UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SCOTT A. WILLIAMS
United States Air Force

ACM 33771

20 May 2003

Sentence adjudged 16 November 1998 by GCM convened at Pope Air Force Base, North Carolina.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Jeffrey A. Vires (argued), Colonel Jeanne M. Rueth, Colonel James R. Wise, Colonel Beverly B. Knott, and Lieutenant Colonel Timothy W. Murphy.

Appellate Counsel for the United States: Major Christa S. Cothrel (argued), Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rodgers, Lieutenant Colonel Clinton Collins Jr., and Lieutenant Colonel Lance B. Sigmon.

Before

VAN ORSDOL,[1] BURD, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

BURD, Senior Judge:

On 23 June, 11 September, 26-28 October, and 4-16 November 1998, the appellant was tried by general court-martial composed of officer and enlisted members at Pope Air Force Base (AFB), North Carolina. Contrary to his pleas, he was found guilty of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and violating 18 U.S.C. § 2252A by possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. §

[1] Chief Judge Van Orsdol detailed himself to this case after former Chief Judge Young retired before completion of the decision.

934. He was found not guilty of kidnapping the alleged rape victim and assault consummated by a battery on her. The convening authority approved the adjudged sentence, which consisted of a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E-1.

The appellant raised one issue in his original Assignment of Errors:

> WHETHER THE MILITARY TRIAL JUDGE ABUSED HER DISCRETION BY PERMITTING TRIAL COUNSEL TO ELICIT TESTIMONY CONCERNING SPECIFIC CONVERSATIONS IN THE "CHIK4U" AOL ACCOUNT AND BY FAILING TO PROVIDE A PROPER LIMITING INSTRUCTION TO THE MEMBERS.

After examining the record of trial, we specified two issues and ordered oral argument on the specified issues.[2] The specified issues are as follows:

> WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN GRANTING THE TRIAL COUNSEL'S CHALLENGE FOR CAUSE AGAINST A COURT MEMBER SOLELY ON THE BASIS OF HIS PARTIAL BLINDNESS.
>
> WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN GRANTING THE TRIAL COUNSEL'S MOTION IN LIMINE EXCLUDING FROM EVIDENCE RECORDS OF PRIOR CONVICTIONS OF THE ALLEGED VICTIM.

In a Supplemental Assignment of Errors, the appellant raised the following additional issue:

> WHETHER THE FINDING OF GUILTY TO SPECIFICATION 2 OF CHARGE III MUST BE SET ASIDE DUE TO INSTRUCTIONAL ERROR BY THE MILITARY JUDGE AS A RESULT OF THE SUPREME COURT'S HOLDING IN *ASHCROFT v. FREE SPEECH COALITION* THAT THE PROHIBITIONS IN TITLE 18, USC §§ 2256(8)(B) AND 2256(8)(D) ARE OVERBROAD AND UNCONSTITUTIONAL.[3]

We will begin with the specified issues and, thereafter, the assigned errors. We will also discuss two additional issues not raised by the appellant nor specified, i.e., the military

[2] As a part of our Project Outreach, we heard oral argument on the specified issues at Andrews AFB, Maryland, on 7 August 2001.

[3] On 2 May 2002, we received the Supplemental Assignment of Errors by our granting the appellant's motion to submit such supplemental assignment of errors out of time.

judge's decision to require defense counsel to give a rights advisement to the husband of the alleged victim prior to interviewing him and cumulative error. For the reasons stated herein, we set aside the findings and sentence, and remand the case for appropriate disposition.

I. Court Member Challenge For Cause

Background

The military judge, after completing her initial group questioning of the court members, conducted individual questioning of some of them before she permitted counsel to question the members. During her initial questioning of Lieutenant Colonel (Lt Col) Harber, the following exchange occurred:

> [Military judge (MJ)]: Sir, I noticed that during the portion of time when you were asked to read the flyer, that you have a vision deficiency. Is that correct?
>
> Lt Col Harber: Yes Ma'am.
>
> MJ: So you use a magnifying glass to read the charge sheet in addition to your wearing eyeglasses. Is that correct?
>
> Lt Col Harber: Yes Ma'am.
>
> MJ: Sir, can you see clearly to the witness box?
>
> Lt Col Harber: Yes Ma'am.
>
> MJ: Would you be able to observe the facial expressions, the demeanor of a person seated in that box or is your vision such that it might affect your ability to observe from that distance?
>
> Lt Col Harber: I can see with my peripheral vision. My problem is I'm centrally blind.
>
> MJ: What does that mean, sir?
>
> Lt Col Harber: It means that when I'm looking directly at you now, I see basically a cloud where you are sitting. I can see the edges of your chair.
>
> MJ: But if you used your peripheral vision, you could see the witness clearly?

Lt Col Harber: Fairly clear, Ma'am.

MJ: Sir, would distance help that in any way?

Lt Col Harber: It does.

MJ: So if we were to reseat you at the end of the jury box where Chief Semmler is seated, would you be able to see the witness more clearly?

Lt Col Harber: I'm not sure.

Eventually, after counsel for both sides asked follow-up questions, the trial counsel challenged Lt Col Harber for cause, claiming that his vision problems "causes some concern that he will not be able to appropriately gauge the credibility and cannot make the assessments that the rest of us generally can." The military judge granted the challenge over defense objection. She provided the following rationale for her decision:

> The court picked up that Lt Col Harber required some assistance to read the charge sheet. That is why I conducted the individual voir dire of him as I did. He indicated candidly and honestly that he had what he called "central blindness." That is that if he looks straight ahead, he is blind, but he observes by peripheral vision. When I asked him if he would be able to observe the demeanor of a witness if I moved him closer, he said he thought he might be able to, but he would be relying on his peripheral vision. I am satisfied that the duty of a court member to observe the witness and to assess the credibility based on those observations would be severely impaired. Because of this particular witness' handicap which would preclude him from directly observing a witness, but relying on his peripheral vision for his observations, and there are no reasonable accommodations that I can make that will change the circumstance that when he looks directly at the individual, he will not be able to observe the individual's demeanor as they testify at this trial; therefore, I find that he would not be able to serve under R.C.M. 912(f)(1)(n) [sic] and should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality.
>
> I think Lt Col Harber's reference was that he was centrally blind. I think that any person who reviewed this record or observed it and knew that this case had been tried by an individual who described himself as blind, would not be satisfied that the individual had been able to observe accurately the demeanor of the parties who testify on the stand. Therefore, I am going to grant the challenge for cause against Lt Col Harber on that ground.

Discussion

A military judge's ruling on a challenge for cause is given "great deference" on appeal. *United States v. Rolle*, 53 M.J. 187, 191 (2000) (quoting *United States v. Rome*, 47 M.J. 467, 469 (1998)). The trial judge's ruling will be reversed only for a "clear abuse of discretion." *Rolle*, 53 M.J. at 191 (quoting *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)). "The burden of establishing that grounds for the challenge exist is upon the party making the challenge." Rule for Courts-Martial (R.C.M.) 912(f)(3). *United States v. Wiesen*, 57 M.J. 48, 49 (2002) and cases cited therein. "A trial court's standard is to grant challenges for cause liberally." *White*, 36 M.J. at 287, *quoted in United States v. Armstrong*, 54 M.J. 51, 53 (2000).

The parties on appeal have given considerable attention to the question of whether it is permissible to exclude the disabled from juries. While this may be an important question for civilian trials, we are not persuaded such a question has direct relevance to courts-martial. *See generally* Michael B. Goldbas, *Due Process: The Deaf and the Blind as Jurors*, 17: I New Eng. L. Rev. 119 (1981) and cases cited therein.

There is no right to be detailed to serve as a court member on a court-martial. *See United States v. Ruiz*, 46 M.J. 503, 508 (A.F. Ct. Crim. App. 1997) (citing *United States v. Santiago-Davila*, 26 M.J. 380, 389 (C.M.A. 1988)), *aff'd*, 53 M.J. 122 (2000). The United States Court of Appeals for the Armed Forces (CAAF) has recognized though that a service member does have an equal protection/due process right against being removed from a court-martial panel because of race or sex. *United States v. Witham*, 47 M.J. 297, 301 (1997) (citing *United States v. Tulloch*, 47 M.J. 283 (1997); *United States v. Greene*, 36 M.J. 274 (C.M.A. 1993)). But disability is not a classification that has been added to the race, ethnic origin, and gender protections flowing from *Batson v. Kentucky*, 476 U.S. 79 (1986), *Hernandez v. New York*, 500 U.S. 352 (1991), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). As a general proposition, we do not suggest that the disabled do not deserve protection from arbitrary discrimination. At the same time, we will not interpret the law to preclude removal of a court member who is physically incapable of performing court member duties because of that incapacity for the purpose of promoting an otherwise laudable social value.[4]

In this case, the question is whether there was a basis for granting the challenge for cause. The military judge relied on R.C.M. 912(f)(1)(N) in granting the challenge. R.C.M. 912(f)(1) specifies fifteen grounds for when a member shall be excused for cause. Subsection (N) states that a member shall be excused whenever it appears that the

[4] A suggestion that the Americans with Disabilities Act applies to this issue is misplaced because its remedies do not apply to uniformed members of the armed forces. *See* 42 U.S.C. § 12101 *et seq.*; *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997) ("courts of appeals have consistently refused to extend statutory remedies available to civilians to uniformed members of the armed forces absent a clear direction from Congress to do so").

member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Our superior court has stated that subsection (N) "'codifies a general ground for challenge' which includes both actual and implied bias." *United States v. New*, 55 M.J. 95, 99 (2001) (quoting *United States v. Minyard*, 46 M.J. 229, 231 (1997)), *cert. denied*, 524 U.S. 955 (2001).

CAAF succinctly defined and compared actual and implied bias in *United States v. Warden*:

> "The test for actual bias [in each case] is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Napoleon*, 46 M.J. 279, 283 (1997), quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987). "[A]ctual bias is reviewed" subjectively, "through the eyes of the military judge or the court members." *Napoleon, supra* at 283, quoting *United States v. Daulton*, 45 M.J. 212, 217 (1996).
>
> On the other hand, implied bias is "viewed through the eyes of the public." *Napoleon, supra* at 283. "The focus 'is on the perception or appearance of fairness of the military justice system.'" *Id*., quoting *United States v. Dale*, 42 M.J. 384, 386 (1995). There is implied bias "when 'most people in the same position would be prejudiced.'" *Rome*, *supra* at 469, quoting *Daulton*, *supra* at 217. We give the military judge less deference on questions of implied bias. *United States v. Youngblood*, 47 M.J. 338, 341 (1997). On the other hand, we recognize that, when there is no actual bias, "implied bias should be invoked rarely." *Rome, supra* at 469.

United States v. Warden, 51 M.J. 78, 81-82 (1999), *cited in New*, 55 M.J. at 99. *See Wiesen*, 57 M.J. at 49-50.

A potentially important question appears to be whether the scope of R.C.M. 912(f)(1)(N) is limited to cases of bias, either actual or implied. The case law seems to support the conclusion that the rule is limited to cases of bias because the reported cases dealing with the rule focus on the question of bias and invariably distill the issue to essentially an analysis of whether the member has the proper state of mind to continue on the case, i.e., whether the member is impartial. *See* David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 15-10 (5th ed. 1999) and cases cited therein. This conclusion also appears to be supported by the Discussion to the rule:

> Examples of matters which may be grounds for challenge under subsection (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case;

> has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

Substantially identical language also appears in the text of the corresponding rules in the early editions of the *Manual For Courts-Martial*. *Manual For Courts-Martial, United States, 1969* (Revised ed.), Para. 62*f*(13); *Manual For Courts-Martial, United States, 1951*, Para. 62*f*(13). Our superior court, early in its history, recognized the fundamental focus on whether the member is impartial: "The real test is whether [the court member] is mentally free to render an impartial finding and sentence based on the law and the evidence." *United States v. Parker*, 19 C.M.R. 400, 410-11 (C.M.A. 1955), *quoted in United States v. Smart*, 21 M.J. 15, 18 (C.M.A. 1985). And more recently, CAAF has said "a military member has a regulatory right to court members who appear to be impartial." *United States v. Ai*, 49 M.J. 1, 4 (1998) (citing R.C.M. 912(f)(1)(N)).

The military judge's rationale for granting the challenge for cause, while somewhat ambiguous, may have been that the member's partial blindness was an implied bias under R.C.M. 912(f)(1)(N) because, as she said after citing the rule as the basis for the member's removal, "**any person who** reviewed this record or **observed [the trial]** and knew that this case had been tried by an individual who described himself as blind, would not be satisfied that the individual had been able to observe accurately the demeanor of the parties who testify on the stand." (Emphasis added). If the military judge rationalized her decision to remove the member on the basis of an implied bias, her exercise was much like putting a square peg in a round hole.

In this case, the real question presented to the military judge was whether the member was physically capable of performing the duties of a court member, not whether there was an implication of bias. Importantly, lack of physical capability is not a ground specifically listed in R.C.M. 912(f)(1) and must not be confused with competency, which is a question of qualification under Article 25, UCMJ, 10 U.S.C. § 825. *See* R.C.M. 912(f)(1)(A). Normally, there is no question of a member's physical capability to perform duty as a court member because Art. 25, UCMJ, limits the pool of available members to individuals on active duty and requires the convening authority to detail members "as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d)(2), UCMJ. Aside from temporary disabilities, e.g., injuries or illnesses, one might well wonder: if a military member has a permanent physical condition that renders the member incapable of performing the duties required of court members, why is that person permitted to be on active duty? It would seem to be a matter of common sense that, as a general proposition and absent temporary disabilities, if one is physically qualified for active duty, one is physically qualified to serve as a court member on a court-martial.

Ultimately, we need not decide what the exact rationale of the military judge was, nor whether R.C.M. 912(f)(1)(N) is limited to bias, because the member was physically capable of performing the duties of a court member and, therefore, the challenge for cause should not have been granted. The record establishes that Lt Col Harber was a physician assigned to the medical operations squadron at the base. He had been a flight surgeon and was the acting squadron commander at the time of the appellant's court-martial. There is nothing in the record to suggest that he was not capable of performing any of the daily medical and command duties that would arise in those roles. The record further reflects that he entered and exited the courtroom several times without difficulty and without the aid of anyone or anything. If Lt Col Harber's vision was sufficient to permit him to accomplish all of these tasks, how could he not be capable of performing court member duties?

The military judge's granting of the challenge was predicated on erroneous conclusions that direct observation of a witness can only occur through one's central vision and that Lt Col Harber would not be able to observe the witnesses' demeanor as they testified. The record does not support these conclusions, which were directly contradictory to Lt Col Harber's responses that he could see the witness stand from where he was and that it might help if he was moved closer.

Our superior court has recognized that "[w]hen a Court of Criminal Appeals reviews a military judge's rulings, it has the 'awesome, plenary, *de novo* power of review' to substitute its judgment for that of the military judge." *Armstrong*, 54 M.J. at 54 (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). We exercise this power in finding that Lt Col Harber's vision was sufficient to permit him to perform court member duties. Article 66(c), UCMJ, 10 U.S.C. § 866(c). We therefore hold that, under R.C.M. 912(f)(3), the prosecution failed to meet its burden of establishing that a ground for a challenge existed. *Wiesen*, 57 M.J. at 49. As a result, we hold the military judge clearly abused her discretion in granting the challenge. *Rolle*, 53 M.J. at 191.

Our holding does not necessarily require reversal because we may only hold a finding or sentence incorrect on the ground of an error of law when the error materially prejudices the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). *But see United States v. Schlamer*, 52 M.J. 80, 94, 95 (1999) (decision to grant challenge for cause over defense objection will not be reversed in the absence of a clear abuse of discretion). We hold that, standing alone, the granting of the challenge for cause against Lt Col Harber did not materially prejudice the appellant's substantial rights.

"A servicemember . . . has, as a matter of 'fundamental fairness,' the right to impartial court members to decide his guilt." *Ai*, 49 M.J. at 4 (citing *Weiss v. United States*, 510 U.S. 163, 179 (1994)). An erroneous ruling on a challenge for cause does not automatically violate the right to an impartial jury. *Ross v. Oklahoma*, 487 U.S. 81, 86-88 (1988), *cited in Armstrong*, 54 M.J. at 54. If the court members who heard the case

were impartial, the right is not violated. *Ross*. *See also United States v. Martinez-Salazar*, 528 U.S. 304 (2000), *cited in Armstrong*, 54 M.J. at 54.

The appellant has made no claim that the court members who heard his case were not impartial. We find nothing in the record to support a conclusion that the members who heard the case were not impartial. Therefore, the only conclusion we may draw from these circumstances is that the error was harmless. Art. 59(a), UCMJ.

II. Evidence of Prior Convictions of Alleged Victim

Background

This issue cannot be appropriately resolved without consideration of the context in which the issue was considered at trial. The military judge finally decided the issue eleven days after the matter was first introduced to her.

During a preliminary session on 26 October 1998, held pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), the trial defense counsel first provided the military judge with certified copies of documentation of prior convictions of the alleged victim from the State of Mississippi, including three convictions for writing bad checks. The defense also offered certified copies of an arrest warrant and a confinement order for the alleged victim. At the same time the defense counsel provided the court with an annotated copy of the Mississippi statute on bad checks. *See* Miss. Code Ann. § 97-19-55 (1984). The military judge instructed the defense counsel to mark the documents as appellate exhibits.[5] During this exchange, the military defense counsel (DC) and the military judge said the following:

> DC: Your Honor, I understand that it is not typical practice to introduce statutes as exhibits but I will go ahead and indicate to the court and [the civilian defense counsel] will speak in greater length about the points to this, but I met with the superior court judge who oversaw these convictions - actually adjudicated these convictions, in order to inquire about the nature of the offenses. She was convicted under the bad checks offense which is Mississippi State Statute, Section 97-19-55, in relevant part, which states shall be unlawful for …
>
> MJ: You can just mark it.
>
> DC: Very well and we said this was what number?

[5] These included Appellate Exhibits XVI, XVII, and XVIII. The Mississippi Code sections with annotations that are Appellate Exhibit XVIII were later duplicated as inclusions in Appellate Exhibit LXXV.

The discussion during this session then moved to other topics, including another defense request for continuance.

The majority of the following day's session was consumed by consideration of issues unrelated to the alleged victim's prior convictions. However, just before a recess at 1540 that day, the military defense counsel returned to the issue:

> DC: Your Honor, the other matter her Honor might want to rule on ahead of time is yesterday's Appellate Exhibit XVI, the Mississippi Court Document that was labeled as the Records of Conviction - the defense intends to refer them or use them in accordance with the rules of impeachment of the victim when she testifies. If there is any objection to that, the government [sic] believes a proffer for whatever reason exists to that. In other words, we would just ask for a ruling on the admissibility of those.
>
> MJ: I'm not going to take that up at this session either. The government is going to have the same opportunity that you have to respond to new matters that are being brought to their attention late in the game. And they can provide a brief if they want to provide a Motion in Limine to preclude the use of those at the next session of this trial. Anything else?
>
> DC: Nothing from us, Your Honor.

The military judge referred to the alleged victim's prior convictions as "new matters" apparently because the prosecution failed to discover their existence even though specifically asked to do so in the 23 June 1998 defense discovery request, Appellate Exhibit III. Paragraph 6 of the defense motion for appropriate relief, Appellate Exhibit XIII, indicates the military defense counsel discovered the records while he was in Mississippi the week of 19 October. Eventually, on the afternoon of 28 October, the military judge granted a continuance until 4 November.

The issue of the prior convictions next arose at the end of the session on 4 November. The military judge was identifying issues still unresolved and asked counsel for their input:

> MJ: Any others that you are aware of? Trial counsel?
>
> TC: No Your Honor. With respect to the Motion in Limine from the government, we talked specifically about the contempt orders, but it is our belief that the same kind of rules would apply to the bad check offenses as well. I just wanted to make that clear, because it was not specifically delineated in the brief. I wanted to make it clear that that is our position.

MJ: I'm not going to take that up right now. I'm going to adjourn here in a few minutes.

TC: Yes Ma'am. I just wanted to make sure that the defense was aware of it.

DC: Your Honor, I asked [the assistant trial counsel] earlier today whether there was any objections as far as the checks were concerned, and he said none that he knew of but he needed to talk to [the trial counsel]. This is in fact the first time that we've heard of an objection to the admissibility of the checks.

MJ: So you all will have a chance to talk about that overnight. This is just a summary of what I still have to resolve before we more [sic] forward or don't move forward, depending upon the ruling of the court.

After addressing some unrelated matters, the military judge adjourned the court until the following day. The issue was ignored the following day.

Finally, on the afternoon of 6 November, the military judge agreed to consider the prosecution's motion in limine. The trial counsel sought to preclude introduction of the alleged victim's bad check convictions, essentially claiming they were not admissible under Mil. R. Evid. 609(a)(1) because they were misdemeanors and warranted exclusion under Mil. R. Evid. 403.

Rather than address the objections voiced by the trial counsel, the military judge expressed her concern with the form of the records. The military defense counsel had been arguing in response to the argument of the trial counsel, and suggested that, under Mil. R. Evid. 609(a)(2), the records were required to be admitted because the crimes involved dishonesty. The military judge interrupted and the following exchange occurred.

MJ: Let me ask you this before you continue with your argument. I have retrieved from the court reporter Appellate Exhibit XVI, the computerized printout which you have obtained from the court. First of all, in looking at this document, for example, it indicates "Burchfield traffic ticket issued." Then it says, "Violation, bad check, Fine Code: 061, bad check, 1st offense." It does not indicate that it was charged under this criminal law procedure, but rather that a traffic ticket was issued.

DC: Yes, Your Honor.

MJ: How does that correlate to what you're arguing from the Mississippi Code? It doesn't have anything to do with the statute under which you've cited that the Mississippi law would apply.

DC: And Your Honor, that may be one of the -- there are also driver's license, etc.

MJ: Well, this is a bad check offense. It says "violation, bad check," and then says a traffic ticket was issued. Not indicted under that provision of the law. It says a traffic ticket was issued.

DC: Your Honor, some of the court tickets that are issued are notices to appear.

MJ: Well this is the printout, page 1.

DC: At this point, mine may be out of order, Your Honor.

MJ: In the top left-hand corner, you will see the date "10-19-98."

DC: Yes, Your Honor.

MJ: It says "Cause/Case#: 0000238" at the top of that page.

DC: Yes, Your Honor. I have it now.

MJ: And it says "Violation, Bad Check, Fine Code: 061, bad check 1st offense." There is absolutely no reference whatsoever to indicate that it was charged under the provision that you have argued to the court, but rather that it was dealt with in the form of a traffic ticket. Now let's go to the next page. The reason I want you to clarify this for me, counsel, is I'm perfectly willing to take a look at the Mississippi Code and to look at all of the research that you've done through the Duke Law School, as soon as I find something that tells me that this was the statute under which she was charged.

The next page says, "Cause/Case# 0000950, Violation, Bad Check, Fine Code: 061, bad check, 1st offense." There is nothing on here which tells me under what statute she was cited.

DC: Your Honor, I understand. There is an offense under Mississippi law called "Bad Checks." I know that this printout, this certified record of the convictions doesn't say what paragraph this is under, but it does say "bad

check." What I can offer to the court to start with is, I asked the same question. I asked the same question of the judge there when I saw him. It does not say paragraph 97, or whatever one it is under, but it does say "bad check." What I can offer to the court to start with is that I asked the judge how we could correlate -- well, before I could finish asking that, he pulled out his current statute on that. What I offer to the court is, it says "violation, bad check." This is the statute under which she was prosecuted and convicted under -- bad checks. It shows 1st offense, 2nd offense, 3rd offense -- which I need to refer to in one moment. Sticking with this, it is specific enough to say "violation, bad check, 1st offense." Then as we look through the statute and the explanation, it then goes on to define 1st offense, 2nd offense, 3rd offense.

MJ: Look also with me at 97-19-67. For the first offense, if the check is under $100.00, misdemeanor and a $25.00 fine. A $25.00 to $500.00 fine and 5 days in jail or 5 days to 6 months. A second offense where the check is under $100.00, a fine of not less than $50.00, but no more than $1,000.00 and a term of 30 days to one year in jail. I don't see anything in here that says one can get a traffic ticket under that statute. I can't go behind the face of the document that you have offered as self-authenticating and consider an interview with the judge, when the record itself is unclear as to that issue.

DC: Your Honor, I understand you can't accept my proffer as to what the judge said. I do understand that. If there is a problem with that one conviction --

MJ: Well, it is not just one. That's why I'm taking the time to get it sorted out now counsel, because it may affect how you want to approach this motion. Look at the second cause case number, 0000950. Once again, violation, bad check, no citation to the Code section under which she was charged.

DC: Your Honor, none of them says what the Code section is. I understand that, but they do say "violation, bad check." That is the bad check statute.

MJ: Is this the only bad check statute in the State of Mississippi? Counsel, are you prepared to make that representation?

DC: Your Honor, I can certainly make the representation that I asked the judge down there --

MJ: That's the problem. On the face of this document, can I link this factually up with the Mississippi Code?

DC: Your Honor, the alternatives that I have here in this, and I need to put this on the record -- is that it is my understanding, and I'm not pointing fingers here. The situation that I'm in is that on the noon deadline, the paper work that I received was that there was no objection from trial counsel as to the admissibility of the checks for impeachment purposes with them taking leave that when [the trial counsel] got here, they could then raise the issue again. That is what I understood it to be. Then in court on Wednesday evening, I understood that they were going to challenge the checks as well. We contacted the Duke Law Library and asked them to research those and pull for us the statutes governing bad checks in the State of Mississippi. This is what we have. Now that means I've had basically one day and one-half to two days since learning there was a problem. Since learning that there was a problem, I've had one full duty day to do it. We've looked for it. Your Honor, I remind the court that we had to dig these up ourselves. I know the court is aware of that. We went down there and dug them up ourselves. Your Honor, I would ask leave of the court then to be able to call the Circuit Court or a lawyer down there and have the files copied. Then call the prosecutor down there to get a certification from him, saying this is in fact what they were prosecuted under, and that it is impossible that they could have been prosecuted under something else, if need be.

MJ: I'm going to go ahead and listen to the rest of your argument, but I want you to know what the factual deficiency is, so that you understand it. That is, as it appears to the court, if I look at these documents in Appellate Exhibit XVI, I cannot draw the factual conclusion that the statement "Violation/Bad Check" necessarily correlates to the Code section you are arguing to the court. I want to make sure that you understand that. In looking at these documents when they were offered during the previous session, I said there was nothing here to tell me what it was that she was charged under. Nothing telling me what Code section she was prosecuted under. I don't know how I can possibly draw the conclusion that she was charged under a bad check statute that constitutes a *crimen falsi*. Not based on what I've got here.

At this point, the military judge left the matter unresolved and tasked the defense counsel to "take the time to get this sorted out."

By the end of the day on 9 November, the military judge returned to the issue. The defense counsel explained that he had spoken with the civilian judge who presided

over the bad check cases and was referred to the county attorney in the cases to obtain a document clearer on its face, but still didn't have anything additional. The military judge then made it clear that she was then going to decide the motion and asked for argument from counsel.

> TC: As we stated earlier, there is nothing that permits introduction of such evidence under Rule 609, in terms of conviction for more than one year or any kind of crime of dishonesty or false statements. The records reportedly obtained by the court in New Albany, while they say "bad checks," they do not indicate any kind of statute. In fact, on the face of the statute which was provided in that first sample, the statute provided requires a mandatory minimum jail time. No such jail time was ordered at any point. Rather, the victim was ordered to pay a fine and restitution. That was it. There is simply nothing that supports under M.R.E. 609. It doesn't fall within it; therefore, the rules for evidence require exclusion. In addition, given the fact that these occurred years ago -- most of them being in the 1992 time frame, we would suggest that under the 403 balancing test, they would be more prejudicial than probative.
>
> MJ: Thank you. Defense counsel?
>
> DC: Your Honor, as stated before, the case I cited to the court on Friday, which I don't have in front of me, said there is no 403 balancing test in regard to anybody other than the accused, when the issue of the admissibility is a prior conviction. Your Honor, my situation now is no different than what it was on Friday afternoon. I do not have anything further.
>
> MJ: I just want to make sure. I know the case that you are talking about counsel, but I'm going to give you the opportunity to tell me everything that you want to tell me about this motion before I decide.

The military judge and defense counsel continued the exchange. The defense counsel again made it clear that Mil. R. Evid. 609(a)(2) was the rule of evidence the defense was arguing required admission of the records of the bad check convictions. The defense counsel then summarized the defense position.

> DC: Your Honor, I now believe that it come[s] down to a factual issue for the judge to determine whether the documents on their face -- prior ruling understood. We are still trying to find what we can. I know that the court will reconvene by 1300. We will endeavor to continue seeking something to meet the concern of the judge. But if that in fact is met, this statute, if

they are under that statute that we had presented before, the Mississippi Statute 97-19-55, that language specifically says, "with fraudulent intent."

The defense would argue that by its nature, it is a crime involving dishonesty, because it is involving fraud. If the defense can produce the evidence that the military judge would need to see in order to be satisfied that the documents are what the defense purports them to be, then they would be admissible under 609(a)(2).

MJ: Thank you, counsel. Trial counsel, anything further?

TC: We simply think that because 403 is not specifically mentioned in 609(a)(2) does not mean it is not to be considered. In the view of the government, 403 is always an application to consider, with respect to every rule. The fact that it is not specifically set forth, does not mean that it cannot be considered. Further, the fact that we are talking about a bad check offense, even though on its face it assumes dishonor, it is not the same thing as a crime of dishonesty. That even if it were a 123(a) type thing, that does not equate to a crime of dishonesty that would fall within 609(a)(2).

The military judge then made her findings and ruling granting the prosecution motion in limine.

MJ: These acts are contained in Appellate Exhibit XVI. Absent any further evidence to establish that these offenses were charged, under the provisions of Appellate Exhibit LXXV, I rule that they are not admissible to impeach the witness under 609(a)(1) or (a)(2). Specifically, I cannot find on the record and on the matters presented for the court's consideration, that the checks allegedly or purportedly contained in Appellate Exhibit XVI were in fact charged under the provisions contained in the Mississippi statutes identified in Appellate Exhibit LXXV. Specifically tending to refute the representation that they were charged in accordance with Appellate Exhibit LXXV is the fact that the printout indicates that the witness received "a traffic ticket," that each of these were resolved as misdemeanor offenses and that the minimum prescribed punishments for the offenses listed in the statutory provision provided in Appellate Exhibit LXXV are not in fact the punishments imposed for the offenses listed in Appellate Exhibit LXXV. Therefore, I cannot find that any offense listed in Appellate Exhibit XVI was punishable by death, dishonorable discharge, or imprisonment in excess of one year, if it had been tried in a trial by court-martial. I find that specifically based upon the nature of what is in Appellate Exhibit XVI, I cannot conclude that these would have been

> 123(a), bad check offenses, and I cannot conclude that they would even have been Article 134 check offenses, inasmuch as they were handled by a traffic citation process. Therefore, I cannot conclude that they have any similarity to any system known to the military law concept.

The military judge continued by citing cases dealing with Mil. R. Evid. 608(b) for the proposition that the underlying facts of the offense must be known to determine whether the offense involves untruthfulness. *See United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994).

> MJ: This is the circumstance in which this case also finds itself. I cannot conclude, based upon the record before me, that the underlying facts contained in Appellate Exhibit XVI relate to truthfulness or untruthfulness. Therefore, the government Motion in Limine to preclude introduction of those matters in Appellate Exhibit XVI is granted. Certainly counsel, if you find some additional information that you believe is relevant on this issue, I will give you leave to bring it to the court's attention.

Discussion

A military judge's ruling excluding evidence is reviewed for abuse of discretion. *United States v. Palmer*, 55 M.J. 205, 208 (2001) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (1995)). "A military judge's preliminary finding of fact will not be overturned unless clearly erroneous, but [her] rulings on questions of law are reviewed *de novo*." *United States v. Shover*, 45 M.J. 119, 122 (1996) (citation omitted).

While these are standards of review followed by our superior court, the Courts of Criminal Appeals are not constrained by them. Art. 66(c), UCMJ; *Ryder v. United States*, 515 U.S. 177, 186-87 (1995) (Service Courts "exercise *de novo* review over the factual findings and legal conclusions of the court-martial"); *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991) (Service Courts need not apply the waiver doctrine); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (Service Courts have the option of applying an "abuse of discretion" standard). However, analysis of the issues presented is often facilitated by discussion within the context of the standards of review employed by our superior court. Additionally, promotion of such standards encourages resolution of issues in the earliest possible forum where a detailed record of the pertinent matters can be created, i.e., the trial court.

We hold the military judge abused her discretion by excluding the records of the bad check convictions of the alleged victim because the records were admissible under Mil. R. Evid. 609(a)(2). The military judge's determination, in essence that she did not have sufficient information to find that the crimes evidenced by the records involved dishonesty or false statement, was clearly erroneous. Based on the record of trial, we find

that the alleged victim's bad check convictions, which are contained in Appellate Exhibit XVI, were all for violations of § 97-19-55.

We are convinced the erroneous conclusions drawn by the military judge about the records of the convictions were based on an inadequate examination of the documents provided her on the first day this issue was raised. The military judge's focus on the records of the convictions was improperly narrow and ignored important information contained on each page.

The records consist of computer printouts that were certified as true copies by the court clerk. The records of the bad check convictions consist of 18 pages, one page for each bad check. Each page shows the alleged victim as the defendant, identifies who the check was written to and the amount written, lists the violation as "bad check," indicates the number of the offense (1st, 2nd, 3rd), the dates a warrant was issued and returned, the court date, the judge, the guilty plea, the guilty finding, and the court order based on the guilty finding. Comparing the pages, it is clear that the alleged victim's first conviction covered the first two checks, her second conviction covered the next seven checks, and her third conviction covered the last nine checks.

The military judge apparently ignored all of this consistent data because the first page contained a reference to a "traffic ticket" being issued. The judge failed to note that this "ticket" was issued on a date preceding issuance of the warrant and that none of the other pages contained a reference to a "traffic ticket." The second page references an "affidavit" being issued and all of the other pages reference "court tickets" being issued, all on dates prior to the dates of the warrants issued on each check. Our conclusion is that these entries likely refer to a document created at the beginning of police involvement with each bad check. What we are certain of is that the military judge's conclusion that the alleged victim received a "traffic ticket" for her first bad check is clearly erroneous. Our overriding conclusion is that the validity of the records of these convictions is not dependent on the meaning of "traffic ticket" on one page out of eighteen.

More importantly, the military judge drew upon an incorrect interpretation of Mississippi law to bolster her erroneous conclusion that the records of the convictions were ambiguous. The military judge was incorrect in concluding that the punishments imposed for the bad check offenses were outside the minimum prescribed punishments if the offenses were found to be violations of § 97-19-55. We have examined § 97-19-67, "Bad checks; penalties; restitution," which provides the penalties permitted for violations of § 97-19-55. *See* Miss. Code Ann. § 97-19-67 (1984). We hold that the penalties imposed for each of the three bad check convictions of the alleged victim are within the permissible limits of this statute.

Further, the military judge could have resolved her question whether the bad check convictions involved dishonesty or false statement by examining the annotations of § 97-19-55, which were initially provided to her in Appellate Exhibit XVI and then provided again, days later in Appellate Exhibit LXXV. One annotation, which appears in both Appellate Exhibit XVIII and Appellate Exhibit LXXV, states:

> Worthless Check Act, not requiring intent to defraud or knowledge of insufficiency of funds, and providing for dismissal of prosecution on payment of check violates constitutional provision prohibiting imprisonment for debt. State v. Johnson (1932) 163 Miss 521, 141 So 338.

The text of the full decision makes clear that, up to that time, Mississippi had two bad check statutes, one requiring intent to defraud and knowledge of the worthlessness of the check. The other statute, which was held unconstitutional by *State v. Johnson*, was essentially analogous to the worthless check offense under Art. 134, UCMJ.

The military judge's failure to correctly interpret the records of the bad check convictions of the alleged victim and her misinterpretation of Mississippi law have led us to our own analysis and finding that the bad check convictions were convictions for violating § 97-19-55. This section provides:

> It shall be unlawful for any person with fraudulent intent to make, draw, issue, utter or deliver any check, draft or order for the payment of money drawn on any bank, corporation, firm or person for the purpose of obtaining money, services or any article of value, or for the purpose of satisfying a preexisting debt or making a payment or payments on a past due account or accounts, knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer has not sufficient funds in or on deposit with such bank, corporation, firm or person for the payment of such check, draft or order in full, and all other checks, drafts or orders upon such funds then outstanding.

Miss. Code Ann. § 97-19-55 (1984). Of note, this section requires proof of intent to defraud and knowledge of the worthlessness of the check.

We turn now to the rules of evidence to address the admissibility of the records of the convictions. Mil. R. Evid. 609 governs impeachment by evidence of conviction of crime. *See generally Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989). This rule separates convictions into two categories with different rules regarding admissibility: felony convictions and *crimen falsi* convictions, i.e., crimes involving dishonesty or false statement. The appellant's contention at trial and before this Court is that the convictions were crimen falsi and, therefore, required to be admitted under Mil. R. Evid. 609(a)(2).

Mil. R. Evid. 609(a)(2) provides: "For the purpose of attacking the credibility of a witness, evidence that any witness has been convicted of a crime **shall** be admitted if it involved dishonesty or false statement, regardless of the punishment." (Emphasis added.) Such convictions are automatically admissible in evidence without a need to conduct a Mil. R. Evid. 403 balancing test. *United States v. Coats*, 652 F.2d 1002 (D.C. Cir. 1981); *United States v. Field*, 625 F.2d 862 (9th Cir. 1980); *United States v. Toney*, 615 F.2d 277 (5th Cir. 1980); *United States v. Frazier*, 14 M.J. 773, 776 (A.C.M.R. 1982).

Our superior court has not specifically decided whether bad check offenses that require knowledge of the worthlessness of the check and the intent to defraud are crimen falsi, i.e., involve dishonesty or false statement within the meaning of Mil. R. Evid. 609(a)(2). The Service Courts, including this Court, also have not addressed the issue in any published case. We have generally discussed the issue on two occasions where we said that shoplifting does not involve dishonesty or false statement within the meaning of the rule. *See United States v. Jefferson*, 23 M.J. 517 (A.F.C.M.R. 1986); *United States v. Huettenrauch*, 16 M.J. 638 (A.F.C.M.R. 1983). *See generally* Lieutenant Colonel James Moody, USAF, & Lieutenant Colonel LeEllen Coacher, USAF, *A Primer on Methods of Impeachment*, 45 A.F. L. Rev. 161, 166-74 (1998); Colonel Francis A. Gilligan, USA, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 Ohio St. L.J. 595, 605-10 (1985).

Section 97-19-55, which closely parallels Article 123a, UCMJ, 10 U.S.C. § 923a, as we have said, requires knowledge of the worthlessness of the check and the intent to defraud. We find it impossible to conceive of a situation where someone could be guilty of knowingly making or uttering a worthless check with intent to defraud without involving dishonesty. Therefore, we hold that the three bad check convictions of the alleged victim for violating § 97-19-55 involve dishonesty and, since the convictions otherwise complied with the requirements of Mil. R. Evid. 609, i.e., were within the ten-year time limit, were not the subject of pardons, and were not juvenile adjudications, were required to be admitted under Mil. R. Evid. 609(a)(2). *See United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991); *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652, 655 n.3 (3d Cir. 1991); *United States v. Rogers*, 853 F.2d 249, 252 (4th Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *United States v. Mucci*, 630 F.2d 737, 743 (10th Cir. 1980).

Of course, the fact that we have held that there is legal error does not resolve the matter standing alone because we may act on an error only if the error materially prejudiced the substantial rights of the appellant. Art. 59(a), UCMJ. The Supreme Court, discussing the history and purpose of 28 U.S.C. § 391, an early harmless error federal statute, said:

> The general purpose was simple, to substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and

> essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.

Kotteakos v. United States, 328 U.S. 750, 759-60 (1946). This wisdom applies equally to appellate reviews under Art. 59(a), UCMJ.

Our superior court has said they will review de novo a question of whether an error was harmless. *United States v. Walker*, 57 M.J. 174, 178 (2002). The Court discussed in *Walker* two tests to be applied, dependent upon whether the error has a constitutional dimension. *See also United States v. Grijalva*, 55 M.J. 223, 228 (2001); *United States v. Davis*, 26 M.J. 445, 449-50 (C.M.A. 1988). "The test for constitutional error is whether the error was harmless beyond a reasonable doubt." *Walker*, 57 M.J. at 178 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). "The test for nonconstitutional error is 'whether the error itself had substantial influence' on the findings." *Id*. at 178 (quoting *Kotteakos*, 328 U.S. at 765).

In the appellant's case, we are not convinced that the error was of constitutional dimensions. The military judge made an erroneous evidentiary ruling that did not directly affect the constitutional rights of the appellant. Therefore, we hold the error to be nonconstitutional. *United States v. Moolick*, 53 M.J. 174, 177 (2000).

The more difficult question is whether the error is harmless under the test for nonconstitutional error. *Walker*, 57 M.J. at 178. We hold that the failure to admit the evidence of the alleged victim's bad check convictions does materially prejudice the appellant's substantial rights. Art. 59(a), UCMJ. To understand our reasoning requires a brief discussion of the facts related to the alleged rape and the appellant's defense at trial.

The appellant first met the alleged victim in an Internet chat room on America Online (AOL), an Internet service provider. The two then exchanged "instant messages" and other electronic mail (e-mail). The communications then progressed to telephone calls, most of which were initiated by the alleged victim and often occurred late at night and early in the morning. She sent the appellant a card and three pictures of herself. They also exchanged "virtual bouquets of flowers" over the Internet. The two eventually talked about meeting. The appellant was stationed in North Carolina and the alleged victim lived in New Albany, Mississippi. The alleged victim was older than the appellant and was married with two children. She did not tell the appellant that she was married with children.

After about two months of this interaction, the appellant met the alleged victim. She and a girlfriend drove to the Memphis Airport to pick up the appellant. The three

returned to the alleged victim's hometown, dropped off the girlfriend, and checked into a motel room, which the alleged victim rented for the evening. The alleged victim stayed in the motel room with the appellant until early the next morning, when the alleged victim's mother arrived at the room. The alleged victim left with her mother and later told her that she was raped.

The appellant returned to Pope AFB, North Carolina, later that day. Two weeks later he left on a nearly two-month deployment to Kuwait. Upon his return, he was greeted by investigators from the Air Force Office of Special Investigations and, soon thereafter, was interviewed about the alleged rape. The appellant confessed to the rape and then reduced the details of his confession to writing.

The appellant testified at trial. He denied the rape and claimed he falsely confessed. His explanation for this was that he was tired from a long return flight from Kuwait and unwittingly agreed to allegations made by the investigators, who interviewed him as soon as he departed the aircraft.

The appellant's defense to the rape allegation was consent. His trial strategy focused on multiple attempts to attack the credibility of the alleged victim and ultimately relied on the burden of proof. In one of those attempts, the appellant sought to introduce the alleged victim's bad check convictions to attack her credibility.

Our superior court's discussion in *Walker* of the test for nonconstitutional error is based upon the Supreme Court's *Kotteakos* decision. But the meaning of the Supreme Court's pronouncement of the test requires consideration of the broader quote. As said in *Kotteakos*:

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, **whether the error itself had substantial influence**. **If so, or if one is left in grave doubt, the conviction cannot stand**.

Kotteakos, 328 U.S. at 765, *quoted in United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993) (emphasis added). Additionally, the burden of persuasion that the error did not have a substantial influence on the findings is upon the government. *United States v. Pablo*, 53 M.J. 356, 359 (citing *Pollard*).

We hold that the government has not met its burden of persuasion. Moreover, given all the circumstances of this case, we cannot conclude that the error did not have a substantial influence on the findings. As to this, we are left in grave doubt.

We have given serious consideration to the importance of the appellant's confession. Some might suggest that the strength of the confession renders the error harmless. *See United States v. Ellis*, 57 M.J. 375 (2002). But, in this case, if the confession were as compelling to the members as such a viewpoint would seem to compel, why didn't the members convict the appellant of all the allegations? Ultimately, it would be speculation for us to attempt to explain why the court members decided the case as they did. The trial counsel, in her final remarks during her rebuttal argument, highlighted dramatically the importance of credibility:

> What you're faced with is something very simple. You have two different stories, and you have to decide who you are going to believe; the accused, an admitted liar in his contacts with OSI; or [the alleged victim], who has required physical medical treatment, as well as medication for the past year for the trauma which she has had to endure. That's not a tough call.

The court members were obviously aware that the alleged victim's character was significantly flawed. Had her credibility been directly impeached by the introduction of her prior convictions, who can say what the members would have done with the rape allegation? Given the facts of this case, how could we ever be reasonably certain that hiding the full measure of those character flaws from the members had no impact on the result? Of this we believe we cannot be reasonably certain and, therein as a result, we acknowledge that we are left in grave doubt whether the error had substantial influence on the findings. *Moolick*, 53 M.J. at 177 (citing *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985)). Therefore, we will set aside the findings of guilty of the Specification of Charge I and Charge I.

III. Evidence of The Appellant's Use of AOL Account Name "CHIK4U"

The appellant claims in his original Assignment of Errors that the military judge abused her discretion by permitting trial counsel to elicit testimony concerning specific conversations in the "CHIK4U" AOL account and by failing to provide a proper limiting instruction to the members. While our resolution of the issue presented in the Supplemental Assignment of Errors may make consideration of this issue unnecessary, we address the issue because of our decision to address the question of cumulative error. We disagree with the appellant's claims of abuse of discretion.

The evidence of the appellant's possession of child pornography included graphic images found on his personal computer that had been downloaded through the appellant's AOL account. A single Internet service account with AOL is permitted multiple users, or

"user names." Each "user name" functions as a sub-account and has its own e-mail address. The appellant created multiple "user names" in his account and let several of his friends use his account through some of those "user names." One of the "user names" was "CHIK4U." The child pornography found on the appellant's computer was downloaded through "CHIK4U."

The prosecution called friends of the appellant as witnesses to testify about their knowledge of the appellant's use of the "CHIK4U" user name. Later, when the appellant testified, he was cross-examined about his use of "CHIK4U." The witnesses and the appellant described how the appellant engaged in "chat" in Internet "chat rooms" with unwitting airmen they all knew. The appellant pretended to be a female and engaged in sexually suggestive "chat." The motive for this sophomoric behavior appears to have been amusement rather than lasciviousness.

The trial defense counsel did not object to the testimony of the witnesses regarding the appellant's use of "CHIK4U." Instead, the defense counsel conducted extensive cross-examination of the witnesses about the subject. It was only when the appellant was cross-examined that the defense counsel objected. The initial grounds offered were relevance and hearsay. The defense counsel later interposed "asked and answered." The defense did not claim prejudice under Mil. R. Evid. 403 and did not ask for a limiting instruction.

We need not dwell on this issue. The military judge did not abuse her discretion in overruling the objections and not excluding the evidence. *Sullivan*, 42 M.J. at 363. The evidence was offered as proof that the appellant knew about and had used the "user name" identified with the child pornography. The testimony was relevant. Mil. R. Evid. 401, 402. It was not hearsay. Mil. R. Evid. 801.

On appeal, the appellant now claims that the military judge failed to perform a Mil. R. Evid. 403 balancing test. Simply because the military judge did not state for the record that she performed a balancing test does not mean that she did not. Of course, it is difficult to conclude that a balancing test was performed when the judge is silent on the matter.

A military judge has "wide discretion" in applying Mil. R. Evid. 403. *United States v. Humpherys*, 57 M.J. 83, 91 (2002). Our superior court "exercises 'great restraint' in reviewing a military judge's 403 ruling if his reasoning is articulated on the record." *Id*. (quoting *United States v. Harris*, 46 M.J. 221, 225 (1997)). The military judge does not receive this deference when he or she fails to state the grounds for such a ruling. *Id*. *See United States v. Manns*, 54 M.J. 164, 166 (2000).

It matters little in this case whether the military judge performed a balancing test. We have performed the test and find that the probative value of the evidence is not

substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Art. 66(c), UCMJ; Mil. R. Evid. 403.

"Military judges have 'substantial discretionary power in deciding what instructions to give.'" *United States v. McDonald*, 57 M.J. 18, 20 (2002) (quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)). In deciding if there has been an abuse of discretion, we examine the instructions as a whole to see if the instructions sufficiently address the issues and facts presented by the evidence. "The question of whether a jury was properly instructed is a question of law, and thus, review is *de novo*." *Id*. (citing *United States v. Maxwell*, 45 M.J. 406, 424 (1996), quoting *United States v. Snow*, 82 F.3d 935, 939 (10th Cir. 1996)).

During cross-examination of the prosecution witnesses, the trial defense counsel highlighted the fact that the appellant was not the only person with access to "CHIK4U." Thus, the evidence complained of on appeal was not one-sided. The actual thrust of the trial defense counsel's objection to the cross-examination of the appellant was that the questions were cumulative because he admitted he used "CHIK4U," and that to inquire about the specifics of that use was improper. As we have suggested earlier, there is no merit to this position. Our sense is that the trial participants' understanding of the relative weight of the evidence led to defense counsel's vigorous cross-examination of the prosecution witnesses rather than objection to the evidence when first raised, and then, no mention by anyone of any need to conduct an Mil. R. Evid. 403 balancing test or to give a limiting instruction. Additionally, we are unable to conclude that the sophomoric behavior of the appellant was even "uncharged misconduct" that would warrant considering giving a limiting instruction.

We hold that the instructions, as a whole, sufficiently address the issues and facts presented by the evidence.[6] *Maxwell*, 45 M.J. at 424; *Snow*, 82 F.3d at 939. We hold that the military judge did not abuse her discretion by not giving a limiting instruction on uncharged misconduct. *McDonald*, 57 M.J. at 20; *Damatta-Olivera*, 37 M.J. at 478.

IV. Possession of Child Pornography Offense

The appellant claims in his Supplemental Assignment of Errors that the guilty finding to Specification 2 of Charge III, which alleges possession of child pornography, must be set aside because the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), renders instructions given by the military judge erroneous. Because we are unable to hold the pertinent instructions harmless, we agree.

[6] This holding does not apply to the issue raised in the Supplemental Assignment of Errors.

The appellant was prosecuted, under Art. 134, UCMJ, for violation of a specific provision of the Child Pornography Prevention Act of 1996 (CPPA). 18 U.S.C. § 2251 *et seq*. Specification 2 of Charge III alleged that the appellant did "wrongfully and knowingly possess a computer disk or other material which contained 3 or more images of child pornography in violation of 18 U.S. Code Section 2252 A, paragraph (a)(5)(A)." At the time of the alleged offense, this statute provided:

> Any person who either in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography … shall be punished as provided in subsection (b).[7]

Relevant definitions appear in 18 U.S.C. § 2256. The definition upon which the present issue turns is the definition of child pornography. The statute provides:

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or **appears to be**, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that **conveys the impression** that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct[.]

(Emphasis added.) The military judge quoted the above definition of child pornography as a part of her instructions to the court members.

[7] An amendment in 1998, effective after the appellant's alleged offense, reduced the requirement of "3 or more images" to "an image."

In *Free Speech Coalition*, the Supreme Court held the prohibitions of 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D) to be overbroad and unconstitutional. *Free Speech Coalition*, 535 U.S. at 425-26. The Court essentially held that the words in these two subsections ("appears to be" and "conveys the impression") "proscribe a significant universe of speech that is neither obscene under [*Miller v. California*, 413 U.S. 15 (1973)] nor child pornography under [*New York v. Ferber*, 458 U.S. 747 (1982)]."

Interestingly, while not mentioned in his Supplemental Assignment of Errors, the appellant moved at trial to dismiss the allegation of possession of child pornography, claiming that the CPPA was unconstitutional because it contained an impermissibly broad definition of child pornography by including the words "appears to be."[8] The military judge denied the motion. But the present issue is not error in the denial of the motion, but the impact of the military judge's instructions that included the definitions struck down by the Supreme Court.

Another panel on our Court has recently addressed the impact of *Free Speech Coalition* on a special court-martial conviction for possessing child pornography, where the accused pled not guilty and elected to be tried by a military judge sitting alone. *See generally United States v. Lee*, 57 M.J. 659 (A.F. Ct. Crim. App. 2002). After lengthy discussion, the *Lee* case panel decided that the military judge's consideration of the definitions of child pornography held to be constitutionally overbroad in *Free Speech Coalition* was error, but harmless beyond a reasonable doubt because the evidence showed that the pictures alleged to be child pornography were of actual children. *Id*. at 662-64.

The evidence of child pornography in this case is substantially different than the evidence in the *Lee* case. The pictures alleged to be child pornography in the appellant's case are not clearly of actual children, i.e., persons under the age of 18 years. Particularly, with the requirement that there must be three images of child pornography, the impact of the judge's definitional instruction becomes apparent when one views the pictures in evidence. The trial counsel even argued to the court members that it didn't matter whether the image was of an actual adult or not as long as it was "marketed" as an image of a child. Under these circumstances, we cannot say that the instructional error, which is of a constitutional dimension after the Supreme Court's decision in *Free Speech Coalition*, was harmless beyond a reasonable doubt. *Walker*, 57 M.J. at 178 (citing *Chapman*, 386 U.S. at 24). *See Griffin v. United States*, 502 U.S. 46, 53 (1991) ("where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground"). Therefore, we will set aside the finding of guilty of Specification 2 of Charge III. We

[8] Appellate Exhibit XXXVII.

will also set aside the finding of guilty of Charge III because our decision on Specification 2 leaves no remaining guilty findings under this charge.

V. Order to Defense Counsel to Give Alleged Victim's Husband a Rights Advisement

While not assigned or specified, we are compelled to comment on the military judge's decision to order the trial defense counsel to advise the husband of the alleged victim[9] of his "Fifth Amendment Rights" before asking him any questions. *See* U.S. Const. amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966).

The following exchange, which occurred near the end of the day of 27 October, initiated the issue:

> DC: Your Honor, for some time now we have asked for an opportunity to interview [KG]. [KG] is the husband of the alleged victim. On Saturday night when we interviewed the alleged victim, we learned for the first time, and in direct contradiction to what the alleged victim had told us in the group meeting that we had with her in New Albany - that [KG] had in fact on one occasion had beaten her. Specifically, hit her in the face after an allegation of adultery - this time on his part, had arisen. Early documents in the investigation and information indicated that [the alleged victim's] mother had concerns that if [KG] found out that [the alleged victim] was located at 6 a.m. in a motel room with a man not her husband, that he would become violent. We also have -
>
> MJ: Let me ask you regarding [KG], if your position is that he had beaten his wife on a previous occasion, wouldn't he be entitled to his Fifth Amendment Rights?
>
> DC: Your Honor, as a non-military member, if I interview him, I'm not acting (a) in a law enforcement capacity or (b) if he shows up for an interview, my only guess is if he's subpoenaed then there might be a custodial issue there. But if I'm the one asking the questions as defense counsel - I understand that this isn't the issue of the military member. I understand if the court so instructs, I have as a civilian law enforcement officer, read people their Miranda rights and if the court so instructs, I would of course follow that. But I believe I should at least have an opportunity to speak with him. I would like to know what consistencies he has to say about what he observed. What the alleged victim has told us - we don't refute this necessarily, but the alleged victim told us that when she communicated facts of the assault to [KG], it was in the presence of the

[9] The alleged victim and her husband were civilians.

mother and [the alleged victim] which then to the extent that there could be a marital privilege or spousal privilege issue, that doesn't rise at that point. Now, I'm not sure I would anyway, but certainly that group setting is something else.

Your Honor, I will relay to the court that we have called - I have tried to get a hold of [KG]. We asked [the alleged victim and her mother] for help in trying to get him to talk to us. And I will tell the court that [the alleged victim] made an implied threat to defense counsel, that if we were to try and contact him at his residence ourselves, that it could be dangerous. I want to be really clear. She didn't say, "I'm not saying he's going to hurt you, I'm not saying he's going to threaten you, but I am saying it's not a good idea because he's a big man with a temper." That type response. And I'm not saying the fact that she says he has a temper as part of my proffer here about what she told us. So at least in this regard, Your Honor, we have been diligently trying to talk to him. We have made this request.

MJ: I believe he is probably entitled to his Fifth Amendment Rights, counsel. That's my problem. You want me to order him to come and tell you about an allegation that he beat his wife?

DC: Your Honor, if the court instructs me not to ask about prior acts of violence between an husband and a wife--

MJ: Well, I'm not going to tell you how to conduct your interview. I'm concerned about whether or not I have any power to require a person who may be suspected of a crime to give up their constitutional rights under the Fifth Amendment.

DC: Your Honor, two things that I can respond to, or would like to respond to in that regard. Number one, if the order is done in such a way that he is produced so that I can query him about admissions made by the victim to him and not to anything else then I will, of course, follow that order. Number two, Your Honor, Saturday night that victim told us in no uncertain terms that she's been beaten by her husband before. And I think that is very, very, very relevant evidence in this case, given the facts that this is not in dispute in this case, which was that she was found in a hotel room by her mother, with a man not her husband. And Your Honor, the remedies out there, if he in fact invokes his rights, stems from nothing to abatement. I'm not prepared to say what, I don't know what they would be. The fact that that violent act has occurred before, and she said that she's been hit in the face and showed up with a facial injury at the doctors office on the 13th of October and to be clear, we've gone on record for sometime

now with what our theory of this case is. We are not hiding anything. As far as our theory of the case is - that she was discovered in a hotel room with my client, and somebody assaulted her after that. And I understand the court's concern, but I guess I would have to ask for a ruling from the judge. If the judge's ruling is, "I'm not going to order him because of his Fifth Amendment rights," then I need to research that issue to find out what I'm supposed to do at that point. The fact that somebody else might be responsible for the crime and is refusing to talk to me - I think it opens up another host of issues.

MJ: Trial Counsel?

TC: In addition to what Your Honor has mentioned in terms of his Fifth Amendment rights, they already have, from the wife, the victim that he hit her once before. So what need is there to ask [KG] about this at all. It's clear from both the testimony and prior statements of [the alleged victim's mother] that the victim's husband was not home at the time that they returned. It's clear from the deposition of [the alleged victim's girlfriend] that he was not home at the time. So we already have three other people that have seen the victim before her husband ever saw her, and I fail to see the issue. Either they are saying they want to talk about a prior incident in the past, in which he still has Fifth Amendment rights or they are going to suggest to him and ask him about whether he in fact committed the injury? Again, it is the same problem.

MJ: I'm going to direct that you, trial counsel, make contact with [KG] and that you urge him to contact the defense counsel. Defense counsel, I believe that [KG], based on what you've indicated you want to interview him on, could be a person entitled to his Fifth Amendment rights. So if you are successful in making contact with [KG] before you interview him you will be obliged to inform him that he has a right to remain silent and that anything he says could and would be used against him in a court of law. And that he has a right to an attorney and an attorney to be present during any interview conducted with you. And all of those other things that go along with Fifth Amendment, Miranda rights, okay?

DC: I probably still have my old rights advisement card, Your Honor.

MJ: Then if he wants to be interviewed by you, you are certainly free to do so. But if he elects to invoke his rights, I don't believe that the Constitution or the accused's trial permits you to ignore his Fifth Amendment rights, when you want to specifically interview him on a issue that may relate to a criminal offense. And you know that. You know that now, because that's

what you have told the court. You want to interview him about him beating his wife, a statement which she apparently made to you. You know that's what you are going to interview him on.

DC: I know that's what I'm going to interview him on. If the court is not compelling his attendance --

MJ: I'm not compelling his attendance now. I'm urging the trial counsel to contact [KG] and to urge him to contact you, so that you can at least inform him of his rights and ask him if he wants to be interviewed.

DC: And, if in fact, it's [the civilian defense counsel] that's going to speak to him. I assume the same applies?

MJ: The same applies. And if that is not successful in getting at least a telephonic interview, then you can re-raise the issue before the court.

At a later session of the court-martial, on 6 November, the following exchange occurred:

DC: Your Honor, may I please put on the record that two nights ago, I did call [KG]. Upon rights advisement as the court instructed, [KG] invoked. I made that known to the trial counsel. Your Honor, I would expect that he would be able to provide information to the following: That during an interview with the alleged victim, she indicated to me that on one occasion, [KG] did assault her. I believe if we got that information out through the alleged victim, then that is an alternative means to get the information out. I would still ask for some assistance, perhaps from the trial counsel, addressing that matter. I don't know if he would have spoken to me otherwise. I don't want to say that I got an impression as to that, because I actually didn't get that far.

MJ: I'm not going to require the trial counsel to try to violate the 5th Amendment rights of any witness for purposes of preparing this trial. That is not what you are asking.

DC: No Ma'am.

MJ: But my concern is that the net effect might be that very thing. This witness has invoked his right under the 5th Amendment. The information on which you want to interview him - I think it is clearly established for the record that this guy did not want to talk to you. He was asked to call you by the trial counsel. This interview with you, I would not call it voluntary

at this point, because I think it is very clear that he does not want to speak with you. That is clear on the record. Therefore, if he has invoked his right under the 5th Amendment, I believe he is unavailable. I am not going to require the government to do anything more.

DC: Yes Ma'am. I understand that my remedy is to request immunity. I'm not going to do so now. I will investigate that this evening.

The military judge further explained her rationale at a later session on 10 November. In discussing the Air Force Rules of Professional Conduct and Air Force Standards for Criminal Justice, she said:

Rules [sic] 4.4 states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." That's rule 4.4, Air Force Rules of Professional Conduct. However, if you look at standard 4-12 - I'm sorry, 4-4.3, subsection B [sic], it states that, "It is not necessary for a defense counsel or an investigator for the defense, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel."

Nonetheless, I required the defense to do that in this particular case with regard to [KG], and I believe that rule 4.4 takes precedence over the standard 4-4.3, subsection B. I believe the rule takes precedence over the standard, particularly where, as here, [KG] was not willing to grant an interview with the defense, and it was with the court's interference or the court's action that he was compelled, essentially, or urged, to contact the defense. And therefore, I believe that rule 4.4 takes precedence over the standard in that in interviewing a witness who did not consensually [sic] involve himself in the interview process, but rather at the urging of the trial counsel, and with the urging of the court, contact the defense, that it would be inappropriate for him not to be advised of his rights in accordance with the standard set out in rule 4.4.

And so I just want to note that for the record because someone may look at this later and say, why did the judge do that. Well, the judge did it because [KG], obviously and clearly, did not voluntarily submit to this interview. It was after the court urged the defense to make this - or urged the witness - the court urged the trial counsel to make this witness contact the defense for an interview that he finally, apparently, made the call. And under those circumstances, I believe rule 4.4 applies, that the defense could not use an interview process that would violate the Fifth Amendment legal rights of

> that witness for the purposes of interviewing the witness. And so that's the reason that I ruled as I did.

We find the military judge's explanation unpersuasive.

> The Fifth Amendment guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." In *Miranda* this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police. The Fifth Amendment itself does not prohibit all incriminating admissions; "[a]bsent some officially **coerced** self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."

New York v. Quarles, 467 U.S. 649, 654 (1984) (citations omitted) (emphasis added), *cited in United States v. Catrett*, 55 M.J. 400, 404-06 (2001). *See also Dickerson v. United States*, 530 U.S. 428 (2000) for a historical account of the law governing the admission of confessions.

In this case, the military judge instructed the trial counsel to "urge" the husband of the alleged victim to contact the defense counsel. The husband was a civilian. He was not in custody. There was no information before the court that the husband was the subject of any police investigation. Under these circumstances, there is no rational basis to conclude that the military judge's "urging" of the witness to call the defense counsel was sufficient coercion to require a rights advisement.

The military judge's conclusion that the Air Force Rules for Professional Conduct take precedence over the Air Force Standards for Criminal Justice exposes her error. The Rule and the Standard are not inconsistent. Standard 4-4.3(b), which states: "[i]t is not necessary for defense counsel or an investigator for the defense, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel," is a correct statement of present law. TJAG Policy Letter No. 26, *Air Force Rules of Professional Conduct & Air Force Standards for Criminal Justice*, (4 Feb 1998). This Standard is taken from the American Bar Association (ABA) Standards for Criminal Justice, Standard 4-4.3(b). Immediately after the Standard, the following history is provided:

> Original paragraph (b) stated that "it is proper but not mandatory" for a defense lawyer or the lawyer's investigator to caution a prospective witness concerning possible self-incrimination and the need for a lawyer. The standard now states that "[i]t is not necessary" that such advice be given. This change is due to the belief that the giving of such warnings is probably inconsistent with counsel's responsibilities under the adversary

> system. Defense counsel's primary duty is to the client, not to prospective witnesses, regardless of the extent to which they may happen to be in need of legal assistance. If the cautionary notice of paragraph (b) were to be given, undoubtedly some witnesses would refuse to speak with the defense, which is difficult to reconcile with the duty of counsel "to seek the lawful objectives of his client" as specified in the Code of Professional Responsibility.

ABA Standards for Criminal Justice 4-4.3, Relations with prospective witnesses, History of Standard, 1986 Supplement, Vol. I (citing ABA, Code of Professional Responsibility DR7-101(A)(1)). Rule 4.4 of the Air Force Rules of Professional Conduct merely states, in relevant part, that a lawyer may not use methods of obtaining evidence that violate the legal rights of a third person.

It is apparent that the military judge erroneously concluded that the husband of the alleged victim was entitled to a rights advisement by the defense counsel prior to questioning. We conclude that, even if the husband were an active duty military member, he may not have been so entitled under Article 31(b), UCMJ, 10 U.S.C. § 831(b). *See United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). *See also United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990); Lieutenant Colonel H. L. Williams, USA, *NOTES FROM THE FIELD: To Read or Not to Read … The Defense Counsel's Dilemma Provided by Article 31(b), UCMJ*, Army Law., Sep 1996, at 50; Major John B. McDaniel, USA, *Article 31(b) and the Defense Counsel Interview*, Army Law., May 1990, at 9. *But cf. United States v. Milburn*, 8 M.J. 110 (C.M.A. 1979) (appropriate warnings required of military defense counsel who sought incriminating statements from military member not represented by counsel); *United States v. Rexroad*, 9 M.J. 959 (A.F.C.M.R. 1980) ("military defense counsel can not deliberately seek incriminating answers from witnesses unrepresented by counsel" (citing *Milburn*)). *Compare Milburn with United States v. Marshall*, 45 C.M.R. 802, 806-08 (N.M.C.M.R. 1972) (quoting *United States v. Howard*, 17 C.M.R. 186 (C.M.A. 1954) (Congress could not have intended to burden military defense counsel with warnings requirement). The compelling point from all of these cases is that there is no debate whether defense counsel, civilian or military, have a duty to warn a **civilian** not represented by counsel before seeking incriminating statements from that person. Defense counsel have no such duty.

In this case, neither the military nor civilian defense counsel had an obligation to advise the civilian husband of the alleged victim of his rights. The military judge's "urging" for the husband to contact the defense counsel provided no coercion for the husband to confess.[10] Therefore, the military judge's actions did not create such an

[10] If anything, the warnings to the husband would have encouraged him to not cooperate. *See United States v. Brice*, 19 M.J. 170, 172 (C.M.A. 1985) (Everett, C.J., concurring).

obligation for the defense counsel and her order to the defense counsel was, as a result, improper.

We are left to address the question of whether the appellant suffered a material prejudice to a substantial right. Art. 59(a), UCMJ. The husband's election to remain silent leaves us to speculate about what he knew that might have been valuable in the search for the truth. On the other hand, the record does not indicate that the trial defense counsel made any further effort to pry the truth from the husband and the appellant has not raised the issue before us. Because of our decision to set aside the findings of guilty for the reasons previously stated and because of cumulative error, we need not decide whether this error alone resulted in material prejudice to a substantial right of the appellant's.[11]

VI. Cumulative Error

As we have held, the error in not admitting the evidence of three prior convictions of the alleged victim and the instructional error flowing from *Free Speech Coalition* each require reversal of the offense to which each error pertains. However, even if these errors were not sufficient standing alone to require reversal, we hold the cumulative effect of all of the errors we have identified require us to set aside the findings and sentence. *United States v. Dollente*, 45 M.J. 234 (1996). One matter that we have yet to discuss that adds weight to our decision on cumulative error is the run of the trial, i.e., the manner in which the military judge and counsel conducted themselves throughout the trial. *See Id*. at 242.

The charges against the appellant were referred to trial on 7 May 1998 and served on him on 15 May 1998. The initial session of the court-martial was conducted on 23 June, but the court was not assembled until 9 November 1998. The military judge was obviously trying to get the case tried as expeditiously as possible, while the civilian defense counsel seemed intent on delaying the trial as long as possible. If the civilian defense counsel's goal was to frustrate and provoke the military judge, he succeeded splendidly. The military judge's exasperation with the defense is clearly laid out on the record. Unfortunately for anyone reading it, the record of trial is nearly 2,000 pages long and is a difficult read.

Despite the protestations of the defense, the military judge insisted on conducting marathon court sessions. The trial started at 0800 and routinely went past 2000 each day, with the military judge proclaiming that sessions would go until 2200. In fact, the military judge sent the court members out to deliberate at 2230 on a Saturday, after a full court day that began at 0825. The court recessed at 2343 without reaching a verdict. Courts-martial are a search for truth and justice, not a race to completion over the

[11] If the rape allegation is again referred to trial, this issue or related issues might become ripe for consideration by the trial court.

prostrate bodies of the participants. It is unreasonable to expect the attorneys, the court members, the court reporter, or even the military judge to be able to retain their focus during such long sessions. Such long sessions are a recipe for frayed nerves and intemperate comments. It certainly provides a less than professional image of the military justice system and smacks of a rush to judgment.

The repeated defense requests for delays and continuances became a sore point between the military judge and the civilian defense counsel. The military judge became so frustrated that she threatened to hold the defense counsel in contempt if he was not ready to proceed to trial at the end of a just-granted continuance. But contempt in a court-martial is not authorized for being unprepared or asking for a continuance. A court-martial is only authorized to "punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder." Article 48, UCMJ, 10 U.S.C. § 848.

The record of trial is replete with rancorous exchanges between the military judge and the civilian defense counsel. The military judge repeatedly restricted the defense counsel from exploring what appear to be legitimate areas for cross-examination of prosecution witnesses. By sustaining just about every petty objection made by a petulant trial counsel, she also ran roughshod over the civilian defense counsel during his direct examination of the appellant. Virtually every attempt by the defense to explore some area in more detail was met with the objection, "already asked and answered," which was sustained by the military judge. The military judge also sustained trial counsel's objections to almost every attempt by the defense counsel to focus the appellant during his sworn testimony on findings as "improper leading."

The nature of and quantity of the errors in this case are controlling. The manner in which the trial participants conducted themselves during the trial only adds to the question of whether the cumulative effect of the errors affected the outcome of the case. As in *Dollente*, "we cannot say with any certainty that the cumulative effect of these errors did not." *Id*. at 243.

VII. Conclusion

The findings of guilty and the sentence are set aside. The record of trial is returned to The Judge Advocate General of the Air Force to forward to the convening authority. A rehearing is ordered. R.C.M. 1203(c)(2).

Judge PECINOVSKY participated in this decision before his retirement.

OFFICIAL

HEATHER D. LABE
Clerk of Court