleven briefed issues addressed above, and it also lists nine issues specific to this case and twenty-nine systemic issues regarding capital punishment.[57] However, Appellant did not provide any argument in support of the latter issues, nor did he cite pertinent authority for many of these listed issues as

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purposes they are designed to serve' will be held to violate the right to present a complete defense." *Id.* at 167 (alterations in original) (quoting *Holmes*, 547 U.S. at 324-25). As the Court of Appeals for the Sixth Circuit recognized in *Johnson*, 416 F.3d at 468:

> [It is] a trial judge's duty to require a *prima facie* showing by the defendant that he can produce evidence on each of the elements of the defense. A trial judge does not 'invade' the province of the jury when determining, as a preliminary matter, whether a defendant has met the burden of introducing sufficient evidence on each of the elements of an asserted defense . . . .

Indeed, by prohibiting Appellant's presentation of a nonviable defense, the military judge rationally prevented the waste of time and potential confusion that would have accompanied the admission of irrelevant evidence. Therefore, we do not find a basis to conclude that the requirement for Appellant to demonstrate the legal viability of his proposed defense was either arbitrary or disproportionate to the purposes served.

[57] These issues are listed in the Appendix to this decision. We note that some of the issues labeled as "systemic" by Appellant are, in fact, specific to his case. However, to remain consistent with the order the issues were presented in his brief, we use the same organizational scheme.

instructed by our Briefing Order. Furthermore, Appellant's reply brief focuses solely on the briefed issues.

We have reviewed each of these issues and conclude that Appellant is not entitled to relief.

Judgment

The decision of the United States Army Court of Criminal Appeals is affirmed.

Appendix[58]

Part A: Section IV (Case Specific Issues)

A.I

Whether the military judge erred in finding that Appellant's waiver of counsel was knowing and intelligent when she received notice from his expert expressing concern over his "adjudicative capacity" and recommending further assessment for his schizotypal personality but failed to reopen the waiver inquiry, especially in light of the fact that she knew Appellant refused to submit to psychological testing during his Rule for Courts-Martial (R.C.M.) 706 board.

A.II

Whether the military judge erred to Appellant's substantial prejudice by denying his motion for change of venue.

A.III

Whether the military judge erred by not ensuring adequate voir dire that resulted in a panel that was tainted by excess publicity.

A.IV

Whether the aggravating factors in this case, to include "the prosecution exhibits" and "the nature of the weapon," were unconstitutionally vague and duplicative. *See Jones v. United States*, 527 U.S. 373 (1999).

A.V

Whether the military judge erred by abdicating her responsibility of courthouse security to the government.

A.VI.

Assuming *arguendo* that this Court does not overturn *United States v. Dock*, whether Appellant's actions at trial, to include admitting that he was the shooter, amount to a

[58] *See* Appellant's Brief at 171-80.

guilty plea prohibited by Article 45, UCMJ. *See also United States v. McFarlane*, 23 C.M.R. 320 (1957).

A.VII.

Whether the military judge erred to the substantial prejudice of Appellant by denying stan[d]by counsels' motion to submit matters in mi[tig]ation and extenuation.

A.VIII

The Government failed to offer reasonable, plausible, and non-discriminatory reasons to challenge LTC S., a prospective panel member, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

A.IX

The cumulative errors in this case compel reversal of the findings and sentence.

Part B (Systemic Issues)

B.I

Whether the President exceeded his authority in promulgating aggravating factors in Rule for Courts-Martial (R.C.M.) 1004.

B.II

Standards applicable to federal and state capital defense counsel have applicability to courts-martial as relevant standards of care, and the Army court's analysis of Major Hasan's case was flawed because of its misapplication of the guidelines and its determination counsel were "well-qualified."

B.III

Under the Supreme Court's reasoning in *Ring v. Arizona*, 536 U.S. 584 (2002), Congress unconstitutionally delegated to the President the power to enact elements of capital murder, a purely legislative function.

B.IV

The lack of a system to ensure consistent and even-handed application of the death penalty in the military

violates both Major Hasan's equal protection rights and Article 36, UCMJ. *See* 18 U.S.C. § 2245 and U.S. Dep't of Justice, U.S. Attorney's Manual § 9-10.010 (June 1998) (USAM) and 10 U.S.C. § 949a(b)(2)(C)(ii). In contrast to the USAM, no protocol exists for convening authorities in capital cases, creating an *ad hoc* system of capital sentencing.

B.V

The military justice system's peremptory challenge procedure, which allows the government to remove any one member without cause, is an unconstitutional violation of the Fifth and Eighth Amendments to the U.S. Constitution in capital cases, where the prosecutor is free to remove a member whose moral bias against the death penalty does not justify a challenge for cause. *But see United States v. Curtis*, 44 M.J. 106, 131-33 (C.A.A.F. 1996); *United States v. Loving*, 41 M.J. 213, 294-95 (C.A.A.F. 1994).

B.VI

Rule for Courts-Martial (R.C.M.) 1004 does not ensure the goals of individual fairness, reasonable consistency, and absence of error necessary to allow this Court to affirm Appellant's death sentence because R.C.M. 1004 does not ensure the race of the victim or alleged perpetrator is not a factor in the death sentence. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

B.VII

The variable size of the court-martial panel constituted an unconstitutional condition on Major Hasan's fundamental right to conduct voir dire and promote an impartial panel. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

B.VIII

The death sentence in this case violates the Fifth, Sixth, and Eighth Amendments and Article 55, UCMJ, because the military system does not guarantee a fixed number of members. *Irvin v. Dowd*, 366 U.S. 717, 722, (1961).

B.IX

The role of the convening authority in the military justice system denied Major Hasan a fair and impartial trial in violation of the Fifth, Sixth, and Eighth Amendments and Article 55, UCMJ, by allowing the convening authority to act as a grand jury in referring capital criminal cases to trial, personally appointing members of his choice, rating the members, holding the ultimate law enforcement function within his command, rating his legal advisor, and acting as the first level of appeal, thus creating an appearance of impropriety through a perception that he acts as prosecutor, judge, and jury.

B.X

Article 18, UCMJ, and R.C.M. 201(f)(1)(C), which require trial by members in a capital case, violates the guarantee of due process and a reliable verdict under the Fifth, Sixth, and Eighth Amendments.

B.XI

Major Hasan was denied his right to a trial by an impartial jury composed of a fair cross-section of the community in violation of the Sixth Amendment to the U.S. Constitution. *Duren v. Missouri*, 439 U.S. 357 (1979). *But see United States v. Curtis*, 44 M.J. 106, 130-33 (C.A.A.F. 1996).

B.XII

The selection of the panel members by the convening authority in a capital case directly violates Major Hasan's rights under the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution and Article 55, UCMJ, by in effect giving the government unlimited peremptory challenges.

B.XIII

The President exceeded his Article 36 powers to establish procedures for courts-martial by granting trial counsel a peremptory challenge and thereby the power to nullify the convening authority's Article 25(d) authority to detail members of the court.

B.XIV

The designation of the senior member as presiding officer for deliberations denied Major Hasan a fair trial before impartial members in violation of the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution and Article 55, UCMJ.

B.XV

Major Hasan was denied his constitutional right under the Fifth Amendment to a grand jury presentment or indictment.

B.XVI

Court-martial procedures denied Major Hasan his Article III right to a jury trial. *Solorio v. United States*, 483 U.S. 435, 453-54, (1987) (Marshall, J., dissenting). *But see United States v. Curtis*, 44 M.J. 106, 132 (C.A.A.F. 1996).

B.XVII

This Court lacks the jurisdiction and authority to review the constitutionality of the rules for courts-martial and the UCMJ because this Court is an Article I court, not an Article III court with the power to check the legislative and executive branches under *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 1 Cranch (1803). *See also Cooper v. Aaron*, 358 U.S. 1 (1958) (the power to strike down unconstitutional statutes or executive orders is exclusive to Article III courts). *But see Loving*, 41 M.J. at 296.

B.XVIII

Major Hasan is denied equal protection of law in violation of the Fifth Amendment as all U.S. civilians are afforded the opportunity to have their cases reviewed by an Article III court, but members of the United States military by virtue of their status as service members are not. *But see United States v. Loving*, 41 M.J. 213, 295 (C.A.A.F. 1994).

B.XIX

Major Hasan is denied equal protection of law under the Fifth Amendment to the U.S. Constitution because [in accordance with] Army Regulation 15-130, para. 3-1(d)(6), his approved death sentence renders him ineligible for clemency by the Army Clemency and Parole Board, while all other cases reviewed by this Court are eligible for such consideration. *But see United States v. Thomas*, 43 M.J. 550, 607 (N-M. Ct. Crim. App. 1995).

B.XX

Major Hasan's death sentence violates the Eighth Amendment prohibition against cruel and unusual punishment because the capital referral system operates in an arbitrary and capricious manner.

B.XXI

The death penalty provision of Article 118, UCMJ, is unconstitutional as it relates to traditional common law crimes that occur in the U.S. *But see United States v. Loving*, 41 M.J. 213, 293 (C.A.A.F. 1994). The Court resolved the issue against Private Loving, adopting the reasoning of the decision of the Army Court of Military Review. *See United States v. Loving*, 34 M.J. 956, 967 (A.C.M.R. 1992). However, Private Loving's argument before the Army court relied on the Tenth Amendment and Necessary and Proper Clause of the U.S. Constitution. *Id*. Major Hasan's argument relies on the Eighth Amendment to the U.S. Constitution.

B.XXII

The death sentence in this case violates the Fifth and Eighth Amendments to the U.S. Constitution and Article 55, UCMJ, as the convening authority did not demonstrate how the death penalty would enhance good order and discipline.

B.XXIII

The military capital sentencing procedure is unconstitutional because military judges do not have the power to adjust or suspend a death sentence improperly imposed.

B.XXIV

Due to the military justice system's inherent flaws capital punishment amounts to cruel and unusual punishment under all circumstances.

B.XXV

R.C.M. 1001(b)(4) is unconstitutionally vague and overbroad as applied to the appellate and capital sentencing proceedings because it permits the introduction of evidence beyond that of direct family members and those present at the scene in violation of the Fifth and Eighth Amendments.

B.XXVI

R.C.M. 1001(b)(4) is unconstitutionally vague and overbroad as applied to the appellate and capital sentencing proceedings because it permits the introduction of circumstances which could not reasonably have been known by Major Hasan at the time of the offense in violation of his Fifth and Eighth Amendment rights.

B.XXVII

The military judge erred in admitting victim-impact evidence regarding the personal characteristics of the victims which could not reasonably have been known by Major Hasan at the time of the offense in violation of his Fifth and Eighth Amendment rights.

B.XXVIII

The death sentence in this case violates the *Ex Post Facto* Clause, Fifth and Eighth Amendments, separation of powers doctrine, preemption doctrine, and Article 55, UCMJ, because when it was adjudged neither Congress nor the Army specified a means or place of execution.

B.XXIX

Whether the panel and the military judge were biased against Appellant.

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court sitting *En Banc*[1]

UNITED STATES, Appellee
v.
Major NIDAL M. HASAN
United States Army, Appellant

ARMY 20130781

Headquarters, III Corps and Fort Hood
Gregory A. Gross and Tara A. Osborn, Military Judges
Colonel Stuart W. Risch, Staff Judge Advocate

For Appellant: Captain Brian A. Osterhage, JA (argued); Jonathan F. Potter, Esquire (argued); Jonathan F. Potter, Esquire; Major Jack D. Einhorn, JA (on brief); Jonathan F. Potter, Esquire; Major Jack D. Einhorn, JA; Captain Roman W. Griffith, JA (on reply briefs and supplemental brief).

For Appellee: Captain Allison L. Rowley, JA (argued); Lieutenant Colonel Wayne H. Williams, JA; Major Jonathan S. Reiner, JA; Captain Allison L. Rowley, JA (on brief); Lieutenant Colonel Wayne H. Williams, JA; Major Jonathan S. Reiner, JA; Captain Christopher T. Leighton, JA; Captain Allison L. Rowley, JA (on response to supplemental brief).

11 December 2020

OPINION OF THE COURT

BROOKHART, Senior Judge:

On 5 November 2009, at Fort Hood, Texas, appellant fired into a crowd of soldiers attending a pre-deployment Solder Readiness Processing (SRP) in a building dedicated to that purpose. Appellant's attack killed thirteen individuals and wounded thirty-two.

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[1] Chief Judge Escallier, Senior Judge Burton, Senior Judge Aldykiewicz, Judge Fleming, and Judge Walker took no part in this case as a result of their disqualification. Chief Judge (IMA) Krimbill designated himself as Chief Judge in this case, and participated in this case while on active duty.

On 23 August 2013, an officer panel sitting as a general court-martial convicted appellant of thirteen specifications of premeditated murder and thirty-two specifications of attempted murder in violation of Articles 118 and 80, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 880 (2006 & Supp. II 2009) [UCMJ]. The panel sentenced appellant to death, dismissal, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence. Appellant was represented by military counsel for most of the pretrial proceedings, but appeared pro se during the merits and sentencing portions of the trial. This case is now pending automatic appellate review, pursuant to Article 66, UCMJ.

Appellate defense counsel raise fourteen assigned errors on appeal. We find all claims lack merit and affirm the findings and sentence.[2] Nonetheless, the following seven assigned errors bear discussion: (1) whether the military judge erred in allowing appellant to represent himself; (2) whether the military judge erred in allowing appellant to represent himself at sentencing in a capital case; (3) whether the military judge erred in denying standby counsel's motion for the independent presentation of mitigation evidence; (4) whether the Staff Judge Advocate was disqualified from providing the Article 34, UCMJ, pretrial advice; (5) whether the military judge should have sua sponte excused certain panel members; (6) whether the military judge erred in denying appellant's motions for change of venue due to pretrial publicity and heightened security measures;[3] and (7) whether this court can conduct its review pursuant to Article 66, UCMJ, because appellate defense counsel could not access the entire record of trial.[4]

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[2] In addition to the above-referenced assigned errors, appellant personally submitted additional matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have given these matters full and fair consideration and find them to be without merit.

[3] Appellate defense counsel present this issue in two separate assigned errors. One assigned error addresses the pretrial publicity, and another assigned error addresses the heightened security measures. We will discuss these issues jointly.

[4] We have given full and fair consideration to appellant's remaining seven assigned errors and find they merit neither discussion nor relief.

BACKGROUND

Appellant was a Major assigned as a psychiatrist at the Carl R. Darnall Medical Center, Fort Hood. From approximately January to November 2009, appellant searched the internet for various articles relating to the term "*jihad.*"[5] On 31 July 2009, appellant went to a gun shop, Guns Galore, in Killeen, Texas, and asked a salesperson for the "most technologically advanced handgun on the market," one with "high magazine capacity." The salesperson suggested the Fabrique Nationale (FN) 5.7 semi-automatic Herstal pistol. Appellant returned to Guns Galore the next day and purchased the recommended pistol.

In October 2009, appellant purchased a year-long membership to a local shooting range where he took a class to qualify for a concealed carry permit and began to conduct target practice on a regular basis. Also in October 2009, appellant's supervisor informed appellant he would deploy with his unit to Afghanistan. Appellant's unit was scheduled to complete pre-deployment SRP on 5 November 2009. Appellant expressed to a co-worker his reluctance to deploy and stated, "They've got another thing coming if they think they are going to deploy me."

At 0630 on 5 November 2009, appellant attended morning prayer at the Killeen Islamic Center. He called for prayer and, at its completion, bid the congregation goodbye stating he was "going home." Approximately seven hours later, appellant went to the SRP complex on Fort Hood where soldiers were undergoing pre-deployment medical review.

Appellant arrived at the SRP carrying a hidden 5.7 millimeter FN Herstal pistol equipped with two laser sights and a fully-loaded 30-round magazine. In addition to the magazine loaded in the pistol, appellant carried fifteen fully-loaded magazines for the FN Herstal, for a total of approximately 400 rounds. Finally, appellant also carried a fully-loaded .357 revolver.

When appellant arrived at the SRP, he went to Station Thirteen with his medical records in hand. He sat in one of the forty-five folding chairs filled with uniformed soldiers. Appellant then arose and told the civilian data-entry clerk, Ms. LW, that the Officer-in-Charge needed to see her about an emergency. As soon Ms. LW left the area, appellant raised the FN Herstal, yelled, "Allahu Akbar!" and

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[5] The term "*jihad*" has several meanings, including: (1) "a holy war waged on behalf of Islam as a religious duty;" (2) "a personal struggle in devotion to Islam especially involving spiritual discipline;" and (3) "a crusade for a principle or belief." *See* Merriam-Webster, http://www.merriam-webster.com/dictionary/jihad (last visited 25 Nov. 20).

opened fire on the soldiers at Station Thirteen. From that position, appellant was able to cover the only two points of entry and exit to the building.

As soldiers took cover in and around the cubicles, appellant began to move across the facility towards Station Twelve, shooting several soldiers in the back as they tried to run out the front door. Appellant eventually made his way out the door of the SRP facility, pursuing fleeing soldiers. He attempted to enter another building, but the door was locked. Mr. SB, a civilian who was in the vicinity of the SRP site, saw appellant moving outside the SRP building and asked him what was going on. Appellant replied that it was a training exercise and not to worry.

During the chaos, a civilian nurse was able to call 911 from her cell phone. When military police arrived, they located appellant outside the SRP building and a gunfight ensued, lasting approximately ninety seconds. Appellant wounded one police officer. Appellant was eventually shot in the chest and disabled before being taken into custody.

A search of the scene revealed appellant completely emptied four 20-round magazines and two 30-round magazines. Appellant killed thirteen people, including one soldier who was pregnant at the time. He injured thirty-two more. Numerous survivors testified and identified appellant as the shooter.

As a result of being shot, appellant is a paraplegic and permanently confined to a wheelchair. He also suffered some loss of function in his left hand.

LAW AND DISCUSSION

We will address the seven assigned errors referenced above in the order listed, and provide additional facts as necessary to discuss the claims.

A. Whether the Military Judge Erred in Allowing Appellant to Represent Himself

The right to assistance of counsel is a bedrock principle of our nation's constitutional system of justice. "[I]n our adversary system of criminal justice, any person haled into court . . . cannot be assured a fair trial unless counsel is provided to him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). This principle is equally ingrained in the military justice system, according a court-martial defendant "'ample opportunity to meet the case of the prosecution' to which they are entitled." *Gray v. United States,* 76 M.J. 579, 589 (Army Ct. Crim. App. 2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)) (citing Rule for Courts-Martial [R.C.M.] 506(a)).

From the storied foundation of the right to counsel arises an accused's "correlative right" to dispense with an attorney and proceed pro se. *Faretta v.*

California, 422 U.S. 806, 814 (1975) (quoting *Adams v. United States ex rel, McCann*, 317 U.S. 269, 279 (1942)). The Framers of the Constitution "selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation." *Id.* at 832 (1975). Accordingly, the right to proceed pro se is not a "legal formalis[m]," but rather a constitutional right that rests "on considerations that go to the substance of an accused's position before the law . . . ." *Id.* at 815 (quoting *Adams*, 317 U.S. at 279-80). Therefore, "[a]n accused may insist upon representing [himself] – however counterproductive that course may be." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (14 May 2018) (citing *Faretta*, 422 U.S. at 834 (1975)). As the Court further explained in *Faretta*:

> The defendant, and not his lawyer or the [government], will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect to the individual which is the lifeblood of the law."

Id. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

As a fundamental component of due process, the right to proceed pro se has long been recognized in military practice. *See United States v. Howell*, 11 U.S.C.M.A. 712, 716-17, 29 C.M.R. 528, 532-34 (1960) (noting the right to counsel under Article 38(b), UCMJ, and the Sixth Amendment correlate to the right of an accused to represent himself). Moreover, the right is of such pivotal constitutional status that it applies equally in all criminal cases, even those where capital punishment is an option. *See Buhl v. Cooksey*, 233 F.3d 783, 806 (3d Cir. 2000) (holding the trial judge erred in denying accused's request to represent himself and such error was a "structural defect" that required automatic reversal of the conviction) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). While the right to self-representation is protected by the Constitution, it is a "dangerous course of action for an accused," often so contrary to the fair administration of justice that it is rarely advisable. *United States v. Bowie,* 21 M.J. 453, 456 (C.M.A. 1986).

In recognition of its inherent risks, the right to proceed without counsel is not absolute. An accused may proceed pro se only if he knowingly and intelligently waives his right to appointed counsel. *Faretta*, 422 U.S. at 835. In the military, this requirement is embodied in R.C.M. 506(d), which requires the military judge to make an affirmative finding that the accused is "competent to understand the disadvantages of self-representation" and that his waiver is "voluntarily and

understanding." R.C.M. 506(d); *United States v. Mix*, 35 M.J. 283, 285-85 (C.M.A. 1992); *see also Maynard v. Boone*, 468 F.3d 665, 676-77 (10th Cir. 2006) (holding waiver of counsel contains two distinct inquiries: (1) that the defendant is competent to waive counsel; and (2) that the waiver is knowing and voluntary). Given the risks, "[w]arnings of the pitfalls of proceeding to trial without counsel . . . must be rigorously conveyed." *United States v. Turner*, 644 F.3d 713, 720-21 (8th Cir. 2011) (quoting *Iowa v. Tovar*, 541 U.S. 77, 89 (1993)).

To ensure an accused's decision to proceed pro se is both knowing and intelligent, there must be an adequate inquiry into the accused's mental competency. However, the level of competence necessary to make the decision to waive counsel is no higher than that necessary to waive other constitutional rights. *Godinez v. Moran*, 509 U.S. 389, 398-99 (1993). As such, it is akin to the level of competence necessary to stand trial and cooperate intelligently in one's defense. *Id.* at 398 (rejecting the notion that competence to waive counsel must be measured against a higher standard than competence to stand trial).

Accordingly, where an accused wishes to waive counsel and proceed pro se, there must be "a record sufficient to establish . . . that the defendant 'knows what he is doing and his choice is made with his eyes open.'" *Bowie*, 21 M.J. at 456 (quoting *United States v. Plattner,* 330 F.2d 271, 276 (2d Cir. 1964)). To this end, "[i]t is 'ideal' when the trial judge conducts a 'thorough and comprehensive formal inquiry' including topics such as the nature of the charges, the range of punishment, possible defenses, and a disclosure of risks involved in representing oneself pro se." *United States v. Turner*, 287 F.3d 980, 983 (10th Cir. 2002) (quoting *United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir. 1991)). Ultimately, the military judge must be satisfied, not just that "the accused is mentally competent to make the decision to represent himself," but also that he "clearly understands the disadvantages of self-representation." *United States v. Streater*, 32 M.J. 337, 338-39 (C.A.A.F. 1991). Only when the military judge is satisfied that these findings have been made in sufficient depth and detail should she honor an accused's request to proceed pro se.

In this case, the record establishes that at the time of trial, appellant was forty-two years old. He was born in Arlington, Virginia, and raised entirely in the United States; English is his primary language. Appellant has a medical degree and completed four years of residency in psychiatry. He was a licensed physician who was board certified in general medicine. Appellant also has a Master's Degree in Public Health. He had previously served as an enlisted soldier and spent ten years on active duty as an officer.

Appellant was arraigned on 20 July 2011. At that time, he was represented by a team of military defense counsel consisting of Lieutenant Colonel (LTC) KP, Major (MAJ) CM, and Captain (CPT) JO. Early on during the pretrial proceedings,

appellant released CPT JO, and MAJ JM was detailed in his place. This team represented appellant throughout more than twenty pretrial sessions. However, on 17 May 2013, less than two months before trial was scheduled to commence, appellant submitted a "Waiver of Representation by Counsel and Request to Proceed Pro Se."

Upon receipt of appellant's request, the military judge established appellant had discussed the request with his counsel prior to signing it. She then re-advised appellant of his right to counsel, to include his right to request individual military counsel (IMC) or hire civilian counsel at his own expense. Appellant indicated he understood his right to counsel and still no longer wished to be represented by his three military counsel or any other attorney.[6] The military judge told appellant that if he wanted to represent himself, she would have to determine whether he was "mentally and physically able to do so."

The military judge then explained that she had reviewed the short-form results from a pretrial sanity board conducted pursuant to R.C.M. 706. The military judge noted that the psychiatrists who examined appellant for the sanity board determined he had sufficient mental capacity "to understand the nature of the proceedings, and to conduct or cooperate intelligently in [his] own defense."

The military judge further explained she would also have to evaluate appellant's physical condition.[7] She advised him that representing himself would be much more physically taxing than simply being present and assisting defense counsel as a typical defendant would do. Appellant acknowledged he understood the difference. The military judge discussed how appellant's physical limitations, due to his spinal cord injury, might impact his pro se defense:

> [Y]our defense counsel had earlier told me that perhaps you might not be able to participate here with the defense counsel for more than [five] or so hours a day. If you're going to be representing yourself, I need to determine if that is [five] hours per day . . . . [Y]ou've got to have time at night to prepare your defense for the next day. You've got to be able to remain alert, and be able to comprehend, and be able to strategize for preparation for the next day.

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[6] The record reflects that, for at least some period of time, appellant contemplated hiring civilian counsel. However, appellant ultimately made it clear to the military judge he was no longer pursuing civilian counsel and intended to represent himself.

[7] The military judge cited *United States v. Cash*, 47 F.3d 1083, 1088-89 (11th Cir. 1995) (citing *Fitzpatrick v. Wainwright,* 800 F.2d 1057, 1065-67 (11th Cir. 1986)).

Appellant indicated he was confident his physical condition would not limit his ability to conduct his defense. The military judge then explored appellant's current medical care. That exchange revealed that for the year preceding trial, while appellant was in pretrial confinement, either a physician or a supporting nurse visited appellant every couple of days "just to check in." However, according to appellant, these visits typically did not include any examination. Appellant further stated he was not on any "standing medications," other than occasionally taking over-the-counter Tylenol and Naproxen. After learning appellant's last physical examination was over one-year prior to the court session, the military judge ordered the government to have appellant examined by a physician who could provide a report of examination to the court at the next court session.

On 3 June 2013, the court reconvened and the physician, Dr. PL, gave the court a copy of his report on appellant's physical examination. When the report was marked as an appellate exhibit, appellant objected to the military judge considering the report or providing it to the government, because, he argued, it contained "private information, medical information between me and my physician." The military judge overruled appellant's objection and provided a copy of the physical examination report to government counsel.

The military judge then engaged in a lengthy colloquy with appellant, based on the information in the report. She began with appellant's daily schedule and how it was impacted by his physical condition. Appellant indicated that guards woke him at 0430 every day and brought him breakfast. After he ate breakfast, the guards would bring appellant his uniform, which he was able to put on by himself. He also indicated he could transfer himself from his bed to his wheelchair, where he would typically read until leaving for the courthouse. Appellant further stated he had no set time to go to bed and could read in the evenings. Finally, appellant stated that, while he had occasional episodes of fatigue, he did not believe fatigue would affect him during the trial.

The military judge followed this exchange by calling Dr. PL, the physician who conducted appellant's physical examination. Dr. PL testified specifically regarding the impact appellant's physical condition would have on his ability to represent himself. Dr. PL explained that as a paraplegic, appellant had no feeling from the waist down and was unable to perform most motor movements below the waist. The physician explained that appellant is able to sit upright for up to four hours continuously and would then need a break of approximately fifteen minutes to stretch. Dr. PL explained that the stretch breaks were necessary to avoid "spasticity," a condition wherein the muscles of a paraplegic become so tight that they begin to involuntarily spasm. With proper breaks, Dr. PL opined appellant could sit for up to twelve hours per day.

Dr. PL testified he did not believe appellant had any physical limitations that would affect his ability to sustain concentration, his memory, or his ability to understand. The physician stated appellant had access to suppositories and another medication for bloating and flatulence, as well as two anti-fungal medications for his feet but he was not taking those medications. The only medications appellant took were Tylenol and Naproxen. Dr. PL testified that neither of those medications would impact concentration, memory, or understanding. He also testified the level of pain appellant experienced was not likely to impact appellant's concentration. Finally, Dr. PL expressed his concern that appellant would only be able to write three to four pages at a time due to nerve damage impacting his hands.

At the conclusion of Dr. PL's testimony, the military judge questioned appellant about his limited capacity to write and submit documents to the court. Appellant replied, "I'm pretty sure I can do more than that . . . . [I]'m pretty confident that that shouldn't be a problem." Appellant further stated he was able to type on a computer using both hands, despite some difficulty, explaining, "I have a long history of typing so I can compensate because of my experience."

The military judge expressed her concern about appellant's endurance over the course of days that would begin very early in the morning, and how that might affect his ability to prepare for the next day. Appellant indicated he would do his best and did not think the workload would be a problem. Appellant confirmed he still wanted to proceed pro se.

At that time, the military judge began what she identified as a "*Faretta* colloquy."[8] She instructed defense counsel to place a copy of R.C.M. 506(d) in front of appellant and then began a series of questions about appellant's education and background. Appellant admitted that he had no legal training and had never represented himself, not even for a traffic ticket. The military judge next had the lead prosecutor describe his experience on the record so appellant would understand his disadvantage. She then asked appellant to review the charge sheet and explain the charges as he understood them. Appellant indicated he understood he was facing thirteen counts of premeditated murder and thirty-two counts of attempted premeditated murder. He further understood the case was eligible for capital punishment and there was a mandatory minimum sentence of life in prison.

The military judge continued, explaining that she expected appellant to conduct his defense just as if he were a qualified lawyer and that all of the rules of evidence and procedure in the *Manual for Courts-Martial* [*MCM*] would apply to his

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[8] *See Faretta*, 422 U.S. at 835-36 (emphasizing the need for the trial court to create a record establishing an accused's decision to proceed pro se was made knowingly and intelligently, and that the accused was aware of the disadvantages).

pro se representation. She informed appellant she would revoke his right to proceed pro se if he failed to follow the rules. She explained the process for making evidentiary objections and how such objections preserve issues for appellate review. She also explained the potential adverse consequences to appellate review of his case if he failed to make timely objections. She then used the example of a missed objection for hearsay to demonstrate how appellant's lack of legal knowledge could impact appellate review of his case.

The military judge told appellant he would be better off with trained lawyers who know the law and rules of procedure. She explained that an accused who represents himself will have a difficult time remaining objective, whereas a trained attorney would not carry such a risk. The military judge told appellant it was a bad idea for even legally trained people to represent themselves, noting that if you are not legally trained, "it's even worse." The military judge further explained that appellant's pretrial confinement would make it more difficult for him to review evidence, conduct research, and have access to witnesses for continuing pretrial investigation and preparation. Finally, she explained to appellant that he would not have ready access to any classified evidence, whereas opposing counsel would have such access without any similar impediments.

Throughout the colloquy, appellant consistently indicated he understood the military judge, that he understood the risks and limitations, and that he wanted to proceed with his self-representation. He affirmed his belief that he was physically and mentally capable to review the evidence and prepare for trial, and he stated he was confident he would be ready to proceed to trial. Appellant affirmed his decision was not the result of any threats or force and was made of his own free will. Moreover, appellant expressed a willingness to maintain LTC KP, MAJ CM, and MAJ JM as his standby counsel throughout the trial, so they could assist him with legal research and provide advice as needed or requested.

Following a brief recess, the military judge returned to enter her findings and rule on appellant's request. The military judge reiterated that the R.C.M. 706 sanity board concluded appellant had sufficient mental capacity to understand the nature of the proceeding and to conduct or cooperate intelligently in his defense. Further, she found there was no evidence appellant had any mental capacity issues and that her own observations over five and a half months of pretrial proceedings were that appellant appeared observant, that he comprehended the proceedings, and that he had actively participated in his defense. Accordingly, the military judge found appellant mentally competent to make the decision to waive his right to counsel and to understand the disadvantages of self-representation.

The military judge further found appellant understood his physical limitations and that he was physically able to represent himself with some accommodation. Finally, based on appellant's responses, the military judge found appellant

"[a]ppreciates the nature of a criminal trial and this criminal trial in particular and its significance, and its seriousness, and its possible consequences," and that his decision to represent himself, though unwise, was voluntary and made with full understanding. Therefore, she granted appellant's request to dispense with counsel and represent himself, and directed LTC KP, MAJ CM, and MAJ JM to remain on as standby defense counsel.[9]

Based upon the foregoing, we cannot find any error on the part of the military judge. The military judge conducted a lengthy and detailed colloquy with appellant that was consistent with the relevant R.C.M. and precedential case law. The record reflects appellant's responses are clear and unequivocal, demonstrating he fully understood the requirements and risks of self-representation. Those responses, in combination with the evidence received regarding appellant's mental and physical condition, were more than sufficient to allow the military judge, and this court, to conclude appellant possessed the requisite mental capacity to make the decision to proceed pro se under the standard established by *Farretta*, meaning he was competent to stand trial. *See Godinez*, 509 U.S. at 400-02 (the competence required of a defendant seeking to waive counsel is the competence to waive the right, not the competence to represent oneself).

Accordingly, we find appellant was competent to waive his right to counsel and that he did so knowingly and with full understanding of the meaning and effect of his decision. As such, the military judge did not abuse her discretion in allowing appellant to proceed pro se. *See Indiana v. Edwards*, 554 U.S. 164, 177 (2008) (the trial judge who presided over the competency hearing will often prove best able to

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[9] The military judge explained the role of standby counsel.

> "Standby counsel will be noticed in all communications To and from the court. They will attend all proceedings and will be available to [appellant] for consultation and advice. Counsel may provide [appellant] with advice and procedural instructions. They will not do anything without [appellant's] agreement. However, they are available to act as [appellant's lawyer] or assist [appellant] at any time.

The military judge encouraged appellant to let her know at any time during the trial if he felt he could benefit from advice or if he wanted to take a break to talk to discuss matters with his standby counsel. *See, e.g., McKaskle v. Wiggins*, 465 U.S. 168, 177-78 (1984) (holding trial court has authority to appoint standby counsel to explain court rules and requirements to assure an accused lacking legal knowledge does not interfere with administration of justice).

"make more fine-tuned mental capacity decisions tailored to the individual circumstances of a particular defendant").

Appellate defense counsel, however, argue the military judge's finding that appellant had the mental capacity to make the decision to waive counsel did not go far enough. Citing *Edwards*, counsel argue the military judge was obligated to find not only that appellant was mentally capable of making the decision to waive counsel, but also that he had the mental capacity to represent himself. Contrary to appellate defense counsel's assertions, we find *Edwards* imposes no such requirement.

In *Edwards*, the trial court denied a pro se request because it found the defendant had not only a history of schizophrenia, but also that he was suffering from schizophrenia at the time of trial. 554 U.S. at 167-69. The Supreme Court held that a trial judge, by ruling, or a state, by law, may limit an accused's request to proceed pro se if the court finds the accused lacks the mental capacity to represent himself. *Id.* at 174. The Court in *Edwards* was clear it was addressing only a limited category of cases where an accused, while competent to waive counsel under the standard established in *Godinez*, still lacked the capacity, due to a mental disease or defect, to actually conduct his own defense. *Id.* at 172-73; *see also United States v. Fields*, 761 F.3d 443, 467-68 (5th Cir. 2014) ("*Edwards*' 'new rule applies only in the exceptional situation where a defendant is found competent to stand trial and elects to appear pro se, but is so severely mentally ill that his self-representation threatens an improper conviction or sentence.'") (quoting *Panetti v. Stephens*, 727 F.3d 398, 414 (5th Cir. 2013)), petition for cert. filed (27 January 2014) (No. 13-8453) (cert. denied, 525 U.S. 848 (1998)). The Court held that in such cases, the Constitution permits judges to ask whether a particular defendant is mentally competent to conduct his own defense and likewise permits states to require an accused who represents himself be mentally competent to conduct his defense. *Edwards*, 554 U.S. at 177-78.

Numerous jurisdictions have subsequently found the Court's holding in *Edwards* is permissive, allowing the trial court the discretion to conduct such an inquiry, rather than requiring any additional competence inquiry beyond that in *Godinez*. *United States v. Siddiqui*, 699 F.3d 690, 705 (2d Cir. 2012) ("*[E]dwards* holds a court *may* require that [defense counsel] appear on behalf of a mentally ill defendant, not that it *must* do so") (emphasis added).[10] We likewise find no such requirement exists in the R.C.M., nor in the holdings of any the military courts.

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[10] *See also United States v. Bernard*, 708 F.3d 583, 585 (4th Cir. 2013) (Noting *Edwards* addressed only whether the Constitution permits courts to *force* counsel on a mentally ill defendant who is competent to stand trial); *Panetti*, 727 F.3d at 414

(continued . . .)

Moreover, given the wealth of contrary precedent, we decline to impose such a requirement here. As such, we hold the military judge's determination that appellant was mentally competent to waive the right to counsel was all that was required. The military judge's decision to allow appellant to proceed pro se was not an abuse of discretion.[11]

We further find nothing occurred during trial which should have caused the military judge to reconsider her decision. *See, e.g.*, *Turner*, 644 F.3d at 724-25 (citing *United States v. Ghane*, 490 F.3d 1036, 1041 (8th Cir. 2007)) (holding even when a defendant is competent at the beginning of trial, the court must remain alert during trial to indications the defendant is no longer competent). Appellate defense counsel argue appellant's initial pursuit of a defense that was not cognizable demonstrates appellant's lack of fitness to represent himself. *See United States v. Fraizer-El*, 204 F.3d 553 (4th Cir. 2000). However, the record reveals that while appellant initially sought to pursue a defense of others defense, he ultimately honored the judge's ruling denying him the ability to pursue that defense.

Additionally, appellate defense counsel point to appellant's questioning of his former supervisor as an indication appellant lacked mental fitness. Specifically, appellant asked his supervisor about appellant's officer evaluation report (OER), which was objectively favorable. We find appellant's cross-examination here was

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(. . . continued)
(holding *Edwards* allows states to insist on counsel for accused not competent to conduct his own defense, but does not require it); *Tatum v. Foster*, 847 F.3d 459, 465-66 (7th Cir. 2017) (holding state may insist on counsel where defendant is competent to stand trial but not competent to represent himself); *United States v. Berry*, 565 F.3d 385, 391 (7th Cir. 2009); *Turner*, 644 F.3d at 724; *United States v. DeShazar*, 554 F3.d 1281, 1290 (10th Cir. 2009) (*Edwards* holds only that a court may require counsel on behalf of a mentally ill defendant, not that they must).

[11] Even if the *Edwards* standard were applicable, we would find no error in the military judge allowing appellant to conduct his own defense. At the time appellant's pro se request was granted, there was nothing in the record to indicate appellant in any way lacked the mental capacity to conduct his own defense. Appellant was an Army officer with several advanced degrees. Further, the pretrial sanity board explicitly concluded appellant did not suffer from any serious mental disease or defect and that he possessed the requisite capacity to participate in and conduct his own defense. Additionally, the military judge had the benefit of five months of pretrial interactions with appellant. This gave the military judge the perspective to properly determine he was mentally competent to conduct his own defense. *See Edwards*, 554 U.S. at 177-78. If contrary evidence existed at that time, it was not presented to the military judge.

actually helpful for his defense, because it demonstrated he performed his duties well.

Appellant also asked his supervisor whether appellant had ever raised concerns about United States soldiers committing atrocities in Iraq or Afghanistan. The government objected to the latter question and appellant countered that it was relevant to demonstrate appellant's motive. The military judge sustained the objection and appellant dropped any further inquiry. We note appellant's question here was arguably a permissible attempt to demonstrate a less callous nuance to his motivations, in opposition to the government's narrative, which portrayed appellant as a religiously motivated terrorist. Rather than showing appellant was mentally unfit, we find the cross-examination in question demonstrates appellant was engaged in the proceedings, that he understood his responsibility to establish the grounds for admissibility of testimony and evidence, and finally, that he respected the rules of procedure when the military judge sustained an objection.

While appellant's defense was anything but robust in comparison to the defense an experienced trial litigator might have presented, he nonetheless interacted regularly and effectively with the military judge over the course of several weeks of trial. He was polite and respectful of the rules of court. *See Turner*, 644 F.3d at 726 (noting pro se accused's demeanor was polite and respectful at all times and used cross-examination to his benefit). Appellant's responses to the military judge, and the questions he asked reflected he was paying attention and understood what was occurring in the proceedings at the time. On numerous occasions, the military judge directed appellant to consult with standby counsel, which appellant did. On other occasions, appellant, on his own volition, sought leave of the court to consult with standby counsel, which the military judge granted liberally.

Finally, neither appellant himself, appellant's standby counsel, nor counsel for the government, raised any concern about appellant's mental fitness during the merits portion of the trial.[12] Accordingly, we find the military judge, who was in the best position to observe, did not err in allowing appellant to continue pro se. *See United States v. Washington*, 596 F.3d 926, 941 (8th Cir. 2010) (affording deference to the judge who observed and interacted with an accused throughout the proceedings).

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[12] On 12 June 2013, standby counsel sought to withdraw, however, that request was not based upon concerns of appellant's mental capacity. Additionally, shortly after the trial on the merits began, standby counsel moved the military judge to modify their role, due to their belief that appellant's goal was imposition of the death penalty. Standby counsel argued that even as standby counsel, they could not ethically assist appellant towards that end. The military judge denied their request to withdraw and the request to modify their role.

B. Whether the Military Judge Erred in Allowing Appellant to Represent Himself at Sentencing in a Capital Case

In a related assigned error, appellate defense counsel allege the military judge erred by allowing appellant to represent himself during the sentencing phase of his trial. We find this contention to be without merit.

Between the time the panel began deliberating on findings until the government rested its sentencing case, the military judge conducted several pre-sentencing Article 39(a), UCMJ, sessions, during which she expressly addressed both appellant's decision to continue to represent himself and his right to present evidence in mitigation and extenuation during the sentencing phase of the trial. As to sentencing, the military judge explained appellant's right to present evidence in mitigation and extenuation related to any offenses for which he was found guilty. She further explained his right to make either a sworn or unsworn statement, and explained how unsworn statements may be challenged. Appellant repeatedly affirmed he understood his rights during the sentencing phase of his trial.

In addition to covering appellant's right to present sentencing evidence, the military judge, on three separate occasions, confirmed appellant's desire to continue to represent himself during sentencing proceedings. In doing so, the military judge again explained the importance and complexity of sentencing in a capital case. She reminded appellant that his standby counsel were much better equipped than he was to litigate the sentencing phase of his trial. The military judge also inquired about appellant's physical condition and he assured her he was physically capable of proceeding. Finally, the military judge stressed that she felt it was a bad idea for appellant to continue to represent himself.

Nevertheless, appellant affirmed that he wanted to continue to represent himself and that he understood that by doing so, he would be unable to later claim his representation was ineffective. The military judge again found appellant was competent to make the decision to proceed pro se and to understand the disadvantages of self-representation.

Appellant's decision to proceed pro se during sentencing proceedings prompted standby counsel to file a motion seeking independent presentation of mitigation evidence.[13] The military judge allowed standby counsel to file a written motion and make arguments in support of the motion. However, appellant opposed the motion and declined to waive attorney-client privilege with regard to a number of exhibits standby counsel sought to admit. Ultimately, as discussed below, the

[13] We discuss the military judge's denial of standby counsels' motion to present independent presentation of mitigation evidence below.

military judge denied standby counsel's motion to present independent mitigation evidence. Ruling orally on the record, the military judge held the core of appellant's right to self-representation was the right to control the direction of his case, which "cannot be impinged upon merely because society, or a judge, or a standby counsel may have a difference of opinion . . . as to what type of evidence, if any, should be presented in the penalty stage of trial."

Following the government's case, appellant elected not to present any evidence in mitigation and extenuation or to make any statement on his own behalf. Based on the earlier motion filed by standby counsel, the military judge had a list of mitigation evidence available to appellant, as well the names of some witnesses whom he might call. Using that list, the military judge questioned appellant on each witness and piece of potential mitigation evidence to ensure he understood what was available, and to confirm he knowingly intended to waive presentation of that evidence. In each instance, appellant explicitly waived his right to present the evidence in question.

During the sentencing phase, the government called nineteen witnesses to testify in person and offered one stipulation of expected testimony. The witnesses included three survivors of appellant's attack. These witnesses testified about such matters as the extent of their injuries and the lasting mental and physical disabilities they faced. The remaining witnesses were family members and associates of those who were killed by appellant. These witnesses testified about the trauma of learning of the death of their loved ones, as well as their own on-going experiences with grief and loss. Finally, the government also admitted a number of photographs of those who lost their lives and the family members they left behind. When coupled with the testimony and evidence admitted during the merits, the government's sentencing case was understandably emotional and objectively aggravating.

Although appellant did not present any sentencing evidence, the military judge instructed the panel on several factors in mitigation that they should consider. These included appellant's age, record of service as reflected in appellant's Officer Record Brief and in one OER admitted by appellant on the merits, appellant's awards and medals, and his civilian education. Appellant did not object to these instructions. At appellant's request, the military judge instructed on his physical impairment and confinement to a wheelchair, his demeanor during trial, the duration of his pretrial confinement, and finally, on his lack of prior convictions and non-judicial punishment.

Appellate defense counsel now argue it was error for the military judge to allow appellant to represent himself at sentencing in a capital case, because appellant ultimately did nothing during this critical phase of his capital trial. However, appellate defense counsel provide no legal basis upon which this court could find error.

In *Furman v. Georgia*, the Supreme Court struck down the death penalty, in large part out of concern it was too often applied in an arbitrary and capricious manner which violated the Eighth Amendment's protection against cruel and unusual punishment. 408 U.S. 238, 239-40 (1972). Four years later, the Court again addressed the issue of the death penalty, this time holding that a carefully tailored statutory sentencing structure, one that gives adequate guidance to the sentencing authority to distinguish those accused truly worthy of death, could withstand constitutional scrutiny. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

From that point, those jurisdictions with capital punishment have developed capital sentencing structures that typically bifurcate the proceedings between a guilt phase and a sentencing phase in which the sentencing authority must weigh evidence in aggravation against evidence in mitigation. *See Proffitt v. Florida*, 428 U.S. 242, 259 (1976); *Jurek v. Texas*, 428 U.S. 262, 271-76 (1976).[14] Generally speaking, the sentencing authority in a capital jurisdiction cannot vote for death without finding that the matters in aggravation outweigh those in mitigation to some evidentiary standard. *See Proffitt*, 428 U.S. at 252-53 (noting Florida's capital sentencing procedures require the Supreme Court of Florida to reweigh the aggravating and mitigating circumstances). The military capital-sentencing paradigm is similarly structured. *See* R.C.M. 1004; *United States v. Simoy*, 50 M.J. 1, 2 (C.A.A.F. 1998); *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994); *United States v. Curtis*, 32 M.J. 252, 263 (C.M.A. 1991).

Under this structure, the sentencing portion of a trial is often the most significant gateway through which a valid death sentence must pass. Accordingly, it is no surprise that the performance of counsel during sentencing, as reflected in the caliber of mitigation evidence identified and introduced, is common grounds for appellate attack on death sentences. *See Wiggins v. Smith*, 539 U.S. 510, 522 (explaining "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background'") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). This is true of military capital cases, as well. *See United States v. Akbar,* 74 M.J. 364, 385-91 (C.A.A.F. 2015); *Loving v. United States*, 64 M.J. 132 (C.A.A.F. 2006).

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[14] *See also Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (vacating death sentence because there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not"); *Lockett v. Ohio*, 438 U.S. 586, 608-09 (1978) (holding Ohio death penalty statute unconstitutional because it limited the range of circumstances to be considered in mitigation); *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (invalidating Georgia statute providing a discretionary capital sentence for rape of an adult woman).

In light of the forgoing, we are keenly aware of the critical importance of mitigation evidence in a capital case. Nonetheless, appellant elected to proceed pro se, and as we held above, the military judge did not err in finding he was competent to make that decision. Neither Congress nor the President have chosen to enact any rule or procedure that would abrogate appellant's choice during sentencing, in capital cases or otherwise. Appellate defense counsel point to three state jurisdictions that have, either statutorily or by judicial decision, compelled the presentation of mitigation evidence in capital cases where the accused proceeds without counsel.[15] However, to the extent those cases support appellant's argument, they were not binding upon the military judge and thus created no obligation for her to act, and similarly do not bind this court.

We are unaware of any military or federal cases that required the military judge to bifurcate appellant's right to self-representation between the findings and sentencing phases. Therefore, we determine that the fundamental constitutional status of the right to self-representation must take precedence over the requirements of the UCMJ's capital sentencing scheme. We agree with the military judge that it is not the role of this court to impinge upon appellant's right to proceed pro se, even when his decisions might run contrary to the standard of representation the law would demand of competent and zealous counsel.

Accordingly, we find the military judge did not err in allowing appellant to represent himself during the sentencing phase of his court-martial. We further find that the aggravating factor and the aggravation evidence presented by the government substantially outweighed the mitigation evidence presented by appellant. Therefore, appellant's sentence of death was authorized in accordance with R.C.M. 1004(b)(4)(C).[16]

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[15] *See* N.C.G.S. § 15A-2000(b) (North Carolina statute requiring the presentation of mitigating circumstances to jury in capital sentencing proceedings); *Marquadt v. State*, 156 So.3d 464, 490 (Fla. 2015) (holding trial courts are required to consider mitigation evidence during penalty phase of trial even when accused waives the presentation of mitigation); *Billings v. Polk*, 441 F.3d 238, 252 (4th Cir. 2006) (North Carolina law requires submission of mitigating circumstances to the jury, even over objection by an accused); *State v. Reddish*, 859 A.2d 1173, 1203-04 (N.J. 2004)(noting a pro se defendant's failure to present mitigating evidence has constitutional ramifications which may necessitate participation by standby counsel).

[16] We specifically and comprehensively considered whether appellant's sentence is appropriate for the crimes of conviction and whether appellant's sentence is generally proportional to those imposed by other jurisdictions under similar circumstances. We considered military cases, federal district court cases, and

(continued . . .)

C. Whether the Military Judge Erred in Denying Standby Counsel's Motion for the Independent Presentation of Mitigation Evidence

Related to appellate defense counsels' claims the military judge erred by allowing appellant to represent himself, appellate defense counsel further argue the military judge erred by denying standby counsels' motion to present independent mitigation evidence over appellant's objection. Appellate defense counsel frame the issue as a decision to exclude evidence, which they assert we should review for an abuse of discretion. However, we find the military judge's refusal to allow presentation of mitigation evidence over appellant's objection is a question of law, which we review de novo. *See, e.g., United States v. Davis*, 180 F.3d 378 (5th Cir. 2002). As explained below, we find no error.

As noted above, prior to the sentencing phase of appellant's court-martial, the military judge engaged in another *Faretta* inquiry with appellant. The military judge again properly determined appellant was competent to waive his right to counsel and proceed pro se into the penalty phase of his trial. At that point, the military judge permitted standby counsel to argue a motion to independently present mitigation evidence. After reviewing standby counsels' brief and hearing arguments, the military judge engaged in a more specific colloquy with appellant, in which appellant objected to the presentation of any such evidence by standby counsel. During the exchange with the military judge, appellant requested a recess to confer with standby counsel on the matter. After conferring with counsel, appellant affirmed his objection to the submission of any mitigation evidence by standby counsel. The military judge denied standby counsel's motion, placed her reasoning on the record, and ultimately placed the transcript of the proceeding and the related exhibits under seal.

As standby counsel did at trial, appellate defense counsel now rely on the example of three states to support their argument for independent presentation of mitigation evidence. Those states, North Carolina, New Jersey, and Florida, each have statutory capital sentencing schemes that either explicitly, or through judicial interpretation, require the admission of mitigation evidence in a capital trial, even

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(. . . continued)
Supreme Court decisions on state cases involving circumstances similar to appellant's crimes. We find appellant's capital sentence was both appropriate and proportional for appellant's convictions. *See Akbar*, 74 M.J. at 408 (emphasizing the preference for the Court of Criminal Appeals to include an explicit discussion of its proportionality review) (citing *United States v. Gray*, 51 M.J. 1, 63 (C.A.A.F. 1999); *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A. 1991)).

over the accused's objection.[17] Appellate defense counsel argue the military judge was obliged to follow the example of those states and direct the independent presentation of mitigation evidence over appellant's objection to ensure the constitutional validity of his death sentence. We disagree.

Rule for Courts-Martial 1004(b)(3) affords a capital accused "broad latitude" to present evidence in mitigation and extenuation. The rule reflects the effort of the President, Congress, and the drafters of the R.C.M. to narrow the scope of those eligible for the death penalty by ensuring the panel considers admissible mitigating evidence and finds it is substantially outweighed by any evidence in aggravation. *See Loving v. United States*, 517 U.S. 748, at 754-755 (1996). We recognize the weighing of mitigating evidence against evidence in aggravation is critical to the constitutionality of the UCMJ's capital sentencing scheme. However, neither R.C.M. 1004, nor any other provision of the UCMJ or the R.C.M., make presentation of mitigation evidence obligatory when a pro se accused objects. Likewise, there is no military case law interpreting the UCMJ's capital sentencing scheme as requiring standby counsel to present mitigation evidence over a pro se accused's objection.

The capital sentencing schemes in the three states relied upon by appellate defense counsel are merely suggestive to this court, and we do not find their logic compelling. In our view, forcing the independent presentation of mitigation evidence over a pro se accused's objection undermines the right to self-representation as defined by the Supreme Court in *Faretta*, 422 U.S. 806. Following *Faretta*, the Supreme Court addressed the limits of a standby counsel's role in assisting a pro se accused in *Wiggins*, 465 U.S. 168. In *Wiggins*, the Court held the core of *Faretta* is the pro se defendant's right to "preserve actual control over the case he chooses to present to the jury." The Court further held that allowing standby counsel to present evidence to the jury over a pro se accused's objection undercuts a key tenant of *Faretta* by "[destroying] the jury's perception that the defendant is representing himself." *Id.* at 178.

The Fifth Circuit has specifically addressed the appointment of independent counsel to present mitigation evidence in a federal death penalty trial. *See Davis*, 180 F.3d 378. In *Davis*, the court reviewed a trial court's decision, during a capital sentence rehearing, to appoint independent counsel to present mitigation evidence when the accused declined to do so. *Id.* at 380. The court reiterated the Supreme Court's holding in *Wiggins,* recognizing the core of the "*Faretta* right" is the accused's right to preserve control over the direction of his case, and noting this right should be preserved "[r]egardless of whether society would benefit from having a different presentation of the evidence." *Id.* at 385 (citing *Wiggins*, 465 U.S. at 178). As such, the Fifth Circuit enjoined independent counsel from

[17] *See* footnote 15, *supra*.

presenting any mitigation evidence over the accused's objection. *Id.*[18] We agree with the Fifth Circuit that permitting independent presentation of mitigation evidence, over an accused's objection, would "stri[p] [an accused] of his right to preserve actual control" over his sentencing case. *Id.*

Accordingly, we find that allowing standby counsel's presentation of mitigation evidence over appellant's objection would have violated his right to self-representation under the Sixth Amendment. The military judge, therefore, correctly denied standby counsel's motion. We find appellant was given full opportunity to present evidence in mitigation pursuant to R.C.M. 1004(b)(3) and 1004(b)(4)(C), and the panel considered all appropriate evidence of record in the penalty phase. *See Eddings v. Oklahoma,* 455 U.S. 104, 128 (1982). Thus, we find no error.

D. Whether the Staff Judge Advocate Was Disqualified from Providing the Article 34, UCMJ, Pretrial Advice

We next turn to appellant's claim the Staff Judge Advocate (SJA) was disqualified from providing the Article 34, UCMJ, pretrial advice in appellant's case. Appellant claims the SJA was disqualified because he (1) "was part of a community profoundly affected by the tragedy;" (2) supervised and mentored soldiers who had been caught in the attack; and (3) visited the crime scene.[19] Appellate defense counsel request this court commute appellant's sentence or order a rehearing. As we explain below, we do not find the SJA's status as a member of the Fort Hood community, nor any of his actions taken in the course of his official duties, disqualified him from acting as the SJA in appellant's case. Further, even if we were to assume the SJA was disqualified, we find appellant suffered no prejudice.

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[18] *See also Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005) (Constitution does not prevent competent capital accused from waiving presentation of mitigation evidence); *Singleton v. Lockhart*, 962 F.2d 1315, 1322-23 (8th Cir. 1992) (an accused may be found competent to waive the presentation of mitigation evidence); *Barnes v. Sec'y, Dep't of Corr.*, 888 F.3d 1148, 1160 (11th Cir. 2018) (distinguishing Fifth Circuit's decision in *Davis*, 285 F.3d 378, from Florida Supreme Court's interpretation of *Farretta*).

[19] In support of this assertion, appellant submitted a motion to attach a post-trial declaration made by CPT NF, a former judge advocate, dated 21 May 2018. Captain NF's declaration recounts his actions at the scene of appellant's crime on 5 November of 2009, as well as his interactions with the SJA in the days following appellant's attack. Although the affidavit contains hearsay and is otherwise outside the record of trial, we nonetheless consider it for purposes of this assigned error.

Whether an individual is disqualified from acting as the SJA responsible for advising the convening authority is a question of law we review de novo. *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (citing *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004)). Article 34, UCMJ, requires that "[b]efore directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice." *MCM* (2012). Article 34, UCMJ, prohibits the convening authority from referring a specification under a charge unless the SJA has advised in writing of the following: "(1) the specification alleges an offense under [the UCMJ]; (2) the specification is warranted by the evidence indicated in the [Article 32 report of investigation]; and (3) a court-martial would have jurisdiction over the accused and the offense." *Id.* The SJA must provide the convening authority a written and signed statement expressing his conclusion as to each of the aforementioned matters and recommend the action to be taken by the convening authority. *Id.*

Rule for Courts-Martial 406 sets forth the same requirements as Article 34, UCMJ. *MCM* (2012). Additionally, the Discussion accompanying R.C.M. 406 states the following:

> The [SJA] is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.

R.C.M. 406 Discussion. Similarly, Article 6(c), UCMJ, provides that "[n]o person who has acted as a member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as [an SJA] or legal officer to any reviewing authority upon the same case."

In appellant's case, the SJA performed none of the disqualifying roles listed in either Article 6(c) or R.C.M. 406. Nonetheless, appellate defense counsel contend the SJA "functions in a quasi-judicial role when providing pretrial advice under Article 34," and thus should be held to standards similar to those applied to a military judge. To support this assertion, appellate defense counsel argue the SJA's role in providing pretrial advice has evolved from being "purely advisory" to "more like a quasi-judicial magistrate making a probable cause determination that protects the accused from being prosecuted on baseless charges." *United States v. Hayes*, 24 M.J. 786, 790 (A.C.M.R. 1987).

Relying on *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987), which addresses the impartiality of Article 32 investigating officers (IO), appellate defense counsel argue the SJA should be held to a similar quasi-judicial standard of impartiality. *Id.* at 263 (noting "[t]he appointed Article 32 officer must be impartial and, as a quasi-judicial officer, is held to similar standards set for a military judge"). According to appellant, the same objective test for determining the disqualification of a judge should apply to the SJA. Under that standard, a judge is disqualified if "a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (quotations omitted). We disagree that *Reynolds* is applicable to the actions of the SJA in appellant's case.

In *Reynolds*, the appellant challenged the Article 32 IO's impartiality because the IO worked in the Legal Assistance Division of the SJA's office. *Id.* at 263. The court held there was no appearance of impropriety because the IO had limited contact with the trial counsel and never discussed the case with the trial counsel. The holding in *Reynolds* is limited to Article 32 IO's and nothing in *Reynolds*, nor any subsequent case, supports the assertion that the SJA, in providing pretrial advice, must be held to the same standard of impartiality as a military judge.

Although we decline to treat the role of the SJA as quasi-judicial, that does not end our inquiry. We must consider the objectivity of the SJA's actions in this case, in light of Article 6(c), UCMJ. An SJA who advises a convening authority on the disposition of charges must "be, and appear to be, objective." *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997) (citations omitted). In the context of an SJA's post-trial actions, Article 6(c) has been "[b]roadly applied . . . [i]n light of its well-established purpose 'to assure the accused a thoroughly fair and impartial review.'" *United States v. Lynch*, 39 M.J. 223, 227-28 (C.M.A. 1994) (quoting *United States v. Crunk*, 4 U.S.C.M.A. 290, 15 C.M.R. 290, 293 (1954) (holding SJA disqualified because he had previously acted as the trial judge)). "Other conduct by [an SJA] may be so antithetical to the integrity of the military justice system as to disqualify him from participation." *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976) (finding SJA disqualified from post-trial review where accused claimed the same SJA provided defective Article 34 advice). Accordingly, we believe it is appropriate for this court to determine whether a reasonable person could impute to the SJA a personal interest or feeling in the outcome of the case. *See, e.g., United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *see also United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Gordon*, 2 C.M.R. 161 (1952).

According to CPT NF's declaration, he was present at the SRP on 5 November 2009 during the attack. That same day, CPT NF met with the SJA and told the SJA what he witnessed. Several days later, the SJA mentioned to CPT NF that he had toured the SRP building the evening of 5 November. According to CPT NF, the SJA stated, "[i]t was a difficult experience that would make it hard to sleep at night or

words to that effect." Based on the information in CPT NF's declaration, appellate defense counsel implore this court to find a reasonable member of the public would harbor doubts about the SJA's impartiality in this case.

Appellate defense counsel contend appellant's case is analogous to *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995), which involved the trials of Timothy McVeigh and Terry Nichols, who bombed the Alfred P. Murrah Building in Oklahoma City. *Id.* at 350-51. In *Nichols*, the Tenth Circuit held the trial judge was not impartial because his courtroom and chambers were damaged in the bombing and a member of his staff was injured, as were other court personnel. *Id.* at 349-50. However, as the court noted in *Nichols*, determining whether a judge should be disqualified is an extremely fact driven analysis, and each case "[m]ust be judged on [its] unique facts and circumstances more than by comparison to situations in prior jurisprudence." *Id.* at 351 (quoting *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995)).

Under the specific facts of appellant's case, we find neither the SJA's statement to CPT NF, nor the SJA's membership in the Fort Hood community, call into question his impartiality. First, the SJA's physical office was not involved in the attack. Fort Hood is a large installation. An attack at the SRP site, located separate and apart from the SJA's office, is not equivalent to an explosion that damaged a judge's chambers. Second, unlike the staff member who was injured in *Nichols*, while CPT NF was present at the SRP site, he was not physically injured during the attack. Third, no other member of the SJA's office was injured or present for the attack. Finally, as the court pointed out in *Nichols*, "[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" are not ordinarily sufficient to require disqualification. 71 F.3d at 351.

We find the SJA's purported statement to CPT NF following the SJA's tour of the SRP building does not show the SJA's partiality, but rather was an expression of empathy. Moreover, his role as SJA under R.C.M. 406 required him to review and comment on the evidence gathered in the pretrial investigation pursuant to Article 32, UCMJ. That evidence was likely disturbing to him as well. Nonetheless, we have no reason to doubt the SJA's ability to view it dispassionately and make a fair and impartial recommendation as to the disposition of charges. Finally, appellant points to nothing in the pretrial advice itself that in any way suggests the SJA was partial. Accordingly, we find the SJA had only an official interest in preparing the pretrial advice.

Finally, even if the SJA should have been disqualified, we find appellant suffered no prejudice as a result of the SJA's pretrial advice. *See United States v. Loving*, 41 M.J. at 288 (C.A.A.F. 1994) (citing *United States v. Murray*, 25 M.J. 445, 447 (C.M.A. 1988)) (noting defects in the pretrial advice are not jurisdictional, but are tested for prejudice). Here, the SJA provided the General Court-Martial Convening Authority (GCMCA) an objective and informed written recommendation (SJAR), pursuant to Article 34, UCMJ, regarding the disposition of the preferred

charges. Specifically, the SJAR noted the convening authority met previously with appellant's trial defense counsel. During the meeting, the defense team provided an oral presentation and written submissions in support of its request for a non-capital referral. The SJAR clearly advised the GCMCA he was "[n]ot required to take any specific action or to dispose of the charges in any particular manner. Any action taken by you is to be made within your sole, independent discretion as a [GCMCA]."

Further, the SJA's advice was based on an informed and impartial review of the evidence. The SJA stated in his recommendation that he considered the Charge and its Specifications, the Additional Charge and its Specifications, the R.C.M. 706 sanity board results, the Report of Investigation, the verbatim transcript from the Article 32 investigation (which was presided over by a senior Military Judge who was learned in the practice of capital litigation), the transmittal documents from the chain of command, and the defense team's written submissions. As required by Article 34, the SJA provided the following legal conclusions: (1) Each specification alleges an offense under the UCMJ; (2) The allegation of each offense is warranted by the evidence in the Report of Investigation; and (3) The court-martial will have jurisdiction over the accused and the alleged offenses.

The SJA recommended the convening authority direct the case to be tried as capital, due to the presence of an aggravating factor under R.C.M. 1004(c)(7)(J) (providing death may be adjudged only if an aggravating factor is found such as, if "[t]he accused has been found guilty in the same case of another violation of Article 118"). The SJA was not alone in that recommendation. The SJA's advice noted that appellant's chain-of-command and the Article 32 IO also recommended a capital referral. Finally, further underscoring the SJA's impartiality, the SJAR provided an alternative option for the convening authority to direct the case to be tried as non-capital.

Based upon the foregoing, we hold the SJA was not disqualified from providing pretrial advice in appellant's case to the convening authority. Even assuming arguendo the SJA was disqualified, we find no prejudice to appellant.

E. Whether the Military Judge Should Have Sua Sponte Excused Certain Panel Members

Appellate defense counsel claim the military judge should have sua sponte excused two panel members for bias. Appellate defense counsel assert Colonel (COL) DM's presence in the Pentagon on September 11, 2001, creates a perception of implied bias. Appellate defense counsel also assert LTC KG was actually biased because he had a bumper sticker on his truck that read, "Major League Infidel." Although appellant, proceeding pro se at this point, conducted individual voir dire of both panel members, ultimately neither he nor the government challenged either of them.

"An accused 'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'" *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). Rule for Courts-Martial 912(f)(1) lists the grounds available for challenging potential panel members. Subparagraph (N) of that section provides a general ground for challenge when a member should not sit in the interest of having a court-martial free from substantial doubt as to legality, fairness, and impartiality.[20] *See United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997). This general ground includes both actual and implied bias. *See United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999) (citing *United States v. Rome,* 47 M.J. 467, 469 (C.M.A. 1998)). Counsel for each side make challenges for cause based on either actual or implied bias, and the military judge then rules on those challenges. *See* UCMJ art. 41(a)(1); R.C.M. 912(d), (f)(3). The burden of persuasion for challenges rests with the party making the challenge. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) (citing R.C.M. 912(f)(3)); *Warden*, 51 M.J. at 81 (citing *Rome*, 47 M.J. at 469).

The test for actual bias is whether any bias held by a member is such that it will not yield to the evidence presented and the instructions of the military judge. *Warden*, 51 M.J. at 81 (citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)) (quoting *United States v. Reynold*s, 23 M.J. 292, 294 (C.M.A. 1987)). Actual bias is both a question of fact and a question of credibility, wherein a set of facts suggests some grounds for bias that the member either explains or renounces through voir dire. *See United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000) (citing *Warden*, 51 M.J. at 81 (C.A.A.F. 1999)); *see also United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1997) (citing *Patton v. Yount*, 467 U.S. 1025, 1038 (1984)). We afford the military judge great deference when deciding whether actual bias exists because of her superior position to observe the members and assess their credibility. *See Napolitano*, 53 M.J. at 166; *Warden,* 51 M.J. at 81; *Minyard*, 46 M.J. at 231.

Implied bias, on the other hand, asks whether, regardless of any disclaimer, "most people in the same position as the member would be prejudiced [i.e. biased]." *Strand*, 59 M.J. at 459 (quoting *Napolitano*, 53 M.J. at 167); *see also United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000) (citing *Warden*, 51 M.J. at 81-82). We consider implied bias under a totality of the circumstances. *Strand*, 59 M.J. at 459. However, we afford less deference to the military judge when deciding whether implied bias exists, because "[i]mplied bias is viewed through the eyes of the public, focusing on the appearance of fairness." *Id.* at 458 (quoting *Rome*, 47 M.J. at 469).

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[20] Rule for Courts-Martial 912(f)(1)(N) requires a member be excused for cause "[w]henever it appears that the member 'should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.'"

Accordingly, a military judge's assessment of bias is not dispositive. *Minyard*, 46 M.J. at 231 (citing *Daulton*, 45 M.J. at 218).

If neither party exercises a challenge for cause, then with limited exceptions, the challenge is considered waived. *See* R.C.M. 912(f)(4); *see also* R.C.M. 912(g)(2). However, "[n]otwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie." R.C.M. 912(f)(4). This power of the military judge to sua sponte exercise a challenge is strictly discretionary. *See United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015). Moreover, a military judge has "no duty [to excuse a member]." *Id.* A military judge's decision to sua sponte excuse a panel member is a "drastic action" that should be undertaken only in the interest of justice. *United States v. Velez*, 48 M.J. 220, 225 (C.A.A.F. 1998). We review a military judge's decision not to excuse sua sponte a member for actual or implied bias for an abuse of discretion. *Strand*, 59 M.J. at 458-60; *Akbar*, 74 M.J. at 395; *but see McFadden*, 74 M.J. at 90 (military judge has no duty to sua sponte excuse a panel member).[21]

1. Colonel DM's Presence in the Pentagon on September 11, 2001

During individual voir dire, COL DM stated he was previously assigned to the Pentagon as a member of the Joint Staff. On September 11, 2001, COL DM was present in the Pentagon when it was attacked. At the time the plane impacted the Pentagon, COL DM was about three corridors away from the point of impact. Colonel DM was not involved in the rescue operations, but re-entered the Pentagon several hours after the attack to manage the telecommunications systems staff. Colonel DM stated that the wife of one of his co-workers was killed in the attack. He did not personally know his co-worker's wife. The trial counsel asked COL DM if there was "[a]nything about [his] experiences on [September 11, 2001] that would cause [him] not to be fair and impartial." Colonel DM gave a negative response.

Appellant did not question COL DM about his experience in the Pentagon. However, appellant asked COL DM about an answer on his panel member questionnaire wherein COL DM expressed a "somewhat unfavorable" view of Sharia Law. In his exchange with appellant, COL DM explained he was comparing Sharia Law to a democratic form of government and felt Sharia Law conflicted with

[21] We recognize that applying an abuse of discretion standard to a military judge's decision not to sua sponte excuse a member pursuant to R.C.M. 912(f)(4) undermines the waiver language also found within that section. Nonetheless, we find the weight of our Superior Court's precedent rests on testing such decisions for abuse of discretion.

democratic values. Appellant did not conduct any further voir dire of COL DM and he did not challenge COL DM for cause.[22]

Appellate defense counsel now assert COL DM was biased because of his "deeply personal connection to terrorist attacks." We disagree that the record supports a finding of either actual or implied bias against COL DM. In regards to actual bias, COL DM thoroughly and candidly described his experience at the Pentagon on September 11, 2001. To the extent those experiences might amount to bias, COL DM unequivocally stated he could set aside his experience and be fair and impartial. The parties were in a position to see and hear COL DM's assurances of impartiality and determine his credibility. Neither appellant nor trial counsel lodged any objection. The military judge was in a similarly superior position to this court and she too expressed no concern about COL DM being biased. Accordingly, we find there was no actual bias. Therefore, the military judge did not abuse her discretion by not sua sponte excusing COL DM for actual bias.

Turning to implied bias, we find under the totality of the circumstances, most people similarly situated to COL DM would not be biased against appellant. We recognize being a victim of a similar offense can serve as grounds for disqualifying a potential member. *See Daulton*, 45 M.J. at 217 (C.A.A.F. 1996). However, in this case, we are not convinced COL DM's presence at the Pentagon when a group of foreign terrorists commandeered a commercial jet and crashed it into the building is sufficiently similar to appellant's small arms attack to warrant any concern as to implied bias. In any event, even assuming a similarity exists, a panel member is not per se disqualified merely because he has a personal familiarity with a similar crime. *Id.* In such instances, the crucial determination is whether the panel member can unequivocally disregard past experiences and consider solely the evidence presented in court. *See United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985).

Colonel DM clearly and unequivocally stated his experience at the Pentagon on September 11, 2001, would not prevent him from being fair and impartial. Therefore, we find that a member of the public aware of all the facts, to include COL DM's responses, would not have substantial doubt as to the legality, fairness, and

[22] In his responses to the government's voir dire, COL DM expressed some hesitancy about the death penalty, indicating that "capital punishment is punishment from days gone by," and "there are probably better ways today to administer rehabilitation." He also agreed that he thought capital punishment was used too often in some states. Ultimately, he stated he could consider the full range of penalties, including the death penalty, if appellant were found guilty.

impartiality of appellant's trial. Accordingly, we find that the military judge did not abuse her discretion by not sua sponte excusing COL DM for implied bias.[23]

2. Lieutenant Colonel KG's Bumper Sticker

During individual voir dire, LTC KG stated he, at some point, had a bumper sticker on the back of his truck that read: "Major League Infidel." The bumper sticker was a gift from a friend and was on his vehicle for about one year. Lieutenant Colonel KG explained the bumper sticker was "[j]ust a morale decal. It seemed like a contemporary statement to be made, perhaps." Trial counsel then asked LTC KG about the bumper sticker:

> Q: Does putting that sticker in your back window, does that express any opinions you may have?
>
> A: Towards the enemy we were fighting.
>
> Q: Concerning that opinion, does that, in any way, affect your ability to be fair and impartial in this case?
>
> A: I don't think it does, sir, no.
>
> Q: You don't hold an opinion, based upon that bumper sticker, or any other reason you may have an opinion, that would preclude you from following the evidence in this case, considering the evidence in this case, and following the judge's instructions?
>
> A: No, sir.
>
> Q: Likewise, do you have any opinion, either based on that bumper sticker, or any other opinion you may have, that may stop you from being fair and open minded, and being able to consider all the evidence when deciding an appropriate sentence in this case ----
>
> A: No, sir.

[23] In their brief, appellate defense counsel also suggest COL DM was biased due to his holding a "somewhat unfavorable" opinion of Sharia Law. However, as with his presence in the Pentagon, COL DM explained he only felt Sharia Law conflicted with the ideals of democracy. There was no indication he held any such view about Islam in general. In any event, Sharia Law played absolutely no role in any phase of appellant's court-martial. Accordingly, we find the military judge did not abuse her discretion by not sua sponte excusing COL DM for either actual or implied bias due to his opinion of Sharia Law.

When trial counsel was finished, appellant, acting as his own counsel, asked LTC KG to define "major league infidel." Lieutenant Colonel KG stated, "[i]n short, somebody who stood against what the enemy believed in, I think. I look at it from an extremist viewpoint, not as a common Islamic viewpoint. It was meant directly towards the enemy extremists." Appellant then went on to question LTC KG about his understanding of Islam and his interactions with other Muslims. Lieutenant Colonel KG indicated he learned about Islam from a Muslim co-worker while serving in Canada. Lieutenant Colonel KG stated his co-worker would answer his general questions and that his co-worker had once explained the differences between Sunni and Shiite Muslims. However, when questioned by appellant, LTC KG could not articulate those differences. Appellant then ended his questioning of LTC KG. The military judge followed appellant to inquire briefly about LTC KG's exposure to pretrial publicity before terminating the questioning. At the conclusion of his voir dire, neither party challenged LTC KG for cause.

Appellant now argues the military judge was obliged to excuse LTC KG because his bumper sticker constituted actual bias. We disagree. The record clearly demonstrates LTC KG's bumper sticker was a comment on the enemies of the United States, rather than on appellant or his religion. Moreover, LTC KG clearly indicated nothing expressed on a bumper sticker would prevent him from being fair and impartial, fully considering the evidence presented, and following the military judge's instructions. *See United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008) (noting the question of bias is not whether a member has particular views but whether they can put these views aside to evaluate the case on its merits).

Lieutenant Colonel KG was open and frank about the bumper sticker and responded to questions from both sides under the observation of the military judge. Having engaged with LTC KG and directly observed his responses, neither party challenged LTC KG for actual bias, or in any way expressed any concerns about bias. We therefore find the military judge did not abuse her discretion by not sua sponte excusing LTC KG for actual bias, because there was no actual bias.

With regard to implied bias, LTC KG presents a closer question. However, we are convinced that in light of all the facts, LTC KG's bumper sticker did not compel the military judge to take the drastic action of sua sponte excusing him from the panel. First, our Superior Court has held implied bias should rarely be invoked when there is no actual bias. *Warden*, 51 M.J. at 81-82. As discussed above, we are confident there was no actual bias on the part of LTC KG. Moreover, we assess the potential for implied bias under the totality of the factual circumstances. *Strand*, 59 M.J. at 459. Among those circumstances are statements of the panel member disavowing bias, which although not dispositive, can "carry weight." *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997) (citations omitted).

In this case, LTC KG's bumper sticker reflects only that he stood in opposition to the enemy against whom the armed force in which he served was engaged in conflict. From this perspective, LTC KG's opinion was likely not unique among his fellow panel members. This dynamic alone does not lead to an impermissible appearance of bias against appellant. Any such concerns were dispelled by LTC KG's answers on voir dire. He was transparent about the bumper sticker and willingly answered questions from both trial counsel and appellant. He openly explained what message he intended to convey with the bumper sticker and he explained directly to appellant what he believed it meant to be a "major league infidel." Lieutenant Colonel KG's frank explanation established that the bumper sticker was neither a comment on appellant nor his religion in general, but rather, only on "enemy extremists." Although LTC KG's knowledge of Islam was limited, nothing in the record suggests he was incapable of drawing that distinction.

Finally, LTC KG was unequivocal when stating he could be fair and impartial and that his bumper sticker would have no impact on his ability to participate in appellant's trial, to include following the military judge's instructions. Under all of these circumstances, we do not believe that most people in the same position would be biased against appellant. *Strand*, 59 M.J. at 459 (citing *Napolitano*, 53 M.J. at 167). Accordingly, we find that the military judge did not abuse her discretion by not sua sponte excusing LTC KG due to his bumper sticker.

F. Whether the Military Judge Erred in Denying Appellant's Motions for Change of Venue Due to Pretrial Publicity and Heightened Security Measures

Appellate defense counsel assert the military judge committed error in denying defense's motions for change of venue. In pretrial litigation, appellant, still represented by counsel, submitted two motions requesting a change in venue. The first motion requested a change in venue and venire due to the panel's exposure to pretrial publicity. Therein, appellant argued, at a minimum, the panel was exposed to media reports from the date of the incident, 5 November 2009, until 6 July 2011, when the convening authority issued an order to the panel to avoid any publicity. The second motion requested a change of venue due to the heightened security measures at appellant's trial. The military judge denied both motions.[24]

We will first address the issue of pretrial publicity, and then we will discuss the security measures at appellant's trial. After thoroughly considering each asserted claim of prejudice independently and for any cumulative effect, we find no error.

[24] Defense requested reconsideration of both motions, which the military judge denied.

We review a military judge's decision to deny a change of venue for abuse of discretion. *United Sates v. Loving,* 41 M.J. 213, 282 (C.A.A.F. 1994) (citations omitted). "Anyone alleging an abuse of discretion faces an uphill climb." *United States v. Tsarnaev*, 968 F.3d 24 (1st Cir. 2020) (citing generally, *United States v. Rivera-Carrasquillo,* 933 F.3d 33, 44 (1st Cir. 2019) (holding a judge abuses his discretion "if no reasonable person could agree with the ruling."). Particularly in claims alleging jury partiality, "[t]he deference due to [the military judge] is at its pinnacle." *Id.* (citing *Skilling*, 561 U.S. 358, 396 (2010)).

1. Pretrial Publicity

"Servicemembers are entitled to have their cases 'adjudged by fair and impartial court-martial panels whose evaluation is based solely upon the evidence,' not pretrial publicity.'" *Akbar*, 74 M.J. at 398 (quoting *United States v. Simpson*, 58 M.J. 368, 372 (C.A.A.F. 2003)). The doctrine of unfair pretrial publicity is based upon the constitutional right to due process. *See* U.S. Const. amend. V; *Simpson*, 58 M.J. at 372. Pretrial publicity alone is insufficient to require a change of venue. *Id.* (citing *United States v. Curtis*, 44 M.J. 106, 133 (C.A.A.F. 1996)). Rather, an accused is entitled to a change of venue only if "pretrial publicity creates 'so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial.'" *Akbar*, 74 M.J. at 398 (quoting *United States v. Loving*, 41 M.J. at 254 (citing R.C.M. 906(b)(11) Discussion)). An appellant bears the burden of demonstrating either presumed prejudice or actual prejudice.

Presumed Prejudice

Prejudice may be presumed if the pretrial publicity is "(1) prejudicial, (2) inflammatory, and (3) has saturated the community." *Simpson*, 58 M.J. at 372 (citing *Curtis*, 44 M.J. at 139) (further citations omitted). "To establish saturation, 'there must be evidence of the amount of pretrial publicity and the number of individuals exposed to it.'" *Curtis*, 44 M.J. at 139 (citing *United States v. Gray*, 37 M.J. 730, 747 (A.C.M.R. 1992)). A conviction will not be overturned for presumed prejudice resulting from pretrial publicity unless there is a manifest injustice. *Id.* at 139 (citing *Mu'Min v. Virginia*, 500 U.S. 415 (1991)). In this case, we find appellant failed to meet his burden, at trial and on appeal, of establishing a presumption of prejudice.

On 6 July 2011, the GCMCA issued a memorandum to all prospective panel members detailed to appellant's court-martial. The memorandum provided the following direction:

> I instruct you to avoid all print, media, and internet coverage concerning this case and the accused. I further instruct you to in no way conduct any independent

> research, electronic or otherwise, concerning this case or the accused. I also direct you not to discuss this case, the accused, or your selection as a panel member unless required to do so in the course of your official duties.

On 20 March 2012, a superseding order was issued to a new venire of prospective members containing nearly identical language. On 29 May 2012, the military judge issued a court order to all primary and alternate panel members selected for duty in appellant's case. Therein, the military judge instructed all prospective members as follows:

> I instruct you to avoid all print, media, and internet coverage concerning the shootings which occurred at Fort Hood, Texas on 5 November 2009, this case and/or the accused. You must not read, view, or listen to any reports or coverage about the shootings, this case and/or the accused in the press, or on radio, television, or the internet. You should not take part in or engage in any discussions about any reports or coverage of this case. Should you inadvertently find yourself exposed to such reports, coverage or discussions, you must take immediate and reasonable steps to stop the exposure and report the exposure to the Chief of Military Justice, III Corps and Fort Hood. I further instruct you to in no way conduct any independent research, electronic or otherwise, concerning the shootings which occurred at Fort Hood, Texas on 5 November 2009, this case and/or the accused.

Appellant's motion for change of venue due to pretrial publicity and request for reconsideration occurred prior to voir dire. Appellant argues the "community," for purposes of evaluating media saturation, should be the limited pool of field grade United States Army officers eligible to serve as panel members in his court-martial. Accepting this claim as true, the military judge made the following findings:

> Prejudice in the jury venire, and in this location, has not been shown and cannot be presumed. The publicity is not so inherently prejudicial that trial is presumed to be tainted before jury selection even begins. The presumption of prejudice attends only in extreme cases, and this is not that case.

The military judge acknowledged appellant's case had received considerable nationwide publicity, but found the "mere quantum of publicity in this case does not create presumed prejudice." She also found the local coverage was greater than

national coverage. The majority of the prospective members served at installations other than Fort Hood, thus tempering concerns the community was saturated.[25] Relying on *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Irvin v. Dowd*, 366 U.S. 717 (1961), the military judge found there was nothing in the content of appellant's pretrial publicity, such as disclosure of inadmissible evidence, that panel members could not be expected to disregard.

The military judge further noted the most recent publicity generally reported on the court proceedings and filings, as opposed to appellant's alleged crimes. Finally, the military judge found the passage of three years since the time of the alleged crimes was significant. *See Skilling*, 561 U.S. at 383. Accordingly, the military judge ruled the community from which appellant's panel was selected was not saturated by inflammatory and prejudicial pretrial publicity. However, the military judge left open the possibility of finding actual prejudice through the process of voir dire.

Appellant now asks us to infer, from a small sampling of voir dire and panel member questionnaire responses regarding pretrial publicity, that the military judge erred in finding no presumed prejudice.[26] We find much of the authority presented in support of appellant's argument for presumed prejudice is simply inapplicable in this case. Many of the cases relied upon by appellant find a presumption of prejudice where the actions of the government or court greatly exacerbated the degree of prejudicial pretrial publicity. We will briefly summarize these cases below, and then readily distinguish appellant's case.

First, in *Rideau*, the state allowed television broadcasts of the accused's custodial interrogation and inadmissible confession, thereby polluting the venire population with information no venireman would be able to set aside. 373 U.S. at 724-25. The Court was particularly concerned with the manner in which the accused's custodial interrogation occurred. *Id.* at 725. The video of the interview, which was broadcast to the local television station, depicted the accused "[i]n jail, flanked by the sheriff and two state troopers, admitting in detail the commission [of the charges], in response to leading questions by the sheriff." *Id.*

Next, in *Estes v. Texas*, the trial judge permitted the broadcasting of pretrial proceedings to the local community and failed to insulate prospective jurors and trial witnesses from their own public celebrity. 381 U.S. 532, 536 (1965). The Supreme

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[25] No prospective panel member was assigned to Fort Hood either at the time of appellant's crime or at the time of trial. However, some prospective members had been assigned to Fort Hood in the intervening years.

[26] Appellant did not object to the composition of the final panel and did not renew his motion for change of venue following voir dire.

Court reversed the conviction, holding that "[i]n most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.* at 542-543 (citing *In re Murchison*, 349 U.S. 133 (1955)).

As a final example, in *Sheppard v. Maxwell*, the Court presumed prejudice when the trial court, aware of intense pretrial publicity and slanderous reports regarding the accused and his counsel, denied the appellant the opportunity to explore bias during voir dire, and later failed to instruct the jury to ignore such outside influence. 384 U.S. 333, 362-63 (1966); *see also Tsarnaev*, 968 F.3d at 41 (finding trial judge failed to conduct a "thorough and searching voir dire" sufficient to assess the impact of pretrial publicity).

In marked contrast to *Rideau*, *Estes*, and *Sheppard*, there is no indication in appellant's case that the actions of the government or the court exacerbated pretrial publicity in any manner that might have unfairly prejudiced appellant. The convening authority twice issued orders for prospective panel members to avoid all publicity. The military judge issued a court order to all members to that same effect. *See, e.g., Simpson*, 58 M.J. at 373 (military judge ordered panel members to avoid media coverage of trial). As the date of trial drew near, the Chief of Military Justice followed up with a reminder to all prospective members that they must adhere to the orders to avoid exposure to publicity.[27] These measures all served to protect the impartiality of the potential panel members rather than amplify the risk of exposure to unfair pretrial publicity.

Moreover, having reviewed the entire record of trial, we find no indicia the pretrial publicity (although clearly extensive) was inaccurate or unfairly prejudicial in terms of its content. Based upon the record, we agree with the military judge's assessment that the volume of coverage was initially high, but subsided over the passage of almost three years until the time of appellant's trial. That passage of time likewise ameliorates our concerns of possible prejudice. *See, e.g., Skilling*, 561 U.S. at 383 (noting "decibel level of media" diminished in the years since the charged crime). We also concur with the military judge's finding that the coverage

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[27] Appellate defense counsel further allege appellant suffered prejudice due to panel members' exposure to operational briefs, training presentations, and other administrative reports that assessed lessons learned from the shooting incident. We find no evidence panel members in appellant's case were exposed to such information. When asked in voir dire about the potential exposure, every panel member consistently responded that they adhered to the pretrial orders and removed themselves from those operational or training environments where the incident might be discussed. Without indicia of actual exposure, this argument lacks merit.

was more intense in the area around Fort Hood, a concern the convening authority alleviated by selecting panel members from installations across the country. *See, e.g., Loving*, 41 M.J. at 282 (convening authority detailed panel members who arrived at installation after the alleged crime occurred, or were assigned to other installations).

A presumption of prejudice based upon pretrial publicity "attends only the extreme case." *Skilling*, 561 U.S. at 381. We agree with the military judge that appellant's is not such a case, and we find no grounds for presuming appellant suffered prejudice from inflammatory and prejudicial pretrial publicity.[28] Accordingly, we find the military judge did not abuse her discretion in denying appellant's motion for change of venue and venire based upon presumed prejudicial pretrial publicity.

Actual Prejudice

Next, we to turn to whether appellant suffered any actual prejudice due to pretrial publicity.[29] In all but extreme circumstances, a showing of actual prejudice

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[28] *See, e.g., Murphy v. Florida*, 421 U.S. 794 (1975). The Court in *Murphy* acknowledged in certain cases an accused may suffer a high level of notoriety. *Id.* at 803. However, the Court found that while there may be some indicia of potential bias due to pretrial publicity, that by "no means suggests a community with sentiment so poisoned against [appellant] as to impeach the indifference of [panel members] who displayed no animus of their own. *Id.* The Court reasoned:

> Qualified jurors need not, however, be totally ignorant of the facts and issues involved. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the jury can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

Id. at 799-800 (citing *Irvin,* 366 U.S. at 722-23). Similarly, we find the pretrial publicity in appellant's case insufficient to rebut the presumption of the panel members' impartiality.

[29] Following the military judge's ruling on presumed prejudice, the military judge advised the parties the case would continue to voir dire so that "any actual bias of any potential members based on pretrial publicity can be explored and tested at that

(continued . . .)

is necessary before a change of venue is granted. *Curtis,* 44 M.J. at 124. "To establish actual prejudice, the defense must show that members of the court-martial panel had such fixed opinions that they could not judge impartially the guilt of the accused." *Simpson*, 58 M.J. at 372 (citing *Curtis*, 44 M.J. at 139). The impact of pretrial publicity on the members "is determined by a careful and searching voir dire examination." *United States v. McVeigh*, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996). It is the role of the trial judge "to realistically assess whether the jurors could be impartial." *Curtis*, 44 M.J. at 139 (citing *Mu'Min*, 500 U.S. at 430). A military judge should liberally grant challenges when there are questions about a panel member's ability to serve impartially. *See United States v. Clay*, 64 M.J. 274, 276-77 (C.A.A.F. 2007).

The pretrial panel questionnaire, jointly approved by the parties and the court, included several questions that required members to disclose their knowledge of the case and the accused, and then identify the source of any such knowledge.[30] The

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(. . . continued)
time." Following voir dire, appellant challenged one member for cause, but did not exercise a preemptory challenge, and did not renew his motion for change of venue. Rule for Courts-Martial 912(f)(4) assigns an affirmative duty on parties to challenge questionable panel members, and failure to do so at trial constitutes waiver of the issue. However, for purposes of this appeal, we find appellant's pretrial motions for change of venue adequately preserved the issue on the grounds of both presumed and actual prejudice.

[30] The questions relating to pretrial publicity asked panel members how often they read newspapers, watch television news, listen to radio news, and read news on the internet. Panel members were asked to specifically state which national news networks and televisions talk shows they watch, and to which radio talk shows they listen. Panel members were further asked to specifically list what newspapers, magazines, journals, websites, or other periodicals they regularly read or subscribe to, both in print and online. Additionally, panel members were asked to specifically state what they had heard about appellant's case. Panel members were asked whether they had seen, heard, or read anything about appellant's case; how much they had heard; how closely they followed the news about appellant's case; from what sources they heard about appellant's case; whether they had ever listened to any commentator on the radio or television or read any internet columns, blogs, or tweets that discussed appellant's case; whether they had ever visited a website or other internet feature (chatrooms, discussion groups, or list serves) that discussed appellant or anything about this case; whether they read any government reports, books, documentaries, or special reports about appellant; whether they participated in any surveys or provided input for reports regarding appellant's attack; and

(continued . . .)

general format of the questionnaire for many of the questions was "check-the-block," format, but included designated space for narrative and open-ended responses.

Appellant's court-martial convened and general voir dire began on 9 July 2013. Twenty prospective members were present. The military judge performed general voir dire, and counsel for both parties were permitted time to do the same. During general voir dire, the military judge inquired extensively about the members' perception of media reporting in general. All prospective members agreed media reporting was not always completely accurate and truthful. Upon conclusion of general voir dire, appellant did not have any challenges for cause. The government challenged six members without opposition and the court released them. Of the remaining fourteen prospective members, nine returned for individual voir dire.

Appellant, proceeding pro se with the assistance of standby counsel, actively participated in individual voir dire. Appellant requested to conduct individual voir dire of one member and questioned others called by the government on areas of potential bias. All nine members were questioned about media exposure regarding the incident, the trial, and the accused, as well as the potential influence of media and information on their personal opinions as to appellant's guilt or innocence. All members indicated they would not be biased or otherwise influenced by any publicity. All agreed they had not formed inelastic opinions as to appellant's guilt and would fairly consider the evidence and follow the military judge's instructions.

Following individual voir dire, the military judge granted the government's request for four additional challenges for cause,[31] reducing the panel to ten members, which was below quorum pursuant to both Article 25, UCMJ, and the convening authority's panel appointment order, which required thirteen members. Accordingly, six additional members were produced for voir dire. General voir dire of the six new members included the same questions on media exposure and publicity as for the first group. Three of the six new prospective members were also questioned

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(. . . continued)
whether they have read any articles in the *Army Times*, *Stars and Stripes*, or other military-oriented news source that discussed any military justice case, including appellant's case. Panel members were asked to "[d]escribe as completely as possible" what they have heard about the case and whether they trust or distrust the accuracy of what has been reported about appellant's case. In regards to sentence, panel members were asked whether they had read, seen, or heard an opinion expressed about appellant's case in terms of guilt and/or appropriate punishment.

[31] Appellant did not object to any of these challenges for cause.

individually by the military judge and the parties. Each individual voir dire touched upon media exposure to some extent.

After the second round of individual voir dire, the military judge granted the government's unopposed challenges for cause for two of the three new members who had participated in individual voir dire. The government exercised a preemptory challenge against the third. Appellant did not exercise a preemptory challenge. As a result, the remaining three members of the second group were all seated. At that point, thirteen members remained, which constituted a quorum based upon the convening authority's convening order. The military judge then excused the panel members, with instructions to avoid any media related to the trial, for approximately one month.

When the panel returned, the military judge called each member for further voir dire. The military judge individually asked each member several questions about their exposure to media and their ability to provide appellant a fair trial. No member revealed any significant exposure to pretrial publicity. Each member agreed they could set aside anything they might have heard about the case and give appellant a fair trial. After each member had been called for the additional round of individual voir dire, the military judge asked the parties if they had any further questions for any panel member. Neither party indicated they had any further questions. The military judge then allowed the parties to make additional challenges for cause. No challenges were made.

Although appellant proceeded pro se during voir dire, he was not alone in determining whether to challenge panel members. Appellant was assisted by standby counsel, who were ordered by the military judge to provide both legal research assistance and advice to appellant. Moreover, the military judge made generous allowances in the scope and method of voir dire. *See, e.g., Loving*, 41 M.J. at 257 (noting military judge allowed wide latitude to counsel during voir dire, "virtually no topic was off-limits"). The record demonstrates appellant was active during voir dire, conducting his own questioning based upon member questionnaires and engaging in exchanges with the military judge on challenges for cause.[32]

Finally, although not necessary, the military judge individually questioned each member who ultimately sat on appellant's panel about their exposure to pretrial publicity and their ability to set aside what they may have heard. *See, e.g, Mu'Min*, 500 U.S. at 431 (noting trial court's voir dire examination "was by no means perfunctory"). We find the voir dire conducted in appellant's case was sufficient to

[32] We note government counsel were vigilant as well, making several challenges for cause against members whose responses during voir dire indicated actual or implied bias.

uncover any "fixed opinions" of appellant's case that rose to the level of actual prejudice. *Akbar*, 74 M.J. at 398.

While every member had some prior knowledge of appellant's case, and in some instances more detailed knowledge, it is not necessary panel members be "totally ignorant of the case." *Curtis*, 44 M.J. at 139 (quoting *Mu'Min*, 500 U.S. at 431). Rather, the key question is whether any member has an opinion that will not yield to the evidence presented and the instructions of the court. In this case, questioning by counsel and the military judge did not reveal any fixed opinions as a result of exposure to pretrial publicity. Each member explicitly disavowed any impact from pretrial publicity. Each agreed they could set aside anything they might have heard and provide appellant a fair trial. At the conclusion of the military judge's questions, appellant was given a final opportunity to ask additional questions of any member or to exercise challenges for cause. Appellant declined both options.

Therefore, we cannot find the military judge abused her discretion in denying appellant's motion for a change of venue and venire on grounds of actual prejudice. Likewise, based upon our review of the record, we find no actual prejudice against appellant as a result of pretrial publicity.

2. Heightened Security Measures

In a separate assigned error, appellate defense counsel assert appellant suffered prejudice as a result of the heightened security measures in place at the court facilities on Fort Hood at the time of his trial. In some instances, security measures can "be so inherently prejudicial that they deprive an accused of the right to an impartial jury." *United States v. Miller*, 53 M.J. 504, 506 (A.F. Ct. Crim. App. 2000) (citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). However, not every security measure is "inherently prejudicial." *Id.* A trial judge's approval of security measures is afforded broad discretion. *Id.* (citing *Hellum v. Warden*, 28 F.3d 903, 907 (8th Cir. 1994)). If the challenged practice is not inherently prejudicial, then appellant must show actual prejudice. *Id.* at 507 (citing *Holbrook*, 475 U.S. at 572).

This court acknowledges that the physical security measures employed were considerable and obvious at the time of appellant's trial. Specifically, a barrier consisting of 180 shipping containers, varying between one and three stories in height, was constructed around the courthouse. We accept appellant's proffer that the members were aware of these measures. However, for the reasons set forth below, we find the military judge did not abuse her discretion in allowing increased security procedures. Appellant has not met his burden in demonstrating inherent prejudice or actual prejudice resulting from the increased security measures.

In a pretrial motion, appellant's defense counsel argued the barrier demonstrated the "general atmosphere of hostility and partiality against [appellant]." They also argued the barrier would prejudice the panel members by sending the message "[appellant] is the cause of such barriers and that their lives are at risk," and "that the charges against [appellant] are true and that he is a terrorist and murderer." The military judge directed the government to show cause why the high level of security was necessary. After hearing from the installation director of physical security, the military judge denied the motion for change of venue. The military judge found the measures were not directed at appellant but were designed to promote the safety of all court personnel. She also noted the level of security could well be the same at any other installation to which venue might be changed. Finally, she found no evidence that security would impact the panel and that appellant could receive a fair trial without a change of venue.

During the preliminary instructions to the members, the military judge explained that security precautions of varying degrees are part of any trial, depending on such matters as heightened media awareness or the number of spectators. She instructed the prospective members that it would be "unfair and inappropriate" to hold these measures against appellant, "when it has nothing to do with him at all." The military judge specifically advised the members:

> Security measures are implemented for the safety of all trial participants, and they in no way have any bearing on the accused's guilt or innocence. You should remain focused on the evidence that you will hear inside this courtroom, and disregard the security measures taken outside the courtroom. Do not consider those measures and precautions as evidence of anything, and do not permit it to enter into your view of the evidence or deliberations.

All members responded affirmatively that they understood and would follow these instructions. *See Loving*, 41 M.J. at 235 (citing *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)) (noting panel members are presumed to follow the military judge's instructions). Appellant neither challenged these instructions by the military judge nor did he conduct voir dire of any member regarding his or her perception of the security at his court-martial.

To the extent the security measures were extreme, the record shows they were predominately outside the courtroom itself, and thus less likely to have a direct impact on the panel. *See, e.g., Holbrook*, 475 U.S. at 568-69 (finding shackling of accused in front of panel inherently prejudicial). Typically, security measures outside the courtroom, such as armed guards and metal detectors, are not inherently prejudicial. *See United States v. Miller*, 53 M.J. at 507 (citing *United States v. Darden*, 70 F.3d 1507, 1534 (8th Cir. 1995)). Although the security in this case

went well beyond armed guards and metal detectors, it was not so far outside the experience of the panel members, all of whom were career military officers, that it would engender any concerns of inherent prejudice. Accordingly, we agree with the military judge that there was no inherent prejudice due to security measures at appellant's trial.

We likewise find no evidence of actual prejudice as a result of the security measures employed at appellant's trial. As noted above, the military judge instructed the panel members that security measures were a part of every trial and that they were for the protection of all participants in the trial. She clarified they had nothing to do with appellant and should have no bearing on his guilt or innocence. All members agreed they could follow the military judge's instructions. The military judge then conducted extensive voir dire of the panel members and allowed both parties great range to conduct individual and group voir dire. Appellant elected not to conduct any voir dire related to security measures and he did not seek to challenge any panel member on that basis.

There is nothing in the record to rebut the presumption the panel members followed the military judge's instructions. *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)). As there is no evidence any panel member harbored actual prejudice due to the security measures, the military judge did not err in denying the defense's motion.[33] Accordingly, we find no abuse of discretion in the military judge's denial of the defense's motion for change of venue due to pretrial publicity or heightened security at appellant's trial.

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[33] Appellant suggests we order a post-trial evidentiary hearing to determine whether the security measures at his trial influenced the members of his panel. *See United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). Our Superior Court recently addressed the standard for determining when a *DuBay* hearing is warranted, noting they "have long held that where a post-trial claim is inadequate on its face, or facially adequate yet conclusively refuted by the record, such a hearing is unnecessary." *United States v. Bess*, 80 M.J. 1, 13 (C.A.A.F. 2020) (quoting *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002)). A *DuBay* hearing is neither necessary nor warranted when an appellant's claim on appeal rests on speculation due to a lack of effort to develop the relevant facts at trial. *Id.* (citing *United States v. Ingham*, 42 M.J. 218, 224 (C.A.A.F. 1995)). Here, appellant did not develop the issue of actual panel member bias due to security measures on the record; therefore, we find a *DuBay* hearing is neither warranted nor necessary. *See also United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997) (setting forth six principles for determining whether a fact-finding hearing is required).

G. Whether this Court Can Conduct its Statutorily and Constitutionally Mandated Article 66 Review because Counsel Could Not Access the Entire Record of Trial

During the course of appellant's trial, a number of documents and items of evidence were marked as appellate exhibits and viewed either in camera or ex parte by the military judge. There was also one closed session during the merits portion of the trial. *See* R.C.M. 806(b)(2). At the conclusion of the trial, the military judge issued an omnibus sealing order that placed many of the aforementioned exhibits, as well as the transcript of the closed session, under seal. The order provided the basis for sealing each category of document and authorized access to the sealed materials consistent with R.C.M. 1103A. In general, the documents placed under seal were panel member questionnaires which included personally identifiable information (PII); security plans and threat analysis compiled in anticipation of appellant's court-martial; autopsy photos containing patient medical information;[34] crime scene photos; and information protected by attorney client-privilege.[35]

As part of the investigation into appellant's crime, federal authorities obtained warrants related to appellant under the Foreign Intelligence Surveillance Act of 1978 (FISA). 50 U.S.C. § 1801 *et seq*. The warrants yielded several email exchanges between appellant and a foreign national named Anwar al-Aulaqi, who was linked to terrorism and was residing outside the United States. Prior to trial, the government gave appellant notice that it intended to offer evidence obtained from the FISA warrant. 50 U.S.C. § 1806(c). Appellant, who was still represented by counsel, then filed a motion with the military judge seeking access to review the underlying FISA material, or in the alternative, to have the court declare any derivative evidence inadmissible. In accordance with Section 1806(f) of the FISA statute, the military judge transferred the matter to the federal district court in Texas for review. *See* 50 USC § 1806(f).

The federal district court reviewed the material in camera and found the FISA warrant was properly authorized and executed. *United States v Hasan*, No. 12-MC-195, 2012 U.S. Dist. LEXIS 194450 (W.D. Tex. 14 Aug. 2012). The district court further found that disclosing the materials to appellant would pose a substantial

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[34] *See* Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104-191, 110 Stat. 1936 (21 Aug. 1996).

[35] The sealed attorney-client privileged documents include motions and attachments filed by standby counsel regarding their role in appellant's trial, as well as the motion seeking to independently present mitigation as addressed above. The sealed attorney-client privileged information also contains documents related to the defense of others defense appellant sought to present to the panel and a memorandum from a defense witness who did not testify.

threat to the national security of the United States by damaging the government's ability to collect such information. *Id.* at *7. The district court therefore denied appellant's request for access to the FISA material. *Id.* at *12-13. The Federal Circuit Court of Appeals for the Fifth Circuit upheld the district court's decision. *United States v. Hasan*, 535 F.App'x 378 (5th Cir. 2013). Subsequently, the government declassified several emails between appellant and Anwar al-Aulaqi. Those documents were then provided to appellant through discovery. However, the government never admitted the emails obtained through the FISA warrants during either the merits or sentencing phases of trial.

When appellant's case came before this court for review pursuant Article 66, UCMJ, appellate defense counsel filed numerous motions seeking access to the sealed materials. Ultimately, this court granted appellate defense counsel access to the panel member questionnaires, the exhibits relating to security at appellant's court-martial, and to a number of the sealed documents containing crime scene photographs and medical information. *United States v. Hasan*, ARMY 20130781 (Army Ct. Crim. App. 6 July 2018) (order); *United States v. Hasan*, ARMY 20130781 (Army Ct. Crim. App. 31 August 2018) (order). However, with one limited exception, this court has denied appellate defense counsel access to those documents sealed pursuant to attorney-client privilege, or the work product doctrine, because appellant has not waived his privilege. *United States v. Hasan*, ARMY 20130781 (Army Ct. Crim. App. 16 October 2018) (order); *United States v. Hasan*, ARMY 20130781 (Army Ct. Crim. App. 18 Dec. 2019) (order).[36]

Appellate defense counsel now aver this court cannot conduct statutory and constitutional review of appellant's case because appellate defense counsel have been denied access to the FISA material and to those matters protected by the attorney-client privilege. Counsel also argue they cannot provide effective assistance of counsel on appeal without accessing the information in question. We disagree.

As to the FISA material, appellant has articulated no basis upon which this court could grant relief. At trial, appellant's request for access to the FISA material, as well his motion to suppress that evidence, were litigated in the proper forum according to the R.C.M. and the applicable federal statute. *Hasan*, 535 F. App'x

[36] After this court denied appellate defense counsel access to matters sealed by the military judge as being privileged between appellant and his standby counsel, appellate defense counsel petitioned the Court of Appeals of the Armed Forces (CAAF) for extraordinary relief in the nature of a writ of mandamus. The CAAF denied appellate defense counsels' petition on the grounds that appellate defense counsel failed to establish a clear and indisputable right to the writ. *Hasan v. United States Army Court of Criminal Appeals*, 2019 CAAF LEXIS 274 (18 April 2019).

378. To the extent appellant is asserting that decision is error, we find that any possible recourse does not lie with this court. *See United States v. Horton*, 17 M.J. 1131, 1133 (N.M.C.M.R. 1984) (holding Navy-Marine Court of Military Review does not have jurisdiction to hear challenges to the constitutionality of Section 1806(h) of the FISA statute); *United States v. Ott*, 26 M.J. 542, 545 (A.F.C.M.R. 1988).[37]

We further find that even if the federal district court erred, appellant suffered no prejudice. Ultimately, the government did not admit the declassified emails, nor any other evidence obtained through the FISA warrant. The emails that were not admitted at trial are included in the allied documents to the record of trial. As such, the declassified emails are available for review by appellate defense counsel, as well as this court. Having reviewed the entirety of the record, we find no indication the government relied upon any information or evidence derived from the FISA warrant in securing appellant's convictions and sentence. Accordingly, we hold that appellant's claim regarding the FISA materials lacks merit and provides no basis for any relief.

As to the sealed materials protected by the attorney-client privilege, we also find appellant is not entitled to any relief. Appellate defense counsels' requests for access to the sealed attorney-client privileged material have been vigorously litigated before this court. Rather than challenge those previous rulings, appellate defense counsel now argue they cannot provide effective assistance of counsel on appeal without access to the sealed material. We disagree.

Military Rule of Evidence 502(a) governs attorney-client privilege in courts-martial.[38] The time-honored privilege is ultimately controlled by the client. *United*

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[37] We note that federal courts have consistently held the procedures defined in the FISA statute do not violate the Constitution. *See United States v. Islamic American Relief Agency*, 2009 U.S. Dist. LEXIS 118505, *9 (W.D. Mo. 21 December 2009) (noting "[t]he constitutionality of FISA's provisions regarding the court's ex parte, in camera review procedures have been affirmed by federal courts . . . .") (citing *United States v. Isa*, 923 F.2d 1300, 1303 (8th Cir. 1991)); *United States v. Damrah*, 413 F.3d 618, 624 124 Fed. Appx. 976 (6th Cir. 2005)).

[38] Military Rule of Evidence 502(a) provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client" between a client and the lawyer and between lawyers representing the client. *See also* Army Reg. 27-26, Rules of Professional Conduct

(continued . . .)

States v. Romano, 46 M.J. 269 (C.A.A.F. 1997) (citing 8 Wigmore Evidence § 2292 at 554 (McNaughton rev. 1961)). As such, in the absence of an applicable exception, information protected by the privilege cannot be disclosed without the consent of the client. R.C.M. 502. In this case, the military judge reviewed the documents, which were submitted ex parte or provided in the closed ex parte hearing, and determined they were protected by attorney-client privilege. *See* R.C.M. 502; *United States v. Zolin*, 491 U.S. 554, 569 (1989) (approving of the practice of in camera inspection to determine whether disclosure is warranted). Appellant was given the opportunity at trial to waive privilege; however, he declined to do so. Accordingly, the military judge appropriately placed the documents under seal before adding them to the record of trial. *See, e.g., United States v. Branoff*, 38 M.J. 98 (C.M.A. 1993) (citing *United States v. Roberts*, 793 F.2d 580, 588 (4th Cir. 1986)); *see also* MCM, 2012, R.C.M. 1103A; *MCM*, 2019, R.C.M. 1113(b)(3)(B)(ii).[39]

Appellate defense counsel have moved this court to grant them access to review the attorney-client privileged documents for purposes of this appeal. This court reviewed the documents in question in camera. We denied appellate defense counsels' motions to review the privileged documents because appellate defense counsel have not identified an applicable exception under Mil. R. Evid. 502(d) which would authorize disclosure absent appellant's consent.[40] To date, appellant

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(. . . continued)
for Lawyers, Rule 1.6 (28 June 2018) (Confidentiality of Information); American Bar Association's Model Rules of Professional Conduct 1.6 (Confidentiality of Information) (2020).

[39] Rule for Courts-Martial 1113 was modified by the 2018 Amendments to the *MCM*, and except as otherwise noted above, did not substantively change in language, which in prior iterations was referenced as R.C.M. 1103A. *See MCM*, 2019, Appendix 15, ¶ A15-22.

[40] Military Rule of Evidence 502(d) provides five exceptions to the attorney-client privilege: (1) "[i]f the communications clearly contemplated the future commission of a fraud or crime . . . ;" (2) "[c]ommunications relevant to an issue between parties who claim through the same deceased client . . . ;" (3) "[c]ommunications relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;" (4) "[c]ommunications relevant to an issue concerning an attested document to which the lawyer is an attesting witness;" and (5) "[c]ommunications relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients."

has not waived his attorney-client privilege with regard to those documents.[41] *See United States v. Dorman*, 58 M.J. 295, 298 (C.A.A.F. 2003) (appellate counsel must obtain client's consent to release attorney-client protected information). Accordingly, the documents are unavailable to counsel for purposes of their representation of appellant before this court. *See Romano*, 46 M.J. at 275 (sealed documents not ordered released by a court of criminal appeals shall remain under seal).

Appellate defense counsel cite no authority for the proposition that their performance can be judged ineffective on the basis of material which a lawful court order prohibits them from viewing. In fact, the precedent of our Superior Court is directly to the contrary. *See United States v. Rivers*, 49 M.J. 434, 438 (C.A.A.F. 1998) (appellant not denied effective appellate review where counsel were prevented from reviewing sealed materials). Accordingly, we find appellate defense counsels' concerns about ineffective assistance of counsel to be without merit.

Finally, appellate defense counsels' contention that this court cannot perform its Article 66, UCMJ, review because certain documents remain under seal is also without merit. Article 66, UCMJ, requires this court to affirm only such findings of guilt or sentence as we find correct in law and fact based upon the entire record. Rule for Courts-Martial 1103 requires all matters presented to the trial court, even those not ultimately admitted, be placed in the allied documents to the record of trial. This requirement does not conflict with the long-standing premise that the trial court, either upon request, or for good cause, may seal matters at its discretion. Nor does the military judge's sealing order prohibit this court from reviewing the sealed documents. The military judge's sealing order specifically states that reviewing authorities, such as this court, are allowed to examine the sealed attorney-client privileged material. *See Branoff*, 38 M.J. at 103-04 (indicating that judge's order controls access). Such access is consistent with R.C.M. 1103A(b)(4), *MCM*,

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[41] This court ordered appellant's trial defense counsel to provide appellate defense counsel privileged documents for which appellant waived privilege due to his disclosure of those matters to a third party. *United States v. Hasan*, ARMY 20130781 (Army Ct. Crim. App. 17 May 2019) (order) (citing Mil. R. Evid. 510(a); *In re Itron, Inc.* 883 F.3d 553, 558 (5th Cir. 2018)).

2012,[42] and R.C.M. 1113(b)(3)(B)(ii), *MCM*, 2019,[43] which independently grant this court access to sealed materials when necessary to carry out our review function under the UCMJ.

In this case, we find that access to the sealed materials was necessary to complete our mandate pursuant to Article 66, UCMJ. *See Rivers*, 49 M.J. 434, 437-38 (citing *Pennsylvania v. Ritchie,* 480 U.S. 39, 59 (1987)); *see also Romano*, 46 M.J. at 275. We recognize our review may suffer from the absence of adversarial testing because independent review is not the equivalent of assistance of counsel. *See Rivers,* 49 M.J. at 437 (citing *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987)). However, we find this is a case where the needs of appellate defense counsel must yield to the status of the privilege to be protected. *See id.* at 437-38 (citing *Ritchie,* 480 U.S. at 59; *United States v. Nixon*, 418 U.S. 683, 706 (1974)). Accordingly, we have reviewed the sealed materials in camera and we find nothing contained therein affects the legal or factual correctness of the findings or sentence in appellant's case. *See id.* (citing *Ritchie*, 480 U.S. at 60-61). Accordingly, appellant's request for relief on this basis is denied.

CONCLUSION

On consideration of the entire record, we AFFIRM the findings of guilty and the sentence.

Chief Judge (IMA) KRIMBILL and Judge RODRIGUEZ concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

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[42] Rule for Courts-Martial 1103A(b)(4) (2012 ed.) authorizes reviewing and appellate authorities to examine sealed matters when determined "[t]hat such action is reasonably necessary to a proper fulfillment of their responsibilities under the [UCMJ, *MCM*], governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility."

[43] Rule for Courts-Martial 1113(b)(3)(B)(ii) (2019 ed.) authorizes examination by reviewing and appellate authorities of sealed matters reviewed by a military judge, not released to trial counsel or defense counsel.

[The session was called to order at 0946, 7 August 2013.]

MJ: Court is called to order. All parties are present as before; the members are not present. Standby counsel, Colonel Poppe and Major Marcee are seated at counsel table with Major Hasan, and standby counsel Lieutenant Colonel Martin is behind the bar.

Colonel Martin, if you'd step into the courtroom well, please, and take a seat at the table with Major Hasan?

[The ADC did as directed.]

ACC: Your Honor, if I may?

MJ: Yes, Major Hasan?

ACC: I know you're probably getting ready to discuss the motion to modify the role of standby counsel; I ask for an in camera hearing in that regard.

MJ: Well, let's see where we go. I understand the sensitivities here, and I think I may be able to address your concerns, but I'll revisit that in just a moment. Okay?

I am about ready to address this motion. I had a motion marked as Appellate Exhibit 389, a motion to modify the role of standby counsel, which was thrust upon the court late last night and this morning. The court's memorandum order on the role of standby counsel, that standby counsel appears to be moving to modify, is at Appellate Exhibit 354.

Let me just say what I have here – I've got the motion; I also have Enclosure 1; I also have Enclosure 2; I also have Enclosure 3, which has been marked by standby counsel as "sealed." I have not opened Enclosure 3, and I do not intend to open Enclosure 3. This morning, I was sent Enclosure 4, which is the Fox News report.

That's what I have – is that right, standby counsel?

DC: Yes, Your Honor.

MJ: Again, like I said, I have not opened Enclosure 3, and do not intend to open Enclosure 3.

This motion appears to have been filed publically, and served on opposing counsel. Government, did you receive a copy of this motion and its attachments?

TC: Ma'am, we received a copy of the motion with an attachment, but because we're concerned about getting things we're not supposed to – other than the Fox News report, which we've previously seen – I've directed the staff not to open things that the court addressed, until the court decides whether they can be properly released. Right now, I'm operating strictly off of Appellate Exhibit 389 and the Fox News stories.

MJ: When you say "Appellate Exhibit 389," you mean the body of the motion itself?

TC: Yes, ma'am. I'm actually concerned with the body of the motion itself.

MJ: The body of the motion itself, and then Enclosure 4, which is the Fox News release?

TC: Yes, ma'am.

MJ: You have not looked at Enclosures 1, 2 or 3?

TC: No, ma'am.

Ma'am, let me look to make sure.

MJ: When I say "you," I mean the government team.

TC: Excuse me – the stipulation of fact is Enclosure 2.

MJ: You've obviously seen that, because you agreed to that.

TC: That's before the court, so that's not problematic.

MJ: So you've looked at – I just want to make the record clear – you've looked at the body of the motion itself; you've looked at the Fox News release, which is Enclosure 4 ----

TC: Yes, ma'am.

MJ: ---- you've looked at Enclosure 2, which is the stipulation of fact that you and Major Hasan have come up with together. You have not looked at Enclosure 1, and you have not seen Enclosure 3, which has been self-identified by standby counsel as sealed material.

TC: Yes, ma'am.

MJ: When you say you have not looked at it, that means that the entire ----

TC: None of my staff have. I got it, and I'm concerned about it, so I said we weren't going to do anything until it was addressed what we should do with it. So, we didn't, and sent it back to the court.

MJ: What I'm going to do at this point is I'm going to order – no one on your staff, you or the other trial counsel, and no one on your staff, has looked at Enclosure 1 or Enclosure 3, is that right?

TC: Correct.

MJ: Thank you, Colonel Mulligan.

What I'd like to do at this point, in an abundance of caution, is I'm going to order the entire motion, and all of its attachments, sealed. Government, I'm going to instruct you to return, right now, all copies of the motion, and any attachments that were provided, and certify to the court, as officers of the court, that you have done so.

[The trial counsel did as directed.]

TC: Ma'am, for purposes of the record, the writing on the copy is my handwriting.

MJ: Thank you.

Has that been done?

TC: Yes, ma'am.

MJ: Thank you, government.

In the future, any pleadings or motions filed by standby counsel regarding these types of matters need to be filed ex parte and under seal until the court can look at them and determine their releasability.

Just looking at the body of the motion itself, it appears to contain privileged work product with Major Hasan and his expert jury consultant. So, let me just ask, as an initial matter, Major Hasan, were you aware of this motion?

ACC: I was aware that – I was aware that it was going forward.

MJ: Standby counsel told you that they were going to file this motion?

ACC: Yes, ma'am.

MJ: Before they filed it?

ACC: Yes, ma'am.

MJ: Did standby counsel provide you the motion before they filed it?

ACC: In verbal communication. I gave permission for him to file it.

MJ: You gave permission to Colonel Poppe, Lieutenant Colonel Martin and Major Marcee, individually and collectively, to file the motion?

ACC: Well, I didn't talk to – the only person I talked to was Colonel Poppe, and I just assumed he was representing the group. I wasn't aware of the enclosures that were – I wasn't aware of the details of the motion, the enclosures and stuff like that.

MJ: I don't want you to tell me what those details are right now.

Did you understand, Major Hasan, that the motion itself perhaps contained privileged material between you and your expert jury consultant, Dr. Frederick?

ACC: I really didn't give much thought to it. The main message that came across to me was that Colonel Poppe and the standby counsel, in general, that they had an ethical dilemma, and they were going to file a motion in that regard. So, I told them I basically gave them permission to proceed in that regard.

MJ: But my question is, did you know before this was filed that the motion – I'm not talking about the attachments necessarily, I'm talking about the motion that was filed – contained possibly privileged material or work product between you and Dr. Frederick?

ACC: I can't say that I do recall that, ma'am.

MJ: Standby counsel, what authority do you have to file a motion containing privileged material, possibly, between Major Hasan and his expert jury consultant, without getting his permission?

DC: Your Honor, I just have discussed with Major Hasan, both yesterday and previously, the issues we had with regard to his conduct in voir dire, and his lack of – I understand, Your Honor, we're tracking.

So, I did discuss, in particular, the voir dire materials as a part of this motion prior to it being filed, with Major Hasan. We did not provide copies of the motion until it was filed to Major Hasan, but he knew of the outline and the material that was to be discussed; in particular, we pointed out the discussion of Dr. Frederick's assistance, the materials, and the work product.

MJ: I don't want you to get into the specifics in this forum; I'm just talking in generalities here.

DC: Yes, Your Honor, as a general – to the extent that I can describe it, generally, that was discussed, in addition to other matters. As you're aware, there's other things that are a part of this with Major Hasan prior.

MJ: Major Hasan, any privilege belongs to you. Do you understand that?

ACC: I understand.

MJ: The court's reading of this with respect to the voir dire issues with Dr. Frederick – of course, voir dire has already passed, so there wouldn't appear to be any prejudice to you by release of this information by your standby counsel. But nevertheless, the privilege belongs to you.

Do you waive or agree to release the information regarding the jury consultant process?

ACC: No, ma'am.

MJ: Standby counsel, as I said, most of this material seems to deal with voir dire, which was weeks ago. Why did you wait until now to file this motion?

DC: Your Honor, it became clear, both with ----

MJ: Sorry to interrupt you. Are you speaking individually also for Major Marcee and Colonel Martin?

DC: We've discussed this thoroughly, Your Honor, and we have the same position for all three of us.

MJ: Is that true, Colonel Martin?

ADC: It is, Your Honor.

MJ: Major Marcee?

ADC2: Yes, ma'am.

MJ: Colonel Poppe, go ahead.

DC: Yesterday, it became clear as to the fundamental issue – Major Hasan's intent, the way that he was proceeding with regards to representing himself – the decisions he had made as to what his goals were. When it became clear, as was demonstrated yesterday – both in his opening statement, and during the conduct of the examination, the statements that he made in court, as well as the statements that he has, through his civilian attorney, released to the press. It becomes clear that his goal is to remove impediments or obstacles to the death penalty, and is, in fact, encouraging or working towards a death penalty ----

ACC: Your Honor, I object. I object. That's a twist of the facts.

MJ: Thank you, Major Hasan.

I've read your motion on that, Colonel Poppe. My question, though, without going into specifics in this forum, is – much of the motion appears to be based on your disagreement with the way that Major Hasan handled his voir dire. So, my direct and specific question is, why did you wait until yesterday evening to file a motion that seems to be substantially based on your disagreement with the way he conducted voir dire?

DC: Your Honor, we wouldn't characterize that to be the only – it is a substantial part, of course, as the court has – and all parties have acknowledged, for a long time, that in a capital case, voir dire is an essential and important part. We do view, as a group, the voir dire that was conducted in this courtroom wholly inadequate, and that there was a multitude of issues, factual

matters, and things that needed to be inquired of these members that simply was not. That's true. But, it is not the only thing – there is a multiple sequence of events that all become – in our mind, became crystallized yesterday and forced us into filing, last night, this motion, after discussion with Major Hasan, discussing with him our concerns, and to identify what we believed would resolve it. It became a final decision.

We also would note that, of course, there was additional voir dire that was conducted on Monday. We didn't know what would happen there, or what participation Major Hasan would have in that process, given the opportunity – for seven of the members, the very first opportunity – a first time that they were actually individually asked questions, that we knew what their voices sounded like in this courtroom, seven of the panel members, on Monday.

Your Honor, it is not just voir dire; voir dire is obviously very important, but there's a multitude of other things, as we've identified throughout the motion.

MJ: Again, I don't want to go into the details on that. I have the motion, and later, I want to go through each individual one.

But it appears to me, just at first blush, that you disagree with, in that respect, how Major Hasan conducted his voir dire. It seems to be to be a difference in strategy.

For instance, just as an example, you appear to think that it's not a good idea that Major Hasan didn't exercise a peremptory challenge. A lot of people would think that that's a brilliant strategy in a case where a unanimous finding is necessary, and you'd want to increase the numbers of the people sitting on the panel in the hopes of reaching that one outlier who would vote against the death penalty, or for a sentence other than the death penalty.

So, it seems to me, just at first blush, that it is a difference in strategy. Let me just kinda figure out, because the court is confused, exactly what this motion is. It is styled as a motion to modify the role of standby counsel; then in the body, or the request for relief, it seems to be asking to withdraw as standby counsel; then by the time you get to the end of the motion, it seems to say that you're ready, willing and able to resume as the defense counsel for Major Hasan.

So, the motion seems to be at war within itself, Colonel Poppe. I'm not exactly sure what you're asking for. It is a motion to modify? Is it a motion to withdraw? Is it a motion to resume as defense counsel? Or is it a motion to do something else?

DC: We regret your confusion, Your Honor, but I'll clarify. It is a motion – we stand ready to defend Major Hasan, should he decide that he wants to fight the death penalty – we're ready to defend him today. However, since that does not appear to be the case, we request that the modification occur, and that we become truly standby counsel; that we not be ordered and forced by the court to assist him in achieving the goal of arriving at the death sentence. That's what we're asking, Your Honor – that the modification occur, and we be truly standby counsel, and that you withdraw your order ordering us to assist him in doing what we believe to be repugnant to a defense counsel, and contrary to what our professional obligations are to be, highlighted yesterday by there was three times that you directed Major Hasan to discuss with his standby counsel things that we believe – and had questions about, what was the aim of Major Hasan? His direction – what was the aim for his tactical decisions to do so? We cannot play that kind of guessing game, when we know, and it is clear to us, is the overriding purpose and the overriding goal of Major Hasan's trial, Major Hasan's defense. We cannot be in that position,

and therefore, we would ask that the court modify its previous order, and place us in true standby status.

MJ: Let's go through the original court order, which is at Appellate Exhibit 354.

The first thing that I have ordered standby counsel to do is to attend all court sessions; are you asking me to modify that?

DC: No, Your Honor.

MJ: The second thing I asked standby counsel to do is to be prepared to resume the role of detailed counsel, should Major Hasan forfeit or revoke his right to pro se representation. Are you asking the court to modify that role?

DC: As we said, Your Honor, we're ready to do that at any time.

MJ: The third thing that the court had previously ordered was that standby counsel will provide assistance to the accused, only if and when specifically requested by the accused, and to the extent requested by the accused, standby counsel will play an investigative role and assist in locating specific witnesses or evidence. Are you requesting modification of that task?

DC: Yes, Your Honor.

MJ: What exactly are you requesting modification of? To not do that at all?

DC: Correct, Your Honor.

MJ: Secondly, to assist the accused in complying with basic courtroom protocol and procedure. Are you requesting modification of that?

DC: Yes, Your Honor.

MJ: How so?

DC: Your Honor, because again, providing even procedural assistance in achieving what we believe is a goal of moving toward the death sentence is contrary to our professional obligations as defense counsel.

MJ: Advising Major Hasan on an evidentiary matter, such as what is the rule on 'beyond the scope of direct examination' somehow furthers Major Hasan's strategy?

DC: It is assisting him in achieving a goal, and requiring us to provide assistance to Major Hasan directed toward his goal. There is no way that you can divorce even procedural actions within a courtroom from the overall trial strategy and tactics. That is a simple impossibility, Your Honor.

MJ: And oversee defense paralegals? You want that modified?

DC: Your Honor, we believe that the paralegals that are currently assisting Major Hasan are Fort Hood Trial Defense Service, specifically for me as a capital litigation team; therefore, requiring them to provide the assistance that is, again, repugnant to what a defense attorney and defense counsel, a defense team, should be ordered to – can do, specifically to assist a pro se accused facing a capital trial, to assist him in achieving the goal of moving closer to the death sentence is simply something that a trial defense paralegal should not be ordered to do.

MJ: And file and serve, on behalf of the accused, motions, memoranda and other legal documents prepared by the accused.

DC: Again, Your Honor, that is something that could be accomplished through other means, and doesn't ----

MJ: Are you requesting that the court modify that portion of its order?

DC: Yes, Your Honor.

MJ: So, you believe that you can't take a document that Major Hasan prepares and file it with the court reporter? You think you have some kind of ethical problem with that?

DC: Your Honor, the problem is that it is a matter of when we are acting as a liaison, it effectively does involve communications to and from the prosecution, for example, with regards to assisting Major Hasan in achieving his trial goals, which we believe are working in concert, essentially, with the prosecution towards a death sentence. That, we cannot do.

MJ: Thank you, Colonel Poppe.

But just to affirm, you don't have, apparently, any issues with being a standby counsel, or what we call a jump-in counsel, to be prepared to attend all trial sessions and jump in, should Major Hasan's pro se status change?

DC: That's correct. We affirmed that with Major Hasan last night; we've affirmed that with the court today, and we'd be ready to go at any time.

MJ: You'd also – okay.

You have no problems resuming the defense of Major Hasan, if he requests it, or the court orders it?

DC: That's correct, yes.

MJ: Major Hasan, do you have anything that you would like to present to the court to this matter ex parte? And if so, I'm going to give you the opportunity to do that in writing.

ACC: I have – I'd like to do that right now, ma'am, because I ----

MJ: Right now, we're not in an ex parte setting, and I want to give you that opportunity. You said that you'd like to present something ex parte, and I want to give you the opportunity to do that.

ACC: It is done now, ma'am. I wanted it to start ex parte, but in regards to ----

MJ: Hold on there a minute, Major Hasan. I was very careful here not to go into any type of specifics in there, so I'm going to give you the opportunity to present matters to me ex parte, and I want you to do that in writing.

ACC: I object, and I'd like to do that briefly, if I may?

MJ: Are you waiving ----

ACC: Yes.

MJ: Are you specifically waiving any privileges – I don't know what you're planning on going into here – but are you specifically waiving any privileges, and you want to discuss this matter in a non-ex parte setting?

ACC: Yes, ma'am.

MJ: Is anybody forcing you to make that decision?

ACC: No, ma'am.

MJ: I'm giving you the opportunity to present your argument, or anything else that you want me to consider, in an ex parte forum.

ACC: I understand.

I don't think it is what you think it is, ma'am. I just want to clarify about Colonel Poppe's assertion of me seeking the death penalty.

MJ: I would prefer that you give that to me in writing.

ACC: I object, ma'am.

MJ: You're not going to give me anything in writing?

ACC: No, ma'am.

Your Honor, Colonel Poppe has made an assertion ----

MJ: Just a moment, Major Hasan.

ACC: ---- and I feel compelled to clarify the issue.

MJ: You objected to what Colonel Poppe said is what you're telling me?

ACC: It isn't accurate, and I'd like to clarify that.

MJ: Hold on.

I'm going to conduct the rest of this hearing as an ex parte hearing. I'm going to clear the courtroom. That includes you, Bailiff.

[The spectators in the gallery, as well as the bailiffs, security personnel and trial counsels departed the courtroom.]

[END OF OPEN SESSION]

[END OF PAGE]

[The closed ex parte session commenced at 1016, 7 August 2013.]

MJ: The only people present in this courtroom – everyone has exited the courtroom. There are no bailiffs, there are no security officials, there are no spectators; the closed-circuit television feed, I want a confirmation that that has been turned off.

RPTR: [Affirmative response.]

MJ: Mr. Bulavko, the court reporter, has indicated to me that that has been turned off.

This portion of the transcript will be sealed. The only people in the courtroom are myself, Mr. Bulavko, the court reporter, Major Hasan, and his three standby counsel.

Major Hasan, what would you like to tell me?

ACC: In regards to seeking the death penalty, as Colonel Poppe had asserted, it is true the Mujahideen love death more than they love life – that's fact. My standby counsel aren't going to like this, neither are some of my family, and many in the Muslim community, but I am a Mujahid – I'm proud of that. I won't hide that fact. It is a matter of principle. I may have made some mistakes, and I apologize for those mistakes. But as I've stated before, we, the Mujahideen, are imperfect Muslims, trying to establish the perfect religion of Almighty Allah as supreme on the land, despite the disbeliever's hatred for it. My actions on November 5th are centered squarely on this statement. That's why I feel obligated to protect, and am sympathetic to, the Taliban in Afghanistan, Al-Qaeda, the Mujahideen in Iraq post-Saddam Hussein, Hamas, Hezbollah, the Ayatollah in Iran – I'm one of them. We, as Muslim-um are divided and have many shortcomings, and need much improvement, but the answer is not to replace man-made law for the law of God. The answer is for the Muslims to suspend their critical judgment and unite as one.

MJ: Thank you, Major Hasan.

Do you have anything else that you wanted to tell me about the motion?

ACC: The whole principle, ma'am, is the last 3 years, I feel like – it is just a matter of principle. I don't need to hide that I'm a Mujahid, and the court process is quite fine, the way I see it. You're overseeing it to make sure that it is fair, and I'm doing my part. Just because the defense counsel – their job, in my specific case, is for an eye towards getting death off the table, that doesn't mean I need to compromise my principles to do that, and that's what I feel like is occurring.

MJ: That's why you feel like what?

ACC: That's what I feel like is occurring, is trying to occur, these past 3 years – suggestions that maybe you can look at your – have you ever seen those pictures where you tilt it a certain way and you get one image? That's what I feel like is happening to me – the real image is straightforward; you tilt it towards the left, and that's what the defense wants the panel to see; if you twist it to the right, and that's what the prosecution wants the panel to see. But in reality, the picture is straightforward, and that's my goal – just to have a fair, accurate representation of who I am – not who the defense wants me to be.

MJ: Of course, you're preceding pro se – that, the court allowed you to do that. It is your constitutional right to do that. You understand that. We had all that discussion prior to the court granting your pro se representation status.

Do you believe that you are presenting the case as you see fit, without interference from standby counsel?

ACC: Yes, ma'am.

MJ: Do you still wish to precede pro se?

ACC: Yes, ma'am.

I am a little bit concerned, though, because Enclosure 2 – if you look at Enclosure 2, just to make sure that I'm looking at the right one; that's the stipulation ----

MJ: The stipulation of fact, yes.

ACC: That was in my shred bin; that wasn't given to – that wasn't in front a final copy in any way. If you look at the actual copy that was presented to the court, my handwriting is not on that, if I recall correctly. Is that correct?

RPTR: [Hands PE 3 to the court.]

MJ: I have Enclosure 2; it appears to have some handwriting on page one.

ACC: Ma'am, am I correct on that? Enclosure 2 – was that ever submitted to the court like that before today?

MJ: Not that I recall.

ACC: So, if that's accurate, they took something that wasn't meant for the court to see.

MJ: [Reviewing PE 3.] No, it was, I'm sorry. Prosecution Exhibit 3 contains that language, and has been submitted to the court.

ACC: Then I withdraw my complaint on that.

Just for the future, when I ask for something to be shredded, I'm afraid now that things are going to be used in such a way, 'Well, this is why Major Hasan shouldn't proceed pro se, because he is trying to seek the death penalty.'

MJ: You disagree with that statement that Colonel Poppe made?

ACC: Which statement are you talking about?

MJ: The one that you just told me.

ACC: The seeking the death penalty?

MJ: Yes.

ACC: Yes, ma'am.

MJ: You disagree with that?

ACC: Just as I outlined in my full statement there.

MJ: [After pause.] Major Hasan, with respect to the disclosure, you've already seen that the trial counsel, as officers of the court, have said that they have not Enclosures 1 and 3.

ACC: Just remind me which ones 1 and 3 are?

MJ: That's all of the – 1 and 3 is what the standby counsel labeled as "sealed." The trial counsel, as officers of the court, have said they never opened that.

ACC: That was just the voir dire questionnaires?

MJ: I don't know what it was, because I haven't opened Enclosure 3 either, and as I said, I don't intend to open Enclosure 3.

Enclosure 1 ----

ACC: Ma'am, if I may?

MJ: Yes?

ACC: Please unseal everything. I'm requesting that, because the voir dire questionnaires don't need to be sealed.

MJ: Let's see what we've got here, okay? Let's work through this together.

Enclosure 1 appears to be voir dire preparation documents;

Enclosure 2 is this draft stipulation of fact;

Enclosure 3 is something labeled "Defense witness work product – SEALED;" and

Enclosure 4 is the Fox News media excerpts – those clearly seem to have gone to more people than the media – I think that's out there.

So, let's look at it together. Enclosure 1 and 3, the trial counsel has returned all copies of the motion, and all four enclosures to the court reporter, and has certified that they have no copies remaining, and that they have not, ever, opened Enclosure 1 and Enclosure 3. Do you understand that?

ACC: I understand.

MJ: I have not opened Enclosure 3 either.

As I mentioned before, as far as the documents with Dr. Frederick, we're past voir dire now, so I don't necessarily see how any disclosure, even if the trial counsel or anybody had seen that, how it would be prejudicial, but I'm going to ask ----

ACC: I'm asking right now if you'd unseal it.

MJ: I'm going to ask you, do you believe that there's any remedial action that's warranted, based on standby counsel's disclosure of that information?

ACC: No, ma'am.

The part of the unsealing, ma'am, is that if we had done this in camera before all this began, that would've been my preference, but now that the whole idea that I'm seeking the death penalty is out, I feel compelled to address that, not just in front of you, but in front of the media that's hearing this. This is my reputation, my principles at stake here, and I don't want anybody to get a misrepresentation of – they might think, 'Hey, this guy is crazy because he is

seeking the death penalty.' I feel compelled to clarify that and say, hey, I'm not crazy, this is just a matter of principle. The Mujahideen, this is what we do. This is what we are. There's others like me that believe the same.

MJ: Are you specifically, Major Hasan, waiving any privileges that may have attached – are you waiving any privileges, specifically with respect to the jury consultant work product, based on your standby counsel's release of that information?

ACC: Yes, ma'am.

MJ: I told you earlier, the privilege belongs to you.

ACC: I understand.

[After pause] Your Honor, if Colonel Poppe could clarify something for me, at my request? He wants to explain himself what he meant as far as me seeking the death penalty. If you would, afford him the opportunity to do that.

MJ: Alright, just a moment.

[After pause.] Major Hasan, do you waive any issues regarding the release of the motion that was filed by your standby counsel?

ACC: Yes, ma'am.

MJ: You don't want to invoke the privilege of any privileged material that might be contained therein?

ACC: No, ma'am.

MJ: Do you want Colonel Poppe to further address this matter?

ACC: Just in regards to what I'd previously stated.

MJ: Colonel Poppe?

DC: Thank you, Your Honor.

Your Honor, Major Hasan and I have spent hundreds and hundreds of hours in one-on-one conversations about many things, more specifically about what his goals and approaches towards the trial were. While I didn't mean to imply, and I certainly would disagree with the idea and the proposition that Major Hasan is seeking death, what I said, what I mean, and what I firmly believe, is that Major Hasan is seeking to eliminate impediments to or obstacles to the death penalty, and is, in fact, embracing the death penalty, because of what it means in a variety of different issues – but not actually seeking death. He is not crazy, in my view; if I felt he were, I'd bring it to the court and we'd make a request to reopen the sanity board. But I do believe that he has made it clear that he is seeking what a death penalty brings. That's on several levels, the first of which is that Major Hasan would feel, and has made it known for years, that he would feel better and safer on the death sentence tier – the death sentence inmate tier at Fort Leavenworth – than he would be, even in protected custody, or the threat of general population. And that would be brought about by a death sentence ----

ACC: That's enough. I object for any further –

MJ: Alright.

ACC: That's not exactly what I had in mind, ma'am.

MJ: Thank you. That's enough, Colonel Poppe, on that.

Let me just ask you, in general, even if that were true, and Major Hasan is saying that it is not – but even if that were his strategy, what authority do you have that you cannot continue as standby counsel in the role as defined by the court?

DC: Your Honor, the authority is is that, maybe this court and other courts could find that a pro se accused can proceed in that direction under the UCMJ and the Constitution, there is no authority for a court to order defense counsel to provide assistance in achieving that goal, when that is clearly repugnant to what we stand for, and should stand for, as defense attorneys. We cannot ----

MJ: But Major Hasan just said that's not his goal. You just have a difference in strategy. It is like the example I gave you with the peremptory challenge – I just used that as an example. You pointed out that Major Hasan didn't exercise his peremptory challenge; there are a lot of people, learned counsel even, who would say that that is a brilliant strategy, as I said before, in a case where you have to have unanimity. You want to increase your numbers, hoping for one outlier. I'm just using that as an example; I'm not saying that'd be done for each and every one.

DC: I would say, Your Honor, that that's been a thoroughly discredited strategy by all the social science studies of jury behavior that exist out there today. Fifteen or twenty years ago, that was thought to be a strategy that should be embraced – it is no longer. That's the truth of the matter.

The second thing is, Your Honor, quite frankly, Major Hasan is saying that that's not true, and I was stopped – I have information and evidence that I know that says that that's not true; that, in fact, Major Hasan is seeking to eliminate impediments or obstacles to the death penalty, and is, in fact, embracing the prospect of the death penalty.

MJ: Even if – he says it is not, and even if it were true, again, I ask you, what authority do you have that you cannot continue on as the standby counsel in the very limited role, already, that the court has outlined for you as standby counsel?

DC: Your Honor, with regards to – it'd be outside the ethical rules that go towards – to the ABA Guidelines that mandate as to what capital counsel are required to do. Finally, Your Honor ----

MJ: What rule? What rules?

DC: We've cited them in our brief.

MJ: Any others, other than the ones you've cited here?

DC: No, Your Honor.

MJ: Go ahead.

DC: Your Honor, assisting – you are ordering us to assist him in achieving that goal. That is the fundamental problem. We cannot do that and be consistent with what we believe is a course of action is morally repugnant to us. To assist a former client, to assist a pro se accused, down that path is morally repugnant. It is appropriate for a government attorney to, as you have directed and noted, to push the envelope to achieve that goal. It is quite another thing to order a defense attorney to assist a pro se accused to do that.

MJ: But you're ready, willing and able to resume the defense of Major Hasan, should his pro se status change?

DC: Certainly, Your Honor, and act as defense counsel, and to make our decisions, and to exercise all of the strategic and tactical decisions that a defense counsel will make, you bet, Your Honor. We're ready to do that right now. I told Major Hasan that numerous times,

and I told him again last night. We stand here ready to do it today. Obviously, that is not a decision that we make; that is only up to Major Hasan, and we understand that, and that's a part of the constitutional rights that he has. But that does not mean that his exercise of a constitutional right to proceed pro se, to pursue this path that we believe he has chosen – there is no constitutional right for assistance of counsel to proceed down that path. That's what we object to; that's what we're asking the court to do – to put us into true standby counsel position, the way that a standby counsel is described, as a part of a role to being ready to jump in and provide the representation of a former pro se client. We're ready to do that.

ACC: Your Honor, I don't want to get off-track, but just about pursuing the death penalty –

Ma'am, just to give you a little bit of background information, we believe – the Mujahideen, the Muslims that believe in being martyred, the dilemma for me is that when I initially committed the act on November 5th, the thought was that of a martyr. So, I didn't die that day.

The panel, if they give me the death penalty, then my understanding is I would still be considered a martyr. So, seeking the death penalty, from that standpoint, I can understand, because they're basically deciding to kill me because of my acts on November 5th, and I was acting in the name of God, fighting in Jihad, and that's the wrong reason.

However, the Muslim community has criticized me, saying, 'Hey, I know that was what you were trying to do, but look what you did. You did it wrong. You didn't correctly do it in Islamic fashion.' Now, I'm like, 'Boy, if I didn't do it Islamically correctly,' now, dying,

being executed, is not considered martyrdom anymore. I've done a criminal act, and now, I'm just dying because I've done a criminal act.

These are the two things that are vacillating in my mind. I don't know if I would be a martyr if they executed me, because I'm not sure if I did it Islamically correctly. So, that's the dilemma. So, when he says 'seeking the death penalty,' it is true – if I had no doubt in my mind that I did it correctly Islamically, the November 5th event, if it was done Islamically correctly, and they gave me the death penalty, I'd feel assured, personally, that I would be considered a martyr. I don't know for sure, but you know, I would feel personally assured. God makes that final determination.

However, now that the Muslim community has brought up the point of, 'Hey, you broke your oath of office, and the Qu'ran clearly states that you have to keep your oaths; what you should've done is resigned your oath, left the country and then fought.' That was one of the arguments made. I was looking the Qu'ran and doing my own research, and I said, that makes sense, and perhaps my reasoning of why the oath wasn't relevant at the time, maybe it doesn't make that much sense. So I've been vacillating back and forth.

As far as seeking the death penalty, that's where I'm at. I still vacillate sometimes, back and forth. I just thought I'd add that, just for your general knowledge base.

MJ: Thank you, Major Hasan.

Do you still want to proceed pro se?

ACC: Yes, ma'am.

MJ: Do you still want standby counsel?

ACC: Yes, ma'am.

MJ: Do you still want these standby counsel?

ACC: Yes, ma'am.

MJ: I'm also ordering the court reporter, with these ex parte proceedings – as I said, everything that we have discussed on the record since I called this hearing ex parte, until we go off the record here, is going to be sealed. I'm giving an order to the court reporter, who is the only person in here, other than you and me, Major Hasan, and your three standby counsel, that he is not to divulge anything that he may have seen, read or heard in this hearing to anyone. Obviously, no one else is in this courtroom.

ACC: Your Honor, do you mind if I make – just because of what was already heard, just make a statement that the public would hear, just clarifying seeking the death penalty? Just like what I read to you – just limited to that.

MJ: Let me figure out how I'm going to handle that.

What I'm going to do is take some time to consider all this. I'm going to give an instruction to the – Major Marcee, do you have something?

ADC2: Ma'am, I would request to be heard.

MJ: Go ahead.

ADC2: Ma'am, I just want to be clear – at no point am I saying that Major Hasan shouldn't be able to proceed pro se; I don't think any of us involved would. When we do say that we are ready to jump back in and defend his life, that is absolutely true. We're not challenging his right to be his own attorney right now; simply, what we're challenging is – it is not a matter of strategy, Your Honor. If it was strategy, like his use of a peremptory challenge – if it was just strategy, I would sit here, I would be quiet, and I would answer Major Hasan's

questions, when asked. But there are numerous other things highlighted in the motion, and I know that Colonel Poppe talked about, that go to what Major Hasan had offered today, saying that he is a Mujahideen, and Mujahideen like the death penalty, or like death. Again, it fundamentally comes down, for me, personally, that as a defense counsel, if I'm asked to further, in any way, shape or form somebody who is seeking a death penalty, that goes against what I believe my role is as a standby counsel. Again, it is more than just strategy; if a strategy was, 'I think this is the best strategy to not get a death penalty,' then I can certainly support that and serve as standby counsel in that role.

The other thing I'd like to add to the record is just with regard to Enclosure 2 – Prosecution Exhibit 3 – that handwritten portion was not taken out of a shred bin; that was taken from what as in an email provided to the government, at Major Hasan's direction. So, that was not something pulled from a shred pile.

Thank you, Your Honor.

MJ: Thank you, Major Marcee.

ACC: Ma'am, I apologize for my mistake in that case. I think we already cleared that up though.

MJ: Thank you, Major Hasan.

I'm going to take some time to consider this. I'll advise the court officials to take the rest of the day, and just tell everybody to come back tomorrow morning.

What we're going to do, we'll go ahead and recess now. Is there anything else, Major Hasan, that you'd like to say?

ACC: No, ma'am.

MJ: We'll go ahead and recess now, and this is the end of the ex parte hearing.

Court is in recess.

[The session recessed at 1050, 7 August 2013.]

[END OF EX PARTE SESSION.]

[END OF PAGE]

[The session was called to order at 0904, 8 August 2013.]

MJ: Court is called to order.

All parties present when the court recessed are again present; trial counsel are present, Major Hasan is present; standby counsel is present; the members are not present.

I closed the court yesterday -- the public is now present.

I closed the court yesterday to the public and had an *ex parte* 39(a) session. I do that on very rare occasions, and I do it pursuant to Rule for Court-Martial 806. In this particular instance, I believed that we needed to do that to address some issues that arose between standby counsel and Major Hasan, and issues relating to the release of privileged attorney work product, attorney/client, and other privileged communications. There was substantial probability that an overriding interest of retaining the confidentiality of those communications would be prejudiced if the proceedings remained open, and I believed that other means to address the issue were inadequate.

But, obviously, the court is now open, and I now want to address the motion to modify the role of standby counsel, which was filed by standby counsel. Lieutenant Colonel Martin, if you would please enter the courtroom well.

[The ADC did as directed.]

Please take a seat with Colonel Poppe and Major Marcee and Major Hasan.

I have reviewed the standby counsel's motion to modify their role, along now with all of its enclosures. The court believes that this is simply a matter of standby counsel disagreeing with the way Major Hasan wants to try his case.

Major Hasan is competent to represent himself. He has made that election knowingly and intelligently, and the Constitution grants him that right. Standby counsel may not agree with the way the accused is proceeding, they may want to try the case differently, but Major Hasan determines his trial strategy, not standby counsel -- that is the essence of Major Hasan's right to represent himself.

The court has already defined a very limited role for standby counsel in its order of 18 June 2013. Standby counsel have been fulfilling that role since then, and only Tuesday, after the first day of presentation of evidence, moved to further limit their role. If you follow standby counsel's argument, then no standby counsel could be appointed to perform the role assigned by the court, and that is simply not the legal standard. The ABA Standards for Criminal Justice, Special Functions of the Trial Judge, 6-3.7(a) state plainly that standby counsel should always be appointed in capital cases with a *pro se* defendant. The role of standby counsel is left to the broad discretion of the trial court, and this court has already greatly restricted the scope of standby counsel's duties.

While moving to further limit their role, standby counsel at the same time state that they are ready and willing to resume the role of detailed defense counsel should Major Hasan's *pro se* status change, further highlighting that this is nothing more than their disagreement with Major Hasan's trial strategy, which does not provide cause for the requested relief.

The standby counsel motion to modify role of standby counsel is denied. Standby counsel are hereby ordered to comply with the court's 18 June 2013 Memorandum Order.

Colonel Martin, you may return to your position in the front row of the spectator gallery.

[The ADC did as directed.]

We have the panel lined up to come back in at 9:30. I don't know if they are here already.

TC: Ma'am, they weren't told to be here until 9:30, I don't think they're here yet.

MJ: This would be a good time anyway for me to--thank you, Colonel Mulligan.

This would be a good time anyway for me to address the spectator gallery. I am just going to start calling you all members of the spectator gallery.

Some of you may have been here on the first day of trial and some of you may not have been. So, I want to just advise you on how I run my courtroom and how we're going to run this court. For those of you who may not have heard it the first day, I understand -- this court understands that this case may provoke powerful emotions with some people. Some of the evidence may be graphic or complex; some may be emotional; some may be tedious, but this court has the responsibility to ensure that this trial is conducted with a proper decorum.

Spectators will remain silent during all proceedings. There will be no talking, shaking of heads in approval or disapproval, or any other signs or signals of approval or disapproval of the proceedings. There will be no outbursts. We are going to carry on in a quiet, calm, and dignified manner. If you think that you can't do that, then you just simply need to excuse yourself beforehand and exit the courtroom and then come back in during the next recess after you have had a chance to compose yourself. As in all cases, we're going to carry on as I said in a quiet, calm, and dignified manner.

UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES	)	
	)	Motion for Appropriate Relief
v.	)	
	)	Change of Venue
NIDAL M. HASAN	)	
Major, U.S. Army	)	
Headquarters and Headquarters Troop	)	
21st Cavalry Brigade	)	
Fort Hood, Texas 76544	)	6 February 2013

RELIEF REQUESTED

MAJ Nidal M. Hasan, by and through counsel, hereby moves this Court to order a change of venue.

BURDEN OF PROOF AND STANDARD OF PROOF

The Defense has the burden of proof on any factual issue. R.C.M. 905(c)(2). The standard of proof on any factual issue is preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

I. Background

1. On 12 November 2009, MAJ Hasan was charged with 13 specifications of premeditated murder pursuant to Article 18, UCMJ for allegedly shooting multiple individuals at the Fort Hood Soldier Readiness Center on 5 November 2009. On 2 December 2009, MAJ Hasan was charged with 32 specifications of attempted murder pursuant to Article 80, UCMJ arising from the same incidents.

II. The environment at Fort Hood and Killeen, TX

1. The immediate impact of the shooting on the Fort Hood and Killeen, TX community was tremendous and unprecedented. The reaction of the community was unlike anything before. Exhibits 1-8 capture the immediate impact on community. This impact included but was not limited to: lockdown of Fort Hood, lockdown of the Killeen Independent School District, the activation of emergency alert sirens on Fort Hood and announcements over the emergency broadcast system to "stay inside, find shelter, and avoid the emergency situation", SWAT team response, searches conducted by ATF bomb squads, FBI and Texas Ranger investigations, complete lockdown and closure of Scott and White Memorial Hospital to the public, air patrols by Apache helicopters, a blood drive organized by the red cross, a visit by former President George W. Bush and his Wife Laura Bush, public comments by the President of the United

States following the shooting, and a memorial service at Fort Hood just days after the shooting attended by the President, Secretary of Defense, Chairman of the Joint Chiefs of Staff, the Secretary of the Army, and the Army Chief of Staff where President Obama spoke about the tragedy of the shootings.

2. Due to the impact of the shooting on the community, and the pervasive media coverage, it is practically impossible for anyone at Fort Hood to remain isolated from the hostility of the community. The Military Judge in Appellate Exhibit I(a) admitted that numerous people have made prejudicial comments to him about the case such as: "he is guilty," "that should be an open and shut case," "What defense can he have?" "They should have killed him that day" and "it would have been cheaper to kill him that day." (Appellate Exhibit I(a)).

3. This impact was recognized by LTG Robert Cone, the Commanding General of U.S. Army III Corps and Fort Hood, who said "the tragic events of November Fifth *profoundly* impacted each of us personally and the community as a whole." (Enclosure 9).

4. There is a permanent monument emplaced at Fort Hood's Memorial Park just two miles from the courthouse where this case will be tried. The names of the deceased victims are inscribed upon a large headstone with the words, "Death leaves a heartache no one can heal. Love leaves a memory no one can steal." (Enclosure 10 & 11).

5. Killeen also plans on building a memorial to honor those killed in the Fort Hood shooting. The memorial will be prominently located near the Killeen Civic & Conference Center on South W.S. Young Drive in Killeen, Texas. (Enclosures 12, 13).

6. Pictures of the deceased victims are hung on a fence line adjacent to the shooting site. Accompanying the thirteen individual pictures are flowers, American Flags, and wreaths. (Enclosures 14 – 17). These have been hanging since the day of the shooting.

7. Fort Hood has taken several precautions to physically secure the courthouse. Prior to the start of pretrial hearings there were no physical security measures in place outside the courthouse or the surrounding grounds. In 2011, initial precautions included construction of fencing around the back side of the courthouse with green mesh to obscure views, topped with barbed wire. (Enclosure 18 – 20). Inside this fenced area is a trailer for the accused and defense team (Enclosure 20) and also a trailer for panel members. (Enclosure 21). Once trial begins, a fenced-in breezeway with green mesh will connect the panel member trailer and courthouse to obscure the view of panel members. (Enclosure 21 – 23).

8. When pretrial hearings occur, an entry control point is established at the end of the courthouse driveway with a steel arm that can be manually raised and lowered by armed guards with automatic weapons. (Enclosure 24 - 25). In order to proceed beyond the entry control point, identification needs to be verified by a team of armed Soldiers and military police. Once past the entry control point, vehicles must swerve around barriers that are placed in the driveway forcing vehicles to travel at slow speeds. (Enclosure 25 -27). Once parked, in order to enter the courthouse it is necessary to pass through a metal detector manned by two armed Soldiers also holding automatic weapons. (Enclosure 28). All of the precautions from the entry control point

through the metal detector are only used on days when there are pretrial hearings for this case. During "normal" court days there are no active securities measures in place outside of those required to enter onto the military base.

9. In anticipation of the actual trial, sometime between 12 July 2012, and 25 July 2012, Fort Hood constructed a barrier around the courthouse. This barrier consists of approximately 180 steel shipping containers stacked between one and three stories in height. The containers surround the entire courthouse complex with the exception of two ingress and egress points, one directly in front of the building, and another to the side of the courthouse. The containers can be observed from nearly a quarter mile away and off of the installation. (Enclosure 25, 29 – 34). Comparatively, what once looked like Exhibit 35 now looks like Exhibit 30 & 36.

10. After the containers were erected additional security was added in the way of roving armed guards. Ten to fifteen roving armed Soldiers with automatic weapons are positioned inside the compound. Moreover, four to five armed Soldiers with automatic weapons are also positioned inside the fenced area behind the courthouse. Accompanying these Soldiers are generally 2 – 3 Department of Emergency Services guards who are also armed and stationed inside the trailer where MAJ Hasan and the defense team can meet during breaks in court.

11. After the removal of Judge Gross in December 2012, additional securities measures were emplaced. In order to proceed past the access control point not only was valid identification required, but vehicles must be completely searched. While the vehicles are being searched each person is required to undergo metal detection via a wand shaped metal detector. Passing through a metal detector is also required in order to enter the courthouse. On average, a detail of 5 – 6 armed Soldiers with automatic weapons man this access control point.

12. The security measures implemented are part of a security plan developed by III Corps and Fort Hood, presumably based upon a perceived hostile threat against MAJ Hasan and adequate response to counter this threat. Exhibit 37 illustrates the III Corps security measures. This plan depicts two access control points (ACPs) to the compound, 15 military police officers, 4 security response team (SRT) members, a Sergeant of the Guard (SOG), a personnel search tent, a landing zone (LZ), a security landing zone, a quick reaction force (QRF) tent, a surveillance systems on and off post, airspace security via Sky Watch, and additional concrete barriers.

13. On top of these security measures, there are additional security measures taken for MAJ Hasan's personal safety. When being transported from the Bell County jail, where he is in pretrial confinement, to the courthouse, he is required to wear a bullet proof vest and a Kevlar helmet. He is flown by military helicopter from the jail to Fort Hood and is accompanied by a detail of armed guards. Once at Fort Hood he is driven in an armored vehicle from the helicopter landing zone to the courthouse. Once at the courthouse grounds, the van must pass through an entry control point in order to enter the compound. The van must then pass through another ingress point which enters the fenced area behind the courthouse. At all times MAJ Hasan is accompanied by at least two armed guards from the Department of Emergency Services. When court is in session these armed guards sit behind MAJ Hasan in the courtroom gallery.

14. As trial approached on 8 August 2012, just days before the initial scheduled trial date of 20 August 2012, the Killeen Police Department distributed flyers to restaurants in anticipation of the upcoming trial. The flyers offered tips on how to spot terrorists and possible indicators for identifying suicide bombers. The Temple Daily Telegram published an article about these flyers on 9 August 2012, entitled "Killeen Warns Restaurants to Watch for Suicide Bombers" where the flyers were discussed in connection with Naser Abdo's attempted bombing of a Killeen restaurant in honor of MAJ Hasan. (Enclosure 38 & 39). As explained in Enclosure 40, an article from the local Killeen Daily Herald, Abdo stated during his sentencing that, "I am comfortable in the shadow of my brother Nidal Hasan that outdid me in Jihad." The article later reports that the flyers were passed out to local restaurants so that they can "create action plans for possible suicide bomber attacks" in preparation for MAJ Hasan's court-martial.

III. Community hostility generated and illustrated by the local publicity

15. Reliable scientific methods must be exercised when determining whether the pretrial publicity has inflamed a community. Because the Court denied the Defense the assistance of Dr. Steven Penrod, there was no option but for a Defense paralegal, SSG Lafree Ryan, to conduct a limited analysis of the pretrial publicity between the dates of 5 November 2009 and 30 March 2012. Prior to undertaking this task, SSG Ryan had no training, education, or experience in media analysis or any related field. SSG Ryan's analysis is included as enclosures to this motion. (Enclosure 41 – Local Media Analysis; Enclosure 42 – SSG Lafree Ryan's Affidavit #1; Enclosure 43 – SSG Lafree Ryan's affidavit #2 dated 22 January 2013). Within the facts section of this motion are excerpts of charts contained within the media analysis.

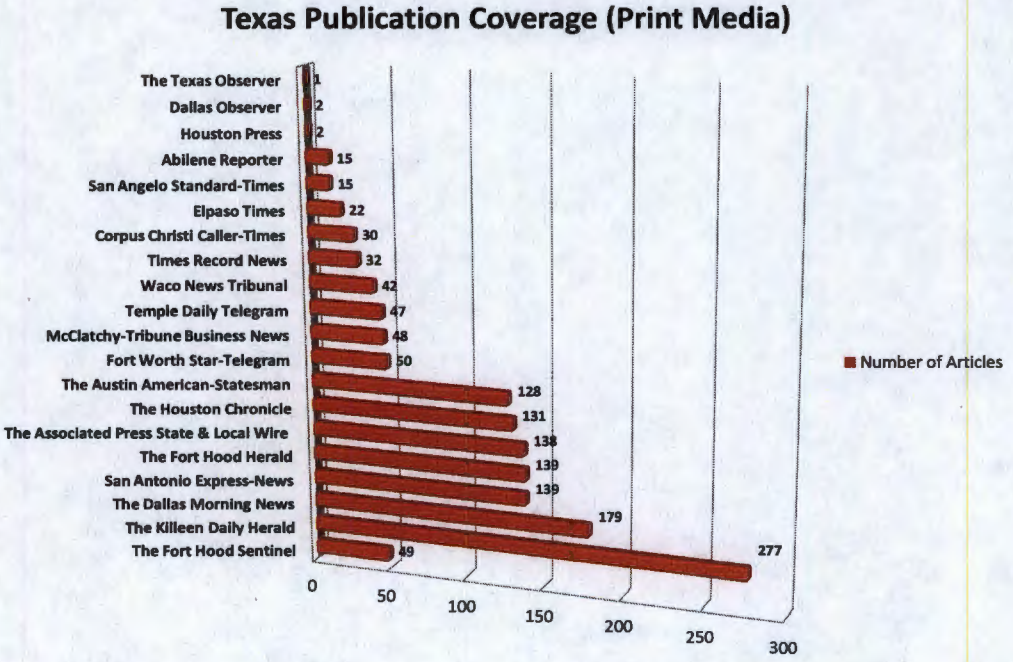
16. Between 5 November 2009 and 30 March 2012, there have been over 21,230 articles publications nationally about the Fort Hood shooting, MAJ Hasan, and this court-martial. This extensive media coverage has included newspaper articles, television reports, magazine articles, online media, blogs, and virtually every form of publication possible. This does not include local articles.

17. In a special 'double issue' of Time Magazine, MAJ Hasan's official military photograph appeared on the front cover with the word 'terrorist' spelled out across his face. (Enclosure 44). The approximate circulation of Time Magazine is 3,300,000 readers. (Enclosure 45). As an introduction to the enclosed story about MAJ Hasan, an illustration appears with MAJ Hasan, in uniform, face covered in blood, the Islamic Crescent appears on a Mosque in the background, and blood is dripping down an American Flag. In the article itself MAJ Hasan is referenced as the 'new face of terrorism' and a 'violent Islamic extremist.'

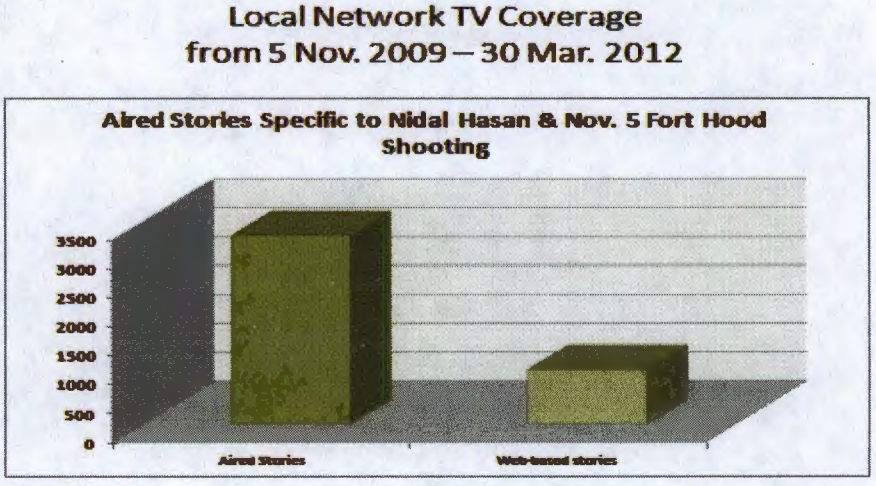
18. In addition to the tremendous amount of media coverage within the national and service specific press, there has been a remarkable amount of local media coverage. Between 5 November 2009 and 30 March 2012, there were 1,486 articles published locally about this the Fort Hood Shootings and this trial.[1]

[1] Within the Killeen and Fort Hood, Texas area alone, there were 1486 articles published about MAJ Nidal Hasan, the Fort Hood shootings, or this trial. The numbers of articles per newspaper were obtained directly from the results retrieved from keyword search "Nidal Hasan."

5 Nov 2009-30 Mar 2012



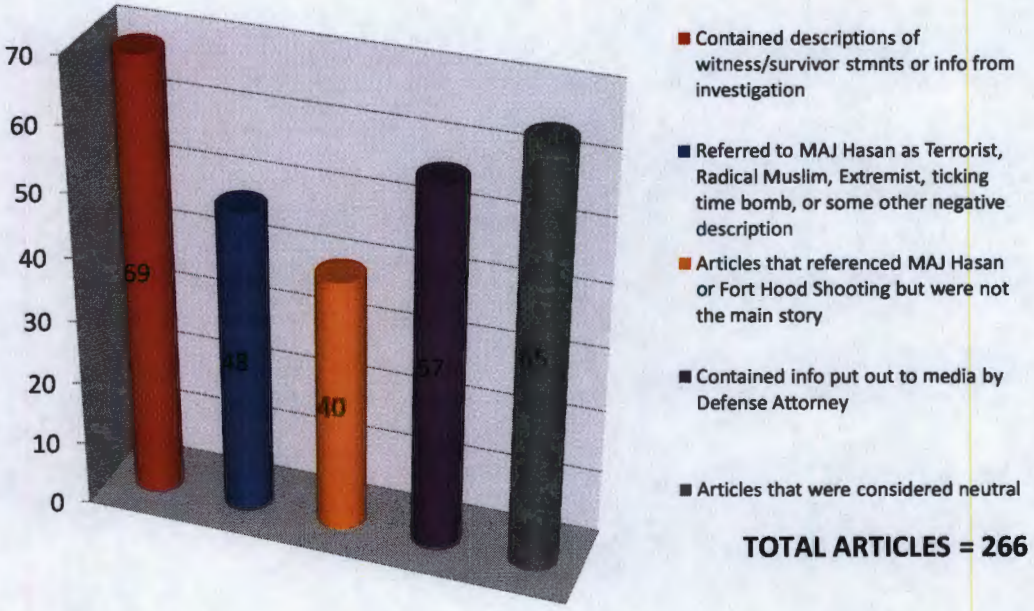
19. In the local Killeen, Texas and Austin, Texas area, there were approximately 3,260 televised news stories specific to MAJ Hasan and the Fort Hood shootings. Additionally, there were 943 web-based Articles specific to MAJ Hasan and the Fort Hood shootings.[2]



[2] In the local Killeen, Texas and Austin, Texas area, there were approximately 3,260 televised news stories and 943 Web news stories specific to MAJ Hasan and the Fort Hood shootings. The approximate number of televised news stories was obtained directly from a representative at the following local networks: KXXV 25, KWTX 10, KCENT 6, KWKT Fox 44, and News8 Austin.

20. The Killeen Daily Herald is a large local news paper in the Fort Hood area. 44 percent of the articles published by the Killeen Daily Herald were prejudicial to MAJ Hasan. Of the 266 articles published, 69 (26%) contained witness statements, survivor statements, or information from the investigation; 48 (18%) referenced MAJ Hasan as a terrorist, radical Muslim, extremist, ticking time bomb, or apply some other negative label; 40 (15%) made ancillary references to MAJ Hasan or the Ft. Hood shootings within articles about other topics; 57 (21%) were articles containing information released by MAJ Hasan's previous civilian defense attorney; and 65 (24%) of the articles could be considered neutral in coverage.[3]

Articles From Killeen Daily Herald Newspaper Related to Fort Hood Shooting From 5 Nov. 09 to 30 Mar. 12



21. On 12 November 2009, the Fort Hood Sentinel featured on its front page a picture of the President of the United States and the First Lady standing in front of a table with thirteen sets of the traditional symbol for a Soldier killed in action (a pair of empty boots with a upside down riffle and protective helmet resting on the butt of the rifle). The President and First lady are backed by rows of Soldiers. (Enclosure 46).

22. On 26 June 2012, the Killeen Daily Herald published a story about the media circus that will ensue if this trial occurs at Fort Hood. (Enclosure 47). Further, the story describes the Mayor of Killeen, Texas urging residents to explain to visitors in town for the trial "*how we wrap ourselves around the soldiers at Fort Hood....*"

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[3] A paralegal working with SSG Ryan pulled all articles related to Nidal Hasan or the Fort Hood shooting published in The Killeen Daily Herald, from 5 November 2009 to 30 March 2012, which was a total of 266 articles. The paralegal placed each article within one of five categories. Some articles were placed in more than one category if the content required such placement.

IV. Additional facts supporting a change in venue

23. In addition to security concerns at the courthouse, the physical courtroom setup and size is not adequate for this trial. The panel box at the Fort Hood courtroom is currently set up to comfortably seat only ten members. There is no way to add additional panel members without uncomfortably crowding them within a box that is too small, or adding a row within the well where attorneys sit and operate. At the same time, the Fort Hood courtroom is well known to have heating and cooling difficulties, and running the air conditioner can make testimony difficult to hear.

24. The panel deliberation room seats ten members, and will be uncomfortably crowded if twelve or more seats are added. In the panel member trailer there is a conference table that seats seven members.

25. Of the 270 witnesses that may testify at trial, only 95 of the witnesses reside within one hour's drive of Fort Hood. This area includes Austin, Round Rock, Temple, Belton, Georgetown, Salado, and other nearby locations. 175 witnesses live outside of this area.

26. Of the 103 remaining panel members, 86 reside outside the state of Texas and only 17 are located in Texas.

AUTHORITIES

United States Constitution Fifth and Sixth Amendments
Rules for Court Martial 906(b)(11)
Federal Rule for Criminal Procedure, Rule 21
In re Murchison, 349 U.S. 133 (1955)
Irvin v. Dowd, 366 U.S. 717 (1961)
Estes v. Texas, 381 U.S. 532 (1965)
Sheppard v. Maxwell, 384 U.S. 333 (1966)
Holbrook v. Flynn, 475 U.S. 560 (1986)
United States v. Gravitt, 5 U.S.C.M.A. 249, (C.M.A. 1954)
United States v. Mallicote, 13 U.S.C.M.A. 374 (C.M.A. 1962)
United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003)
United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996)

Evidence and Witnesses

Enclosure 48- A CD that includes all newspaper and television publications mentioning this case that appeared in the Killeen, Texas and Fort Hood community between 5 November 2009 and the date of filing.

First Sergeant Robert Kovacs
Captain Edwin A. Nunez, Sr.
Sergeant First Class Sabrae Bell

SUMMARY OF ARGUMENT

The effect of the Fort Hood shooting on the Fort Hood and Killeen community has been tremendous. The community hostility is so great that to counter the perceived threat during trial, the courthouse grounds will appear more like a warzone than an impartial facility for the administration of justice. Such hostility not only poses a security threat, but also an increased likelihood of adverse community influence on the panel members during trial. Therefore, the Court should order a change of venue in order to protect MAJ Hasan's right to Due Process.

Argument

BECAUSE MAJOR HASAN CANNOT RECEIVE A FAIR TRIAL AT FORT HOOD, THE COURT MUST ORDER A CHANGE OF VENUE.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." United States Constitution, 6th Amendment. The Supreme Court has held that the constitutional right to due process requires that a defendant be guaranteed the right to "a trial by an impartial jury free from outside influences." *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966). This doctrine is based upon the constitutional right to due process." *United States* v. *Simpson*, 58 M.J. 368, 372 (C.A.A.F. 2003). To guarantee these protections, judges have the authority to order a change in venue. See R.C.M. 906(b)(11).

R.C.M. 906(b)(11) allows the place of trial to be moved "when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby." The Discussion to R.C.M. 906(b)(11) also states that the trial may be moved if "there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial there." R.C.M. 906(b)(11).[4]

Change of venue is appropriate if an accused can "establish that [he] cannot be afforded a fair and impartial trial because of hostility or prejudice existing against him at the place of trial. *United States v. Mallicote*, 13 U.S.C.M.A. 374, 386 (C.M.A. 1962) (dissent). As explained in *Gravitt*, if an accused can demonstrate "[a] general atmosphere of hostility or partiality against him, existing at the place of trial, he would be entitled to be tried in some other place. *Substance not form determines the nature of the relief sought.*" *United States* v. *Gravitt*, 5 U.S.C.M.A. 249, 256 (C.M.A. 1954) (*emphasis added*).

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[4] By comparison, Federal Rule for Criminal Procedure, Rule 21 states:
"(a) **For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) **For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." Fed. R. Crim. Pro. 21.

Prejudice can manifest from a variety of sources. One source of prejudice can be pretrial publicity that is saturating, prejudicial and inflammatory. See *Simpson*, 58 M.J. at 372; *Sheppard*, 384 U.S. 333. Another source of prejudice could result from community reaction. See *Gravitt*, 5 U.S.C.M.A. at 256; *United States v. McVeigh*, 918 F. Supp. 1467 (W.D. Okla. 1996).

A third source of prejudice can be courtroom security. The Supreme Court, in discussing security measures implemented in a trial, held:

> If a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process . . . little stock need be placed in jurors' claims to the contrary. Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "*an unacceptable risk is presented of impermissible factors coming into play.*"

Holbrook v. Flynn, 475 U.S. 560, 570 (1986) (*emphasis added*) (citing internally *Estes v. Texas*, 381 U.S. 532, 542-43 (1965; *Sheppard*, 384 U.S. at 351-52; *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

In sum, these sources of prejudice can reflect the hostility in a particular venue. When examined in the context of this case, it is clear that the hostility in Killeen and Fort Hood create an unacceptable risk of prejudice. Were this trial to occur at Fort Hood, MAJ Hasan's due process rights would be violated.

In recognition that prejudice may require a change in venue to promote justice and prevent even the mere appearance of unfairness, Justice Black wrote:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . To perform its high function in the best way *'justice must satisfy the appearance of justice.*'"

In re Murchison, 349 U.S. 133, 136 (1955) (internal citations omitted) (*emphasis added*).

In this case, Justice will not satisfy the appearance of justice where: the trial is to occur less than four miles from the site where thirteen people were murdered and another thirty-two were shot, where the President of the United States spoke at a memorial service for the shootings less than four miles from the courthouse, where there was a tremendous amount of local pretrial

publicity, and where the local community has been deemed so hostile by the Government that they have transformed the courtroom grounds into a compound resembling a forward operating base (FOB) in a war zone, which the panel members must pass through multiple times a day during trial. The prejudice resulting from such circumstances severely detracts from the reliable result required in a capital case. If a death penalty is adjudicated under these circumstances it will undoubtedly be reversed.

THE REASONS TO CHANGE VENUE FAR OUTWEIGH ANY REASON TO HOLD THE TRIAL AT FORT HOOD.

1) **The shooting had a tremendous effect on the local community and created an atmosphere of hostility**

The Fort Hood and Killeen community were tremendously affected by the shooting. The tragic events of one day were so horrific that they captivated the entire nation, and continue to do so. On 5 November 2009, the entire nation's attention turned to Fort Hood and Killeen, Texas. On this day the Federal Bureau of Investigations, Alcohol Tobacco and Firearms agents, the Texas Rangers, the Texas state police, a SWAT team, and the Killeen Police Department all converged on Fort Hood. The local schools were locked down, the Scott and White Hospital was locked down, Fort Hood was locked down, and Apache helicopters patrolled the sky. Days later former President Bush and his wife made a visit to victims of the shooting. The effect of the shootings was so great that on 10 November 2009, President Obama spoke at a memorial service held at Fort Hood. Accompanying President Obama was the Secretary of Defense, Chairman of the Joint Chiefs of Staff, the Secretary of the Army, and the Army Chief of Staff.

The attendance of this entourage highlights the true impact of the shootings on this community and the nation. The circumstances of this shooting were profound, and this was not lost on the Fort Hood or Killen community.

In fact, even the commanding General of III Corps and Fort Hood recognized the effects of the shooting on the community. According to LTG Robert Cone, "the tragic events of November Fifth profoundly impacted each of us personally and the community as a whole."

Not only did the shootings have a tremendous impact, but they also created an atmosphere of hostility towards MAJ Hasan. Indeed the Army Times even recognized this when they reported that MAJ Hasan "faces what seems like an impossible task of preventing a conviction and potential death sentence," and that "many affected by the Fort Hood rampage believe death is the only appropriate punishment if Hasan is convicted . . . ."

The level of community hostility was surely increased when the Killeen Police Department passed out flyers to restaurants explaining how to spot a suicide bomber. Such an occurrence only serves to increase local tension and hostility towards MAJ Hasan. This also increases the likelihood that the community will project this hostility when they encounter panel members.

For the past ten years the Army has been fighting what Presidents have labeled a 'war on terror.' Many in the Army community have died fighting terrorists abroad. The Army is a very close knit community with institutionalized values. When a Soldier commits a crime against another Soldier the community deems these values to be dishonored. Should a Soldier commit an alleged act of terrorism against another Soldier, the act would not only be a violation of the community values but viewed as an act of the enemy. It is clear that this is how the Fort Hood and Killeen community view MAJ Hasan. The community is so hostile that the Army has transformed the courthouse grounds, already located on a military base, into a war zone FOB.

If the trial were to take place at Fort Hood, the community's hostility would have a prejudicial effect on the members. As the Killeen Mayor stated, a media circus will surround this trial. The Mayor has urged residents to explain to visitors in town for the trial "*how we wrap ourselves around the soldiers at Fort Hood....*" As a result of the Mayor's call, every time a veniremen interacts with the community, the community will attempt to influence the outcome in this case. Indeed this is what the Mayor has called for.

As a result of this hostility the Court must order a change of venue.

2) The pretrial publicity exacerbated the local hostility

It is inescapable that the shooting had a monumental impact on the community and has caused a great deal of hostility. Equally monumental is the volume of local and national press, which has intensified the local hostility.

Arguably, this case has received more media attention than any other court-martial in the history of the United States military. Not only did the crime with which MAJ Hasan is charged captivate the nation, it also altered the course of the war on terrorism causing the Army as a whole to look inward. Between 5 November and 30 March 2012, there were nearly 22,000 articles published nationally about this case and 155 articles in the Army Times, a very popular periodical directed primarily toward Soldiers.

Locally there have here have been 1,486 articles published about this case. Within the Killeen area alone there were approximately 3,260 televised news stories specific to MAJ Hasan and the Fort Hood shootings. Additionally, there were 943 web-based articles specific to this case.

In the Killeen Daily Herald, 44 percent of the articles published were prejudicial to MAJ Hasan. Of the 266 articles published, 69 (26%) contained witness statements, survivor statements, or information from the investigation; 48 (18%) referenced MAJ Hasan as a terrorist, radical Muslim, extremist, ticking time bomb, or apply some other negative label; and 40 (15%) made ancillary references to MAJ Hasan or the Ft. Hood shootings within articles about other topics.

This call for MAJ Hasan to be considered a terrorist is highly prejudicial and highly inflammatory, because 1) this is a murder trial not a terrorism trial, and the Government has not articulated terrorism as an aggravating factor, and 2) because the use of the word 'terrorist' or

'terrorism' incites visceral bias and prejudice in the context of the Army and the war on terrorism.

This pervasive media coverage has ensured that the shooting remain in the forefront of the communities' mind. Moreover, with 44 percent of all local coverage containing prejudicial statements, the communities' hostility has not only continued but has also intensified due to the prejudicial coverage and slow trial progress. The increase in hostility is evidenced by the security measures implemented around the courthouse. These security measures, which started with a fence around the back of the courthouse, have intensified over time and thus parallel the Army's interpretation of the hostile threat posed to MAJ Hasan and the trial participants.

Should this hostile community interact with panel members, they will undoubtedly influence the outcome of this trial. As a result the Court should order a change of venue.

3) The Government's increased security reflects the hostile nature of the community

In anticipation of this trial the Government took preliminary steps to ensure the safety of MAJ Hasan and the trial participants. This included installing a fenced area behind the courthouse, a trailer for the defense team, and a trailer for the panel members. When the panel members walk between the courthouse and this trailer they will walk through a large breezeway that will connect the two structures and obscure them from view.

As pretrial proceedings progressed towards trial the security measures increased. Sometime around 25 July 2012, the Government constructed a barrier around the courthouse. This barrier consists of approximately 180 containers stacked as high as three stories tall. The barrier surrounds the courtroom with the exception of two entry points. The barrier can be seen from outside the installation nearly a quarter mile away. Inside the barrier fifteen armed Soldiers with automatic weapons provide security.

After the stay of trial issued by ACCA and then CAAF, and the subsequent removal of Judge Gross, security increased further. Additional security measures were implemented to enter the compound and additional armed guards were posted on the grounds. Once trial begins more security measures will be implemented by the Government in order to counter the perceived hostile threat.

All of these measures have been implemented despite the fact that the trial is occurring on a military base, where entry onto the base is restricted, and where all entrants, including Soldiers, are subject to search. Comparatively, when "normal" trials occur in this courtroom none of the increased security measures are in place.[5] The increase in security measures indicates that that the Government not only perceives a hostile threat, but they also perceive an increase in the level of hostility.

By comparison, the *McVeigh* trial, which had a change of venue, was not surrounded by containers. Further, no court-martial or trial of which the Defense is aware has ever been barricaded in such a manner. In trials concerning even the most heinous crimes, security

[5] The physical security such as the containers do remain in place.

measures such as these have not been implemented. The reason for this is because such security measures will prejudicially influence jurors. See *Holbrook*, 475 U.S. at 570. It is the same reason why trials are not held in prisons.

Once trial begins, panel members will be required to pass these security measures multiple times a day for the length of a trial, which could last up to several months. In order to enter the courthouse the panel members will have to go through a secured entry control point, past armed Soldiers with automatic weapons, and through the container barrier into the compound, through the barbed wire fenced area behind the courthouse, past more armed Soldiers with automatic weapons, and past an armed security response team. This will occur each and every day.

The security measures constructed by the Government have transformed the courthouse grounds into a war zone FOB.[6] The presence of these measures will not be missed. As suggested in *Holbrook*, these containers will have an incredibly prejudicial effect on the panel members. *Id.* Even though they will not be able to articulate this effect at the beginning of trial, the security measures will prejudicially influence the ultimate outcome.

These security measures indicate that even the Government perceives a hostile threat at Fort Hood, and that the trial should be moved to a different venue. The security measures will communicate the Government's message to the panel members. The message the members will receive is, "the charges against MAJ Hasan are true, he is a murderer and he is a terrorist." This message will be inescapable and only serve to tilt the entire panel towards a verdict of guilt and sentence of death.

The Army and Department of Defense have numerous installations across the continental United States that house top-secret information, personnel, and equipment critical to national security. These installations are not protected in a similar fashion. However, the security measures implemented at these installations do adequately protect against a variety of threats. Since the Government's security measures indicate hostility at Fort Hood, this case should be moved to an installation that can provide adequate security without prejudicing the panel members. Such a move will remove this trial from atmosphere of hostility at Fort Hood. As such, the court should order change of venue.

4) The courtroom setup, location of witnesses, and location of panel members

In addition to security concerns at the courthouse, the physical courtroom setup is not conducive to ensuring a fair trial for MAJ Hasan. The panel box at the Fort Hood courtroom is currently set up to only seat ten members comfortably. There is no way to add additional panel members without uncomfortably crowding them within a box that is too small, or adding a row within the well. If a row is added in the well, the panel members will be within seeing, reaching, and hearing distance of the prosecutor's table and podium. At the same time, the Fort Hood

[6] A forward operating base, or "FOB" are the locations where Soldiers are stationed and live when deployed to Iraq and Afghanistan. Generally, FOBs are barricaded in a fashion similar to the manner in which the courthouse has been barricaded. Due to the war zone environment where FOBs are located, there is generally life threatening enemy outside of the barriers.

courtroom is well known to have heating and cooling difficulties, and running the air conditioner can create hearing difficulties.

By the same token, the panel deliberation room seats only ten members, and will be uncomfortably crowded if twelve or more seats are added. Similarly the panel member trailer can only seat 7 around the table. Under these conditions, MAJ Hasan cannot receive careful, thoughtful deliberation on what may amount to a life and death decision.

Moreover, the majority of both witnesses and panel members reside outside the state of Texas. Of the 270 witnesses that may testify at trial, only 95 witnesses reside within one hour's drive of Fort Hood. 175 witnesses live outside of this area. Of the 99 remaining panel members, 82 reside outside the state of Texas and only 17 are located in Texas. There is no reason to hold the trial at Fort Hood due to witness and member travel.

In sum, because the facilities at Fort Hood are inadequate the venue of trial should be moved.

CONCLUSION

There is no reason to hold this trial at Fort Hood. Given the probable interjection of prejudice from security measures, the press, and the hostile community, the reasons to move the trial far outweigh any reason to hold the trial at Fort hood.

Equally important is that in a case such as this, where the entire nation will be watching, every aspect of the proceedings must expose a fair administration of justice. Today, at the scene of the shootings there still remains a living memorial with wreaths, flowers, flags, and pictures of each deceased victim. This is only four miles from where the life or death of MAJ Hasan will be adjudicated, inside what resembles a forward operating base in a war zone.

A fair trial at an impartial venue preserves justice for the victims, the family members, and the general public. It is crucial to ensure that "justice satisfy the appearance of justice" in the preservation of MAJ Hasan's Constitutional right to Due Process. Should the trial occur at Fort Hood, the perception will be that this tribunal was not organized fairly, but instead organized to sentence MAJ Hasan to death.

As Sam Sheppard said about his case cited above:

> *"The second trial was a fair trial. I do not call it a second trial. I call it a fair trial, as opposed to the first trial, which was an unfair trial, a Roman holiday."*

Should this trial occur at Fort Hood under the current configuration, this will be nothing more than a Roman holiday culminating in a sentence of death to be celebrated less than four miles away at the site of the shooting. The Constitution, due process, and fairness all require a change of venue.

For the stated reasons, this Court should order a change of venue.

KRIS R. POPPE
LTC, JA
Defense Counsel

SERVICE

A true copy of the foregoing was served electronically on Trial Counsel and the Court on 6 February 2013.

KRIS R. POPPE
LTC, JA
Defense Counsel

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Nidal M.
Hasan,
Appellant

USCA Dkt. No. 21-0193/AR
Crim.App. No. 20130781

O R D E R

On consideration of Appellant's motion to unseal portions of the trial transcript, it is, this 6th day of July, 2022,

ORDERED:

That the motion is granted.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Potter)
Appellate Government Counsel (Marren)