IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.D. HARTY**

UNITED STATES

v.

Michael A. SOWINSKI
Sergeant (E-5), U.S. Marine Corps

NMCCA 200202260 Decided 18 August 2005

Sentence adjudged 2 November 2001. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LT MICHAEL J. NAVARRE, JAGC, USNR, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of a single specification of distributing a controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to confinement for 24 months, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed. The CA granted a subsequent clemency request, reducing the appellant's confinement by 3 months.

This court has carefully examined the record of trial, the appellant's Petition for New Trial, the Government's Answer, the appellant's Reply, the appellant's six assignments of error, and the Government's Answer. We find that the findings are correct in law and fact but direct the record of trial be returned to the convening authority for action consistent with the orders of this court as to sentencing. Otherwise, we find that no error

materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Petition for New Trial or *Dubay* Hearing

In his Petition for New Trial, the appellant alleges that he is entitled to a new trial because of member misconduct during deliberations. Petition for New Trial of 15 Sep 2003 at 5. In a related assignment of error, the appellant also asserts the military judge erred in denying the appellant's motions for a post-trial hearing to look into member misconduct. Appellant's Brief and Assignments of Error of 30 Jan 2004 at 3. As an alternative to a new trial and as relief for the denial of a post-trial hearing, the appellant requests a *DuBay*[1] hearing to look into the alleged misconduct. Petition for New Trial at 9. Appellant's Brief and Assignments of Error of 15 Sep 2003 at 13.

The Government asserts the appellant is not entitled to a new trial because he has not proffered newly discovered evidence or a fraud on the court, citing Article 73, UCMJ, and RULE FOR COURTS-MARTIAL (R.C.M.) 1210(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Government's Answer of 10 Oct 2003 at 2-3. The Government argues that the appellant is not entitled to a *DuBay* hearing because he is seeking appellate discovery, which should be denied in accordance with *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002) and *United States v, Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Government's Answer of 10 Oct 2003 at 4-10.

***DuBay* Hearing**

As part of his Petition for New trial and his first assignment of error, the appellant alleges that he is entitled to a *DuBay* hearing on the issue of member misconduct. Specifically, the appellant alleges that members held his written confession up to a light to discover information the military judge ordered redacted.

Prior to trial, the military judge granted a defense request to redact the appellant's handwritten confession. After conducting a MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) balancing test, the military judge ordered the words "four nights, on four different nights" redacted. The Government redacted the above language with strips of correction tape and the defense approved the redacted document before it was published to the members. With the redaction, the appellant's statement read in pertinent part as follows:

> I chose to sell/attempt to sell 10 pills of ecstasy - [redacted language]. I bought them . . . for $200.00. I turned around and sold them for $25 apiece. This was between mid-Feb and mid to late March.

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Prosecution Exhibit 5 at 1.

The appellant was charged with the distribution of 4 pills of "MDMA or 'ecstasy'" on or about 4 March 2000. Charge Sheet. During closing arguments on findings, the civilian defense counsel (CDC) argued the Government did not meet its burden of proof because even if the members were convinced the appellant sold 10 pills of ecstasy at some time, there was no evidence the 4 pills sold to the DEA agent in this case were part of those 10 pills. Record at 392-93. The CDC repeated the appellant's written confession stating he "'chose to sell or attempt to sell ten pills of ecstasy . . . between mid-March to mid-February to late March.'" Record at 397. The members found the defendant guilty of the single sale of ecstasy, as charged.

Immediately following the appellant's trial, a Government witness spoke with one or more of the members who sat on the appellant's court-martial. The Government witness conveyed the content of that conversation to the trial counsel (TC) who then conveyed the information to the trial defense counsel (TDC). According to the TDC, the TC informed him that the following occurred:

> (1) that he (Special Agent (SA) Griffin)[2] had a conversation with several court-martial members as they were leaving the courtroom; and (2) that one or more court-martial members told SA Griffin that they had held the redacted confession up to the light and read the language "on four separate occasions" through the white tape placed on the document. . . .

Appellate Exhibit XXXIV at 1.

Based on this information, approximately 2 months after his trial and before the record of trial was authenticated, the appellant filed a Motion for Post-Trial Session under Article 39(a), UCMJ, Appellate Exhibit XXXIV. He subsequently filed a Supplemental Motion for Post-Trial Session under Article 39(a), UCMJ, Appellate Exhibit XXXVI. Both motions requested an evidentiary hearing to determine if the appellant was prejudiced by member misconduct.

At the military judge's request, the TC submitted his position on the appellant's motions stating in part that:

> 1. The Government witness told him he had talked generally to several members after trial.
> 2. One of the members talked about the redacted portion of the appellant's confession.

[2] SA Griffin was the undercover DEA special agent who testified that he purchased the ecstasy from the appellant.

> 3. The Government witness was joking about the members holding the appellant's written confession up to the light to see what was redacted.

Appellate Exhibit XXXV. The TC did not refute that he had reported this incident to TDC nor did he refute the TDC's version of their personal conversation on this matter.

Without an evidentiary hearing, the military judge issued essential findings and ruling, summarily denying the appellant's motions for a post-trial Article 39(a), UCMJ, session, stating in part that:

> 1. The defense has not provided information sufficient to believe that the members attempted to read the redacted portions of Prosecution Exhibit 4 (sic).[3]
> 2. Even if the members attempted to read the redacted portions of Prosecution Exhibit 4 (sic), the defense has not provided information sufficient to believe that the members were successful in reading the redacted portions of Prosecution Exhibit 4 (sic).

Appellate Exhibit XXXVII at 2. The military judge went on to find that, given the nature of the defense theory of the case and closing argument, the members' knowledge of the redacted language would not have prejudiced the appellant. *Id*. at 3.

In *United States v. Sonego*, 61 M.J. 1, 4 (C.A.A.F. 2005), our superior court concluded that the "colorable claim" test is the standard for determining whether an appellant is entitled to a post-trial evidentiary hearing. There, the appellant petitioned the Air Force Court of Criminal Appeals for a new trial based on post-trial information that one of his sentencing members had not answered a *voir dire* question truthfully.[4] In an unpublished opinion, that court denied the appellant's petition for new trial and denied the appellant's request for a *DuBay* hearing.[5] Our superior court determined that an affidavit from the TDC stating the proffered information created a "colorable claim" that entitled the appellant to an evidentiary hearing. The "colorable claim" standard is not new; it has been adopted in various other contexts. *See*, *e.g.*, *United States v. Taylor*, 60 M.J. 190, 195 (C.A.A.F. 2004)(prejudice due to post-trial error); *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002) (appellate discovery); *United States v. Douglas*, 56 M.J. 168, 170 (C.A.A.F. 2001)(violation of rights under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)); *United States v. Diaz-*

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[3] The appellant's written confession was admitted as Prosecution Exhibit 5.

[4] The question dealt with an inflexible sentencing attitude. There is no indication that the appellant had filed a motion for a post-trial Article 39(a), UCMJ, session with the military judge or convening authority.

[5] *United States v. Sonego*, ACM S30216 (A.F.Ct.Crim.App. 28 Apr 2004).

Duprey, 51 M.J. 168 (C.A.A.F. 1999)(ineffective assistance of counsel).

Applying the "colorable claim" standard to the appellant's case, we find the appellant was entitled to a post-trial evidentiary hearing. That does not mean, however, that he is now entitled to a *DuBay* hearing in order to resolve his petition for a new trial. Unlike *Sonego*, the military judge immediately took proffers from 2 officers of the court, although not in affidavit form. The military judge, in part, assumed *arguendo* that the TDC's proffer was true and found that under all the circumstances contained in the record of trial the appellant would not have suffered any prejudice if the facts were true. We agree. After a full review of the record of trial, and assuming *arguendo* that one or more members learned of the redacted information, we find that the appellant would not have been prejudiced as to findings.[6] We decline to order a *DuBay* hearing to determine if a new trial should be ordered.

Petition for New Trial

The appellant alleges that he is entitled to a new trial because of the same member misconduct described in the previous section. The Government asserts that the appellant is not entitled to a new trial because he has failed to proffer any newly discovered evidence or fraud on the court in accordance with Article 73, UCMJ.

Article 73, UCMJ, allows petitions for new trials "on the grounds of newly discovered evidence" or "fraud on the court." R.C.M. 1210(f)(2) and (3) implement the UCMJ provision by providing that:

> (2) *Newly discovered evidence*. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
>
> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) *The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence,* would probably produce a substantially more favorable result for the accused. (emphasis added).

[6] Prior to trial, the military judge concluded the redacted language was admissible, but that its prejudicial effect substantially outweighed its probative value and therefore should be excluded. MIL. R. EVID. 403. The military judge's subsequent ruling and our finding that no prejudice as to the findings would have occurred by disclosure of the redacted information is based on the entire record rather than the pretrial record.

(3) *Fraud on court-martial*. No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

Although the appellant's motions were submitted pursuant to R.C.M. 1102, which governs post-trial sessions, the military judge applied, in part, an R.C.M. 1210 analysis governing petitions for new trials, and followed the procedure outlined in *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989), where our superior court stated:

> If evidence is discovered after trial which would constitute grounds for a new trial under RCM 1210(f), this might be considered a "matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence" within the meaning of RCM 1102(b)(2). However, even if the drafters of the Manual did not intend such an interpretation of this Rule, we still are persuaded that Article 39(a) of the Code empowers the military judge to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate.

Id. at 65-66 (footnote omitted).

Our superior court has opined "requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored. Relief is granted only if a manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). In *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998), our superior court held that:

> When presented with a petition for new trial, the reviewing court must make a credibility determination, insofar as it must determine whether the "newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused." RCM 1210(f)(2)(C). The reviewing court does not determine whether the proffered evidence is true; nor does it determine the historical facts. It merely decides if the evidence is sufficiently believable to make a more favorable result probable.

Id. at 69. Although the military judge did not reference R.C.M. 1210 in his holding, he did apply the proper standard to determine whether a new trial should be granted. Without regard

for whether the proffered evidence was true, the military judge held, in part, that if the facts were true they would not result in a different finding or sentence. Appellate Exhibit XXXVII at 2-3.

"We review a military judge's ruling on a petition for a new trial for abuse of . . . discretion." *United States v. Humpherys*, 57 M.J. 83, 96 (C.A.A.F. 2002)(citing *United States v. Rios*, 41 M.J. 261, 268 (C.A.A.F. 1998)). An abuse of discretion occurs "if the findings of fact upon which he predicates his ruling are not supported by evidence of record; if incorrect legal principles were used by him in deciding this motion; or if his application of the correct legal principles to the facts of a particular case is clearly unreasonable." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)(citing *United States v. Travers*, 25 M.J. 61, 62-63 (C.M.A. 1987)). The military judge should have held an evidentiary hearing into this matter rather than rely on unsworn proffers. Those unsworn proffers, however, were from officers of the court. Although it was error not to hold the requested hearing, it was harmless error as to findings.

Findings

Based on our review of the entire record of trial we do not believe the appellant would have suffered any prejudice on findings if the members discovered the redacted information. The CDC's defense theory was that the appellant may have sold up to 10 pills of ecstasy during February and March 2000 to unspecified persons on unspecified dates, but there was no admission that he sold the 4 pills to the person alleged in this case. This defense theme began in *voir dire* and carried through to closing argument. In essence, the CDC argued what was redacted from the appellant's written confession. That is, it does not matter how many times the appellant sold ecstasy during February and March 2000, because he did not sell the ecstasy alleged in the charge sheet.

We cannot see how the appellant could have been prejudiced by members learning that he admitted to selling ecstasy on 4 occasions when his own counsel argued that it did not matter if the appellant had sold on multiple occasions. We also note that there was overwhelming evidence that the appellant did sell 4 pills of ecstasy to an undercover DEA agent as alleged. Under these circumstances, we find that the appellant is not entitled to a new trial. This assignment of error does not have merit as it pertains to findings.

Sentencing

The members' consideration of the redacted portion of his confession may have influenced the appellant's sentence. Consideration of the redacted language combined with the defense theory in the case could very likely have resulted in the members sentencing the appellant for a pattern of conduct rather than for

a single act as charged. The military judge ruled, however, that the appellant was not prejudiced on sentencing because the members were instructed they may only sentence the appellant for the offense of which he was convicted. Appellate Exhibit XXXVII. We do not share the military judge's confidence.

There is an "almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *United States v. Ellis*, 57 M.J. 375, 382 (C.A.A.F. 2002). Absent some indication to the contrary, we presume that members follow the military judge's instructions. *United States v. Holt,* 33 M.J. 400, 403 (C.M.A. 1991)(citing *United States v. Ricketts,* 50 C.M.R. 567, 570 (C.M.A. 1975).

The military judge instructed the members "you must bear in mind that the accused is to be sentenced only for the offense of which he has been found guilty." Record at 479. The members were further instructed "you should consider all matters in extenuation and mitigation, as well as those in aggravation, whether introduced before or after your findings. Thus, all the evidence you have heard in this case is relevant on the subject of sentencing." *Id.* at 483.

The TDC made a "colorable claim" that the members considered extraneous information during deliberations. Our superior court has set forth the rule that prejudice is presumed in cases involving extraneous prejudicial information before the members. The purpose of this presumption is to avoid inquiry into the thought processes of the members. *United States v. Straight*, 42 M.J. 244, 250-51 (C.A.A.F. 1995)(citing *United States v. Bassler,* 651 F.2d 600, 603 (8th Cir. 1981)). "Because Rule 606(b) precludes the district court from investigating the subjective effects of any extrinsic material on the jurors, whether such effects might be shown to affirm or negate the conclusion of actual prejudice, a presumption of prejudice is created and the burden is on the government to prove harmlessness." *Bassler,* 651 F.2d at 603.

If we assume the members looked at and read the redacted portion of the appellant's confession during deliberations, as we assumed for purposes of resolving the issue on findings, then we have some indication the members did not confine themselves to "evidence you have heard in this case" in arriving at a sentence. We are also mindful of the approved sentences of similar cases in the field as we discharge our statutory mandate. Taking into account all the facts and circumstances and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we are aware that awarding a combination of a dishonorable discharge and confinement for 24 months for a single sale of a controlled substance is out of proportion to the offense and the appellant's character and service. This is further indication the members may not have followed the court's

instructions by considering information beyond what was admitted as evidence.

This court's options are limited. We can send the record of trial back for a *DuBay* hearing or for resentencing, or we can reassess the appellant's sentence following the principles of *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988), and *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Consistent with our superior court's holding in *Sonego*, the record of trial will be returned to the Judge Advocate General of the Navy for submission to the convening authority for action consistent with the orders contained in our decretal paragraph.[7]

Peremptory Challenge

In his second assignment of error, the appellant contends that the military judge erred by granting the trial counsel's peremptory challenge against one of two female members of the court-martial, where the trial counsel's stated gender and race-neutral reason for the challenge was not connected to the member's ability to execute her duties and was based on discriminatory stereotypes. Appellant's Brief and Assignments of Error at 14. The Government counters that the military judge did not commit clear error by finding the trial counsel's explanation showed a valid non-discriminatory purpose, and that the appellant waived the issue by not objecting to the stated basis, not requesting further detail, and not objecting to the judge's ruling. Government's Answer of 26 Oct 2004 at 6. We are persuaded by the Government.

Following group and individual voir dire of the members, and an opportunity to challenge for cause, the military judge asked the Government whether it desired to exercise its peremptory challenge. The following exchange took place:

> MJ: Does the government have a peremptory challenge?
> TC: Yes, sir. The government challenges Chief Warrant Officer-3 [S].
>
> MJ: I note that this is not a -- that she's a female. Does either side see the need for a Batson type nondiscriminatory challenge for basis?
> CC: Well, I will say it and get it over with, we ---
>
> MJ: -- let me ask you this, do you have a, trial counsel, do you have a nondiscriminatory basis for challenge?
> TC: Yes, sir. Just her disposition. She is a little bit overweight. I don't care for her demeanor. It's not what I call a military demeanor, regardless of her sex. That's why I challenged her. I would do the same

[7] The appellant's 5th assignment of error concerning a defective staff judge advocate's recommendation is rendered moot by the court's action herein.

if it were a male warrant officer with that disposition and demeanor.

CC: Your Honor, it's sort of a reverse Batson for lack of a better term, which is that we expect that the evidence in this case where the accused was threatened with incarceration in a facility, under circumstances which would give the inference that it was a majority populated by African-Americans and that, therefore, he should fear for his physical security there. To some extent, I think that striking an African-American off the panel may be some evidence, of frankly, sort of a reverse Batson.

MJ: Is Chief Warrant Officer [S] African-American?
TC: I couldn't even tell you.
CC: I'm not sure. The questionnaires don't have a race block on them, so I don't know, even though the manual indicates that it should.
TC: I thought she was Indian or Asian to tell you the truth, sir.
CC: I don't know.
TC: Assistant counsel thinks she was Italian, sir, so that in itself should show you that there is no race based challenge to the member.

MJ: Let me say for the record that I do not know what Chief Warrant Officer [S]'s ethnic basis is. I'm not sure if she's a minority myself. She is somewhat dark complexioned, which could be part African-American, part Asian, or part Native-American or Italian. I don't know. I will say that even if she is, I find that there is a sufficiently nondiscriminatory basis for the challenge.

I don't find her to be particularly overweight or slovenly, but I can see where -- I wouldn't say that she's not, and I am not sure that the government is even saying that, but when the government said that, it didn't jump right out at me and say, "How could you say that?" so I find that there is a basis. The objection to the peremptory challenge to Chief Warrant Officer [S] is overruled.

Record at 208-09.

The member who was peremptorily challenged by the Government was 1 of 2 female members on the original 10-member panel. AE-VIII. She is of unknown ethnic origin or race and we will not assume she belongs to a minority race or ethnicity. The appellant is a male. At the time of the Government's peremptory challenge, 10 members, consisting of 8 males and 2 females, remained on the panel. Although the military judge overruled the "objection to the peremptory challenge to Chief Warrant Officer

[S]," we do not find a defense objection to overrule. The defense counsel made a statement, immediately following the TC's expressed basis for the peremptory challenge, regarding a "reverse *Batson*" issue based on race rather than gender. We find that the statement was not an objection to the reason offered by the Government in support of its peremptory challenge. The appellant's failure to object to the reason offered by the Government for the peremptory challenge waived the issue on appeal absent plain error, which we do not find. *United States v. Walker*, 50 M.J. 749 (N.M.Ct.Crim.App. 1999); *see* Art. 59(a), UCMJ; *United States v. Powell*, 49 M.J. 460, 461-65 (C.A.A.F. 1998); *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986).

Trial Counsel Argument

During rebuttal argument on findings, the TC made the following comments:

> He (the appellant) can't remember selling to Agent Griffin because he sold to multiple people.
>
> . . . .
>
> Who knows how many times he (pointing to the accused) sold that night. We don't know. During mid-February to mid-March, you know at least ten pills. He had more customers than Agent Griffin, that's to be sure. Who knows how many? He can't recall each customer he sells to. That's the reasonable explanation as to why he can't recall that specific sale.

Record at 402. Following the TC's rebuttal argument, the TDC objected to the above portions of the argument, moved for a mistrial and, in the alternative, requested a limiting instruction. *Id*. at 405. The military judge overruled the objection finding the comments were not "an unfair argument, under the circumstances." *Id*. at 406. The circumstances the military judge was referring to included the defense argument that the appellant may have sold ecstasy on other occasions but not this occasion and that the appellant did not recognize the DEA agent because the appellant had not sold to him.

In his third assignment of error the appellant alleges the military judge erred by overruling the defense objection, not granting a mistrial, and not giving a limiting instruction based on the trial counsel's rebuttal argument on findings. Appellant's Brief and Assignments of Error at 23. The Government argues that the trial counsel's argument was based on permissible inferences logically drawn from the evidence and defense argument, and therefore was not erroneous. Government's Answer of 26 Oct 2004 at 10. We do not find error.

The legal test for examining an alleged improper argument is whether it was erroneous and whether it materially prejudiced the substantial rights of the appellant. *United States v. Baer,* 53 M.J. 235, 237 (C.A.A.F. 2000). The focus is not on the words used in the argument in isolation, but rather, must be viewed in the context of the entire court-martial. *Id*. at 238. "When arguing . . . the trial counsel is at liberty to strike hard blows, but not foul, blows." *Id.* at 237. Trial counsel is charged with being a zealous advocate, and may argue the evidence of record as well as all reasonable inferences fairly derived there from. However, arguments aimed at inflaming the passions or prejudices of the members are improper. *Id.*

It has long been held that if the Government's closing argument "has a tendency to be inflammatory, we must make certain it is based on matters found within the record. Otherwise it is improper. The issues, facts, and circumstances of the case are the governing factors as to what may be proper or improper." *United States v. Doctor,* 21 C.M.R. 252, 259 (C.M.A. 1956)(citing *United States v Socony-Vacuum Oil Co*., 310 U.S. 150 (1940)). The argument must be evaluated in the light of the entire record. *Id*. at 260. Further, if an argument was improper and resulted in a constitutional error, the Government must convince an appellate court beyond a reasonable doubt that the error was not prejudicial. *Powell,* 49 M.J. at 465 (citing *United States v. Adams,* 44 M.J. 251, 252 (C.A.A.F. 1996)).

We find that the TC's reference to possible multiple sales of ecstasy was within the scope of the DC's argument, struck hard blows, and was not aimed at improperly inflaming the passions of the members. When viewed within the context of the entire court-martial, the TC's argument was fair comment on the evidence and the defense argument. *See, e.g., United States v. McPhaul,* 22 M.J. 808, 814-15 (A.C.M.R. 1986). Even if we were to find that the TC's argument was improper, the appellant was not materially prejudiced by these remarks. This issue is without merit.

Prohibiting Defense Testimony

For his fourth assignment of error, the appellant alleges the military judge erred when he sustained the Government's objection to certain defense evidence. Appellant's Brief and Assignments of Error at 29. The Government asserts the military judge did not abuse his discretion because the answers to the questions would be irrelevant. Government's Answer of 26 Oct 2004 at 17.

The TDC called a former Marine corporal who had been assigned to Criminal Investigative Division (CID) and personally observed the appellant's interrogation. The witness was called to present evidence relevant to the defense assertion that the appellant's confession was coerced and therefore involuntary. The defense sought to ask the witness: (1) Whether the interrogation was conducted in a professional manner; and (2)

Whether the witness would have conducted the interrogation differently. The TC objected to this line of questioning and the MJ sustained the objection on the grounds of relevance. Record at 365-68.

"A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion." *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). In order to be overturned on appeal, the judge's ruling must be "'arbitrary, fanciful, clearly unreasonable' or 'clearly erroneous,'" *United States v. Taylor*, 53 M.J. 195, 199 (C.A.A.F. 2000)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)), or "influenced by an erroneous view of the law," *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)(quoting *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). Relevance under MIL. R. EVID. 401 includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The appellant complains that the Government was allowed to ask the DEA agents if the interrogation was "aggressive", "coercive", and why certain questions were asked. Appellant's Brief and Assignments of Error at 32. The appellant did not object to these questions, nor did the appellant ask his witness if he thought the interrogation was "aggressive" or "coercive."

The military judge sustained the Government's objection to the questions the TDC sought to ask of the former Marine corporal on the grounds that the answers would be irrelevant, not because the answers went to the ultimate issue of voluntariness as the appellant alleges. We agree with the military judge. Whether the defense witness thought the interrogation was conducted in a professional manner or whether that witness would have conducted the interrogation differently was not relevant to whether the appellant's confession was coerced and therefore involuntary. The military judge did not abuse his discretion. This assignment of error does not have merit.

Admissibility of the Appellant's Confession

For his sixth assignment of error, submitted in summary form, the appellant alleges the military judge erred in admitting the appellant's written confession because the Government failed to honor the appellant's previous request for an attorney and because the confession was involuntary. Appellant's Brief and Assignments of Error at 34. The Government responds summarily, resting on the military judge's findings of fact and conclusions of law. Government's Answer of 26 Oct 2004 at 29. Neither party presents case law on the standard of review or in support of their argument.

An involuntary statement by an accused generally may not be received into evidence if the accused makes a timely motion to

suppress the evidence. MIL. R. EVID. 304(a). Once the accused challenges the voluntariness of his statement at trial, the Government has the burden to establish the admissibility of the statement. MIL. R. EVID. 304(e). The Government must convince the military judge by a preponderance of the evidence that the accused's statement was voluntary before it can be admitted into evidence. MIL. R. EVID. 304(e)(1).

The appellant filed a written motion asserting he had asked for an attorney and was not provided an attorney prior to questioning, and challenging the voluntariness of his confession. Appellate Exhibit I. An evidentiary hearing was held during which the Government and defense presented testimonial evidence. The appellant testified at that hearing. Record at 96-141. The military judge issued 36 detailed written findings of fact and 9 conclusions of law, and then granted the motion in part by suppressing all statements made by the appellant prior to being advised of his *Miranda*[8] rights. The military judge denied the motion with respect to the appellant's statements made after the rights warning. Appellate Exhibit XVI.

The military judge properly applied the law governing the admissibility of confessions and admissions, as set forth in MIL. R. EVID. 304 and 305. Upon reviewing this record, we hold that the military judge's essential findings of fact and conclusions of law are supported by the evidence at trial and are not clearly erroneous. This issue is without merit.

Conclusion

We conclude that the findings are correct in law and fact but direct the record of trial be returned to the convening authority for action consistent with the orders of this court as to sentencing. Otherwise, we find that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings are affirmed. Arts. 59(a) and 66(c), UCMJ.

The record of trial is ordered returned to the Judge Advocate General of the Navy for submission to the convening authority to order a *DuBay* hearing to resolve questions of fact and make conclusions of law with respect to whether a sentencing rehearing, due to member misconduct, should be ordered. Upon completion of these proceedings, the record, along with the military judge's findings of fact and conclusions of law, shall be returned to the convening authority for further consideration and action, to include setting aside the prior CA actions and ordering a sentence rehearing, if deemed appropriate. At the *DuBay* hearing the military judge shall answer the following questions:

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

1. Did one or more members attempt to view the language redacted from the appellant's confession?
2. If so, did one or more of those members actually read language redacted from the appellant's confession?
3. If so, did any of those members share the redacted information with any other member?
4. If any of the court-members read the language redacted from the appellant's confession, was that language considered in arriving at the adjudged sentence?
5. If the language was considered, what if any, impact did it have in arriving at the adjudged sentence?

In the event that the convening authority deems such a *DuBay* hearing impracticable, the convening authority shall set aside the prior CA actions and either order a rehearing on the sentence or take action approving a sentence of no greater than confinement already served, reduction to pay grade E-1, and a bad-conduct discharge. Upon completion of proceedings below, including a new staff judge advocate's recommendation and CA's action, the record of trial shall be sent directly to this court for further review.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of the Court