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United States Navy–Marine Corps Court of Criminal Appeals

Before
HOUTZ, MYERS, and KISOR
Appellate Military Judges

UNITED STATES
Appellee

v.

Tony E. DEDOLPH
Special Warfare Operator Chief (E-7), U.S. Navy
Appellant

No. 202100150

Decided: 15 November 2022

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
M. J. Luken (arraignment, motions)
H. C. Larsen (motions, trial)

Sentence adjudged 23 January 2021 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 10 years, and a dishonorable discharge.

For Appellant:
Captain Jasper W. Casey, USMC

For Appellee:
Lieutenant Catherine M. Crochetiere, JAGC, USN
Lieutenant John L. Flynn IV, JAGC, USN

Senior Judge HOUTZ delivered the opinion of the Court, in which Judge MYERS and Judge KISOR joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

HOUTZ, Senior Judge:

Appellant was convicted, pursuant to his pleas, of conspiracy to commit assault and obstruct justice, violation of a lawful general order, involuntary manslaughter, and obstruction of justice, in violation of Article 81, 92, 119, and 134, Uniform Code of Military Justice [UCMJ].[1] All of the offenses relate to the death of Army Staff Sergeant [SSG] Mike, who died while on deployment in Bamako, Mali in June, 2017.[2]

Appellant asserts 6 assignments of error [AOEs]: (1) Appellant was deprived of a meaningful opportunity to cross-examine a key Government witness when the Government did not disclose that the witness was requesting additional clemency from the convening authority; (2) the military judge abused his discretion by admitting improper evidence in aggravation; (3) Appellant's sentence was inappropriately severe and disproportionate; (4) trial counsel committed prosecutorial misconduct; (5) the military judge abused his discretion by denying Appellant's post-trial motion for a mistrial; and (6) cumulative error. We find error in the first AOE and remand for a new sentencing hearing.[3]

I. Background

Appellant's convictions arise from an incident that occurred during a deployment to Bamako, Mali that led to the death of SSG Mike, the victim in this

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[1] 10 U.S.C. §§ 881, 892, 919, and 934 (2016).

[2] All names in this opinion—other than Appellant, the judges, and appellate counsel—are pseudonyms.

[3] Although rendered moot by our resolution of AOE 1, we review AOEs 3, 4, and 5 for reasons of judicial economy.

case. During the deployment, Appellant lived on a compound in Bamako that had several multi-person houses to include the "Marine House" and the "Navy-Army" house where Appellant, SSG Mike, and several other servicemembers lived. The other service members relevant to this incident were Private [Pvt] Marshall, Gunnery Sergeant [GySgt] Mike-Romeo, and Special Operator Second Class [SO2] Murphy.[4] GySgt Mike-Romeo and Pvt Marshall were Marines and SO2 Murphy was a Sailor.

On the evening of 3 June 2017 the group made plans to go out on liberty.[5] SSG Mike, GySgt Mike-Romeo and Pvt Marshall departed the compound and sometime later Appellant and SO2 Murphy departed after receiving a text that GySgt Mike-Romeo and Pvt Marshall were at a local bar. After Appellant and SO2 Murphy arrived at the bar, they learned that SSG Mike had "ditched" GySgt Mike-Romeo and Pvt Marshall to attend an "embassy party."[6] The group, which now included Appellant, GySgt Mike-Romeo, SO2 Murphy, and Pvt Marshall, began to discuss a "hypothetical joke . . . to break in and haze [SSG Mike]" to embarrass him for the perceived slight.[7] The joke, "involved breaking into the room and then wrestling [SSG Mike] to unconsciousness, binding him,[8] and then inviting one of the local guards in to place [him] into a compromised position."[9] The group went to another bar and the joke began to materialize into an actual plan which included a "drum for theatrical effect," a person assigned to film, and a person assigned to execute a chokehold to render SSG Mike unconscious.[10]

The group returned to the compound at approximately 0500 and went to the Marine House where they "grabbed duct tape, handcuffs, sledgehammer, and some other like materials for binding SSG Mike."[11] The group next went to the Navy-Army House where they enlisted the help of two local nationals

[4] (Convening Authority's Action (C.A.A.) at 2, Mar. 24, 2021.)

[5] R. at 234.

[6] R. at 682.

[7] R. at 683.

[8] Also referred to as a "tape job." R. at 234.

[9] R. at 684.

[10] R. at 687.

[11] R. at 690.

who worked as guards on the compound.[12] At that time, SSG Mike had already returned to the compound and was asleep in his room. The group then proceeded to execute their plan and entered a tactical formation, also called a "stack," by the door. At that point GySgt Mike-Romeo broke down the door with a sledgehammer and the group entered the room.[13] Once everyone was in the room, Pvt Marshall raised the mosquito netting that surrounded SSG Mike's bed and Appellant and SO2 Murphy "jumped on the bed, and they started wrestling with [SSG Mike]."[14] SSG Mike jumped up and said words to the effect of "[o]h it's you guys" or "let's go, [f***s]!" Appellant and SO2 Murphy both grabbed SSG Mike to subdue him. Appellant tried to control SSG Mike but he was resisting. Appellant then applied a jujitsu-style "rear naked chokehold" on SSG Mike which involved putting one arm around both sides of SSG Mike's neck and applying pressure.[15] SSG Mike was face down with his head turned to the side. The "rear naked chokehold" caused SSG Mike to lose consciousness in about ten seconds and, during that time, SO2 Murphy and Pvt Marshall bound SSG Mike's arms and legs with tape.[16]

After they bound his arms and legs, GySgt Mike-Romeo took photographs of SSG Mike. After SSG Mike did not regain consciousness, Appellant attempted to revive him by rolling SSG Mike onto his back, and tapping him on the shoulder blades while calling his name. SO2 Murphy and Pvt Marshall removed the tape from SSG Mike and, after these efforts did not result in him gaining consciousness, Appellant and SO2 Murphy took turns performing CPR. While this was going on, Appellant and SO2 Murphy directed GySgt Mike-Romeo and Pvt Marshall to wake up SSG Mike's team leader, Sergeant First Class [SFC] Mu, to begin notification and medical evacuation procedures. Appellant also retrieved an arterial defibrillator from one his medical bags and

[12] R. at 696 ("We asked Big Man to derobe himself and then walk in with sort of a leash around his neck and eye guard over his face for theatrical effect and to march him inside and to place [SSG Mike] in a compromised position, sir.").

[13] R. at 700.

[14] R. at 701.

[15] R. at 236, 260-61 ("It's a--a choke from behind an individual where one arm is around both sides of the neck and another arm is around the back, and it is applied to--in combatives and the sport Jujitsu to subdue opponents.").

[16] R. at 235.

at that point determined he would need to perform an emergency cricothyrotomy to open up SSG Mike's airway.[17] Appellant cut the initial incision but had trouble inserting the breathing tube into SSG Mike's airway due to unexpected blockage. The group then decided to use a vehicle to transport SSG Mike to a local medical clinic. SSG Mike was loaded into the back of the car, and Appellant stayed with him to continue life-saving efforts. Appellant cut additional incisions into SSG Mike's airway and was finally able to successfully insert the breathing tube, but these efforts were complicated by the fact that they were riding in the back of a Land Rover that was driving at a rapid speed along the poorly maintained roads of Bamako, Mali.

After arriving at the medical clinic, SSG Mike was examined, but the person at the clinic, who identified himself as a doctor, made a visual assessment of SSG Mike and informed the group that he was unable to help. Appellant continued to breathe for SSG Mike through the inserted breathing tube and work "feverishly" to save him, but, eventually, a doctor from the American Embassy arrived at the clinic and pronounced SSG Mike dead.[18]

At that point Appellant "hesitatingly" ceased life-saving efforts.[19] After leaving the clinic Appellant and the other service members discussed a plan to tell investigators that only Appellant and SO2 Murphy would take the blame for the incident and they would tell investigators that neither of the Marines were present when SSG Mike died.[20] During the investigation, all four claimed that Appellant and SSG Mike were play fighting when SSG Mike suddenly suffered a medical emergency and became unresponsive.[21] They also provided a false timeline of events to investigators, destroyed a phone containing pictures of SSG Mike bound with tape, and disposed of any alcohol that was in the house.

After an investigation, Appellant and his three co-conspirators were charged with various offenses related to SSG Mike's death. Pvt Marshall

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[17] R. at 826 ("So it's a means to--to establish an airway, and it's sort of a preferential choice because you know that a less invasive method would not be successful. So in civilian emergency medical care, usually somebody would use the nasal trumpet to keep the nasal passages open or--or a pharyngeal airway. It keeps the tongue out of the--the way, or tracheal intubation where you use a scope and you put a tube directly down into the--through the vocal cords and go through the trachea.").

[18] R. at 1107.

[19] R. at 1108.

[20] R. at 248.

[21] R. at 252.

pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, burglary, hazing, false official statements, obstruction of justice, and negligent homicide. He was initially sentenced to four years' confinement, reduction to E-1, and a bad-conduct discharge; however, the convening authority later suspended and remitted confinement in excess of three years as well as the bad-conduct discharge.

SO2 Murphy pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, unlawful entry, assault consummated by a battery, hazing, and obstruction of justice. He was sentenced to twelve months' confinement, reduction to E-5, and a bad-conduct discharge. The convening authority later suspended and remitted the bad-conduct discharge.

GySgt Mike-Romeo pleaded not-guilty at a contested general court-martial and was convicted by members of conspiracy to commit assault, conspiracy to commit obstruction of justice, housebreaking, involuntary manslaughter, and hazing. He was sentenced to six months' confinement, reduction to E-1, ninety days of hard labor, and a letter of reprimand.

Appellant was charged with conspiracy to commit an assault, conspiracy to obstruct justice, burglary, felony murder, involuntary manslaughter, failure to obey a lawful general order, and obstruction of justice.[22] Appellant entered into a pretrial agreement and agreed to plead guilty to conspiracy to commit assault consummated by a battery, conspiracy to obstruct justice, involuntary manslaughter, hazing in violation of a lawful general order, and obstruction of justice.[23] In return, the convening authority agreed to withdraw and dismiss all other charges and specifications and to suspend all confinement in excess of fifteen years.[24]

At Appellant's sentencing hearing the Government called eleven witnesses. The only co-conspirator to testify for the Government was Pvt. Marshall. After Appellant's court-martial, his defense team became aware for the first time that, prior to testifying for the Government, Pvt Marshall submitted a clemency request to the convening authority and received a material assistance letter from the trial counsel in the case.

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[22] Charge Sheet at 1, 3–4, Nov. 14, 2018.

[23] App. Ex. XXV at 4–6.

[24] App. Ex. XXV, App'x A at 1.

II. DISCUSSION

A. Pvt Marshall's Clemency Request

Appellant asserts that he was deprived of a meaningful opportunity to cross-examine Pvt Marshall because Appellant was not provided Pvt. Marshall's request for clemency prior to Appellant's guilty plea and sentencing hearing where Pvt Marshall testified as a government witness.

Prior to Appellant's court-martial, Pvt Marshall pleaded guilty, pursuant to a pretrial agreement, to conspiracy to commit assault and obstruction of justice, burglary, violation of a lawful general order, false official statement, obstruction of justice, and negligent homicide.[25] The military judge sentenced him to four years of confinement, reduction to pay grade E-1, and a bad-conduct discharge. In his pretrial agreement, Pvt Marshall agreed to testify, under a grant of testimonial immunity, as a government witness in the prosecutions of Appellant and the other two co-conspirators. Approximately a month after his sentencing, Pvt Marshall requested an extension to request clemency so the convening authority would not act on his case until his "full cooperation is complete and a matter of record."[26] The convening authority approved that request and approximately two months later trial counsel submitted a material assistance letter to the convening authority discussing Pvt Marshall's material assistance in prosecutions related to SSG Mike's death.[27] Shortly thereafter, Pvt Marshall submitted his clemency request asking the convening authority to reduce his confinement from four years to two years.

Subsequent to Pvt Marshall's plea, clemency request, and receipt of the material assistance letter from trial counsel, Appellant in his initial discovery request to the Government asked for:

> (4) … evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or *bias bearing on a witness's credibility*, including any letters of reprimand, letters of

[25] App. Ex. XXV, App'x B at 1.

[26] Appellant's Mot. to Attach, Encl. G, at 2.

[27] *Id.*, Encl. B.

> caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal investigations, or adverse administrative actions.
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> . . . (6) Any evidence or information of any promises of immunity or leniency made to any potential government witness by trial counsel or military authorities or agents thereof, including closely aligned civilian authorities or entities. This includes the contents of any formal or informal pretrial agreement reached with any co-conspirator or potential witness.[28]

At the time of this discovery request, Appellant was aware that Pvt Marshall previously pleaded guilty and was granted immunity to testify in Appellant's case, but was not aware of Pvt Marshall's clemency request or the material assistance letter.

Prior to his plea, Appellant stated he intended to cross-examine Pvt Marshall "on his pretrial agreement but not the sentence that was imposed or what the pretrial agreement called for."[29] Prior to Pvt Marshall's testimony, the Defense was informed that Pvt Marshall would be testifying in a utility uniform rather than the seasonal dress uniform worn by other witnesses. Civilian defense counsel objected and explained that he intended to cross-examine Pvt Marshall about the fact that he pleaded guilty, but did not want to introduce the specifics of his sentence so as to not set a benchmark the members could use for Appellant's sentence.[30] The Defense expressed concern that if Pvt Marshall testified out of uniform it would cause the members to speculate that Pvt Marshall was already serving confinement.[31] The Government explained that it attempted to secure a proper uniform, but they were unable to procure it due to issues with funding.[32] The military judge overruled the Defense objection and allowed Pvt Marshall to testify out of uniform. Ultimately, neither trial counsel nor Appellant questioned Pvt Marshall about his pretrial agreement or sentence.

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[28] App. Ex. XXXVII (emphasis added).

[29] R. at 628.

[30] R. at 628.

[31] Recommend citation or delete the words suggested above.

[32] R. at 631.

At Appellant's sentencing hearing, Pvt Marshall testified on behalf of the Government. He provided testimony describing the assault on SSG Mike, to include a detailed account of the methods Appellant used to render SSG Mike unconscious. After the trial, the Government endorsed Pvt Marshall's request for clemency and the convening authority reduced Pvt Marshall's confinement from four years to three years.

Appellate courts review allegations of non-disclosure of discoverable evidence de novo.[33] In *Brady v. Maryland,* the Supreme Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[34] The Supreme Court has extended *Brady*, holding "that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence."[35] Under Article 46, UCMJ, "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, and its implementing rules provide an accused with greater statutory discovery rights than the constitutional right to due process.[36] Regardless of whether the defense has made a specific request, the United States must disclose known evidence that "reasonably tends to" negate or reduce the degree of the accused's guilt or punishment that the accused may receive if convicted.[37]

Appellate review of an alleged discovery violation follows a two-step process: (1) "determine whether the information or evidence at issue was subject

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[33] *United States v. Roberts*, 59 M.J. 323, 327 n.3 (C.A.A.F. 2004).

[34] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also* Rule for Courts-Martial [R.C.M.] 701(a)(6) (requiring disclosure of evidence known to trial counsel that tends to negate guilt, reduce guilt, or reduce sentence).

[35] *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted).

[36] *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013); *Roberts*, 59 M.J. at 327.

[37] R.C.M. 701(a)(6).

to disclosure or discovery"; and (2) "if there was non-disclosure of such information, test the effect of that non-disclosure on the appellant's trial."[38] Appellate courts may resolve discovery issues without determining whether there has been a violation if the alleged error would not have been prejudicial.[39]

1. Pvt Marshall's Clemency Was Subject to Disclosure

It is well-settled that impeachment evidence is "material" and "exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[40] The Government argues that it had no "Constitutional" or "regulatory" obligation to disclose Pvt Marshall's clemency because *United States v. Ruiz* does not require disclosure of impeachment information for guilty pleas.[41] Specifically, the Government argues that in *Ruiz*, the Supreme Court found that disclosure of impeachment information relates to the fairness of a trial, as opposed to the voluntariness of a plea and the Constitution does not require disclosure of impeachment information for guilty pleas.[42] Appellant argues that the Government over-simplifies the holding in *Ruiz:*

> In reality, the Supreme Court wrestled with "whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.'" So the issue before the Court was whether depriving the accused of such impeachment evidence rendered her plea involuntary. The Court specifically noted that "impeachment information is special in relation to the fairness of a

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[38] *Roberts*, 59 M.J. at 325.

[39] *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004).

[40] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 679-80 (1985). *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

[41] Gov't Answer. at 31; *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

[42] Gov't Brief at 31; *Ruiz* 538 U.S. at 629. Given "the random way in which such information may, or may not, help a particular defendant," the "degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose." *Id*. at 630. As such, the Court held that the Constitution does not require disclosure of impeachment information for guilty pleas. *Id*. at 633.

> trial, not in respect to whether a plea is voluntary ("knowing," "intelligent," and "sufficiently aware.").[43]

We agree with Appellant that the Court in *Ruiz* focused on whether depriving an accused of impeachment evidence rendered a plea involuntary, specifically noting that "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary ('knowing,' 'intelligent,' and 'sufficiently aware.')."[44] Here, Appellant is not asserting that his plea was involuntary; rather, he is alleging that the non-disclosure of impeachment evidence deprived him of a fair sentencing hearing.

Appellant requested "evidence affecting the credibility of any potential government witness . . . including bias bearing on a witnesses' credibility."[45] The fact that Pvt Marshall sought additional clemency from the convening authority in exchange for his testimony is clearly information that tended to demonstrate Pvt Marshall's bias, and bore on his credibility. All information related to Pvt Marshall's request for additional clemency was responsive to this specific discovery request.

The Government also cites *Roberts* to support its argument that the United States had no regulatory obligation to disclose Pvt Marshall's clemency request because Appellant had other materials (Pvt Marshall's pretrial agreement, wherein he agreed to testify under a grant of testimonial immunity) "upon which to believe [Pvt Marshall's] veracity could be attacked."[46] In *Roberts*, the appellant requested disclosure of derogatory data regarding a law enforcement

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[43] Appellant's Reply Brief at 2 (citing *Ruiz*, 536 U.S. at 625, 629 (2002)).

[44] *Ruiz*, 536 U.S. at 629.

[45] App. Ex. XXVII. In *Ruiz*, the prosecutors' proposed plea agreement contained "a set of detailed terms. Among other things, it specifie[d] that 'any [known] information establishing the factual innocence of the defendant' 'has been turned over to the defendant,' and it acknowledges the Government's 'continuing duty to provide such information.' At the same time it requires that the defendant 'waive the right' to receive 'impeachment information relating to any informants or other witnesses' as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. And despite the absence of any agreement, Ruiz ultimately pleaded guilty." *Ruiz*, 536 U.S. at 625-26.

[46] *See Roberts,* 59 M.J. at 326.

witness that was not disclosed by the military judge after an in camera review.[47] The Court of Appeals for the Armed Forces [C.A.A.F.] found the military judge erred because the internal investigation showed the witness made a false statement and the evidence was "material to the preparation of the defense" because it "was probative of his truthfulness."[48] Without this evidence "the defense was left with no basis upon which to believe [the witness's] veracity could be attacked."[49]

The Government asserts this case is distinguishable from *Roberts* because the defense had an alternative basis upon which to believe Pvt Marshall's veracity could be attacked – the pretrial agreement and the immunity provision. We disagree with this argument. While the pretrial agreement and grant of immunity are typically grounds for counsel to cross-examine a witness to draw out evidence of bias, they can have a limited effect in many cases. In this case, in addition to the questions, responses, and argument that would have likely resulted from the pretrial agreement, there existed the relatively non-standard request for clemency that was pending approval from the convening authority. This evidence, in the Court's opinion, would have had a much more powerful effect on the members. The Defense team made a tactical decision not to cross-examine Pvt Marshall with regard to the pretrial agreement; however, they were deprived of making a similar tactical decision with regard to cross-examination on the clemency matters. Pvt Marshall was a key government witness in this case. His motive to misrepresent was not self-evident (certainly not through the pretrial agreement alone) and the disclosure of the clemency request was material. We provide more discussion on this point below in our prejudice analysis portion . Nevertheless, with regard to disclosure obligations, we find that the evidence at issue was subject to disclosure or discovery. Because there was non-disclosure of this evidence, we next test the effect of that non-disclosure on Appellant's trial.

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[47] *Roberts*, 59 M.J. at 324.

[48] *Id*. at 326.

[49] *Id*.

2. The Non-Disclosure of the Clemency Request was Not Harmless Beyond a Reasonable Doubt

When an accused makes only a general discovery request appellate courts review alleged discovery violations for harmless error.[50] The test for harmless error is whether the accused has shown "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[51] Under this test, the "question is not whether the [accused] would more likely than not have received a different verdict with the evidence, but whether in its absence [the accused] received a fair trial."[52] Thus, a reasonable probability of a different result is shown when the United States' non-disclosure "undermines confidence in the outcome of the trial."[53]

When the accused makes a specific discovery request, appellate courts "apply the heightened, constitutional harmless beyond a reasonable doubt standard."[54]

We agree with the Government that the clemency materials may not have been responsive to the defense request for "evidence related to adverse criminal or administrative actions and promises of immunity or leniency."[55] Nevertheless, they were responsive to Appellant's specific request for "evidence affecting the credibility of any potential government witness . . . including bias bearing on a witness's credibility."[56] We reject the Government's argument that this was not a specific request. This entire AOE is driven by the fact that Appellant was unaware of the clemency request. The language in the discovery request squarely covers the clemency request and we decline to impose, as stated by Appellant in his brief, a requirement that would require "clairvoyant" powers

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[50] *Coleman*, 72 M.J. at 187.

[51] *Id.*

[52] *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (quoting *Kyles*, 514 U.S. at 434).

[53] *Id.*

[54] *Id.*

[55] Gov't Answer at 33.

[56] App. Ex. XXVII.

when drafting such a request.[57] As such, we will apply the constitutional harmless beyond a reasonable doubt standard to the non-disclosure of the clemency matters.[58]

The Government cites *United States v. Coleman* to support its argument that non-disclosure of the clemency request was harmless beyond a reasonable doubt.[59] In *Coleman*, the court held failure to disclose an oral agreement between a co-conspirator and the staff judge advocate "was, at a minimum negligent, and certainly violated" multiple discovery rules.[60] The Court questioned how knowledge of the non-disclosed evidence "would have caused the defense counsel to change strategy or tactics or led to a different result" during cross-examination or closing argument and found ultimately that the failure to disclose was harmless beyond a reasonable doubt because the Government established "disclosure would not have affected the outcome of the trial."[61] The co-conspirator's testimony was "very brief."[62] The court noted the appellant knew the co-conspirator had been convicted and sentenced for the same offenses and could have impeached the witness but chose not to do so.[63] Nonetheless, the appellant argued the co-conspirator testified because he wanted clemency, and the co-conspirator's "motive to misrepresent was self-evident to the court members."[64] Thus, failure to disclose was harmless beyond a reasonable doubt because the Government established "disclosure would not have affected the outcome of the trial."[65]

We disagree with the Government that *Coleman* supports finding that the error in this case was harmless beyond a reasonable doubt. Unlike the facts in *Coleman*, Pvt Marshall's testimony was not "very brief."[66] The Government re-

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[57] Appellant Reply Brief at 4.

[58] *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019).

[59] *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013).

[60] *Coleman*, 72 M.J. at 189.

[61] *Id*. at 189

[62] *Id*. at 187.

[63] *Id*. at 188.

[64] *Id*.

[65] *Id*. at 189.

[66] *Id*. at 187,

lied on his testimony to support the testimony of their expert witness, Dr. Foxtrot, as well as their sentencing argument to the members.[67] It is clear from our review that Pvt Marshall was a central witness to the Government's sentencing case and we find that that there is a reasonable possibility that the outcome of the trial would have been affected by the disclosure of the clemency request. Even when we apply the lower harmless error standard, we find that the error undermines confidence in the outcome of the sentencing hearing.

The Government argues that Appellant had other materials, to include Pvt Marshall's pretrial agreement and testimonial immunity, which could have been used to cross-examine Pvt Marshall. We agree with Appellant that the error in this case - the undisclosed materials - went specifically to bias and the non-disclosure denied Appellant the ability to expose Pvt Marshall's particular basis for bias. Specifically, that Pvt Marshall had motive to exaggerate his testimony. The pretrial agreement and sentence would not have accomplished this because it is a "qualitatively different" means to expose bias. The Appellant's tactical decision not to question Pvt Marshall about the pretrial agreement and sentence is very different than the tactical decision whether to question Pvt Marshall about his pending request to lessen his sentence. Whether knowledge of non-disclosed evidence "would have caused the defense counsel to change strategy or tactics . . ." is relevant to determining whether non-disclosure is harmless beyond a reasonable doubt.[68] We agree with Appellant that his defense made a strategic decision to not highlight Pvt Marshall's sentence to the members but the government's failure to disclose the clemency materials deprived the defense of the facts it needed to make a similar strategic decision on how to expose Pvt Marshall's specific bias and potential motive to misrepresent events. We also agree that this motive was not self-evident to the court members as the members, like Appellant, also had no knowledge he was seeking additional leniency from the Convening Authority in exchange for his testimony. We take corrective action on this in our decretal paragraph.

B. Evidence in Aggravation

Appellant alleges that the military judge erred by allowing the Government to present other possible mechanisms of death through the testimony of Doctor Foxtrot. Additionally, Appellant alleges that the military judge erred by allow-

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[67] Pvt Marshall's testimony included additional aggravating facts that were captured in his previous statements.

[68] *See Coleman*, 72 M.J. at 189.

ing the Government to argue that Appellant's motive for performing the emergency cricothyrotomy was to obstruct justice by destroying evidence. At trial Appellant admitted to causing SSG Mike's death by strangulation via a "rear naked chokehold."[69] Dr. Foxtrot testified about other mechanisms such as suffocation, fractured windpipe, and cricothyrotomy that could have resulted in the death of SSG Mike.

We review the issue of a military judge's decision to admit sentencing evidence for an abuse of discretion.[70] The "military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect."[71] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion."[72] "The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[73]

Aggravation evidence must: (1) directly relate to the accused's convicted offenses; and (2) satisfy Mil. R. Evid. 403.[74] Aggravation sentencing evidence may consist of any "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty"[75] and "often highlights 'same course of conduct' misconduct of an accused."[76] Such evidence "includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission" resulting from the accused's offense.[77] As C.A.A.F. has construed R.C.M. 1001(b)(4), uncharged "depth-of-problem evidence" may directly relate

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[69] R. at 262.

[70] *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009).

[71] *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citation omitted).

[72] *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (citation omitted).

[73] *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (cleaned up).

[74] *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F 2007)

[75] R.C.M. 1001(b)(4).

[76] *United States v. Halfacre*, 80 M.J. 656, 660 (N-M. Ct. Crim. App. 2020).

[77] *Id.*

to the charged offenses.[78] "Directly related" may encompass uncharged misconduct that is part of a "continuous course of conduct."[79] Evidence of uncharged misconduct is admissible if it is "closely related in time, type, and/or often outcome, to the convicted crime."[80] Absent a clear abuse, appellate courts will not overturn a military judge's ruling if he conducts a proper Mil. R. Evid. 403 balancing test on the record.[81] Uncharged misconduct against victims can be appropriate aggravation evidence "because it reflects the true impact of crimes upon the victims."[82]

In this case we agree with the Government that the aggravation evidence was directly related to Appellant's pleas because it was "inextricably interwoven" with the facts and circumstances of the convicted offenses.[83]

The military judge found that the Stipulation of Fact was ambiguous in that it discussed a chokehold done with unlawful force, and indicated the Victim's death resulted from the chokehold.[84] We agree that the facts before the court concerning the chokehold, to include testimony about the Victim being face down with Appellant on his back during the second choke, were "fair game" and not outside the scope of the Stipulation of Fact.[85]

Further, we agree that *United States v. Halfacre* is applicable. In *Halfacre* this Court held that evidence of Appellant's sexual assaults of two prostitutes was proper aggravating evidence even though Appellant pleaded guilty to patronizing a prostitute. This Court found that the evidence was admissible "because it was inextricably interwoven with the facts and circumstances of the

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[78] *United States v. Ciulla*, 32 M.J. 186, 187 (C.M.A. 1991).

[79] United States v. *Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001) (finding evidence of uncharged robberies showed continuous course of conduct in which accused committed similar crimes against same victim and in same location).

[80] *Hardison*, 64 M.J. at 282.

[81] *Stephens*, 67 M.J. at 235.

[82] *Nourse*, 55 M.J. at 231 (citations omitted); *see United States v. Terlep*, 57 M.J. 344, 350 (C.A.A.F. 2002) ("Such rules provide for accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case.") (citations omitted).

[83] Gov't Brief at 41 (quoting *Halfacre,* 80 M.J. at 662).

[84] R. at 892.

[85] Gov't Answer at 19.

convicted offenses and painted a complete picture for the sentencing authority."[86] Similar to *Halfacre*, evidence in this case indicating Appellant suffocated the Victim, fractured his windpipe, and performed a cricothyrotomy to obstruct the investigation was "inextricably interwoven" with Appellant's offenses.[87] Appellant pleaded guilty to conspiracy to assault the Victim by strangling and placing him in a chokehold resulting in the Victim's death.[88] The aggravating evidence at issue consisted of actions Appellant took in committing the offenses to which he pleaded guilty, and are thus "directly related" to his offenses.[89] Finally, we also agree that the aggravating evidence is appropriate under *Hardison* because it was "closely related in time, type, and outcome" to Appellant's offenses.[90]

We reject the Appellant's argument that his pleas limit the scope of aggravating evidence. As cited by the Government, in *Terlep*, the appellant was charged with burglary and rape, but pleaded guilty pursuant to a plea agreement to unlawful entry and assault consummated by a battery.[91] At sentencing, the victim testified that the appellant raped her.[92] The *Terlep* court found the victim's testimony admissible, holding that pretrial agreements, unless expressly agreed to otherwise, do not bar victims from giving their version of the truth to the factfinder at sentencing.[93] In this case, as in *Terlep*, the aggravating evidence was proper because Appellant admitted to executing the deadly chokehold during his providence inquiry and there was nothing in Appellant's pretrial agreement limiting the scope of aggravating evidence.[94] The aggravation evidence at issue in this case provided appropriate additional "depth-of-problem" evidence on Appellant's convictions, including how the physical mechanics of Appellant's actions killed the Victim.[95] This evidence illustrated the violent nature of Appellant's offenses and were properly introduced to show

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[86] *Halfacre*, 80 M.J. at 661–62.

[87] See *id*. at 662.

[88] Pros. Ex. 1 at 2–3.

[89] *See* R.C.M. 1001(b)(4).

[90] *Hardison*, 64 M.J. at 282.

[91] *United States v. Terlap*, 57 M.J. 334, 345. (C.A.A.F. 2002)

[92] *Id*. at 347.

[93] *Id*. at 350.

[94] *See* App. Ex. XXV; *Terlep*, 57 M.J. at 350.

[95] *See Ciulla*, 32 M.J. at 187.

"the circumstances surrounding" Appellant's conviction and its repercussions.[96]

We also reject Appellant's reliance on *United States v. Barker*.[97] As stated by the Government, the prosecution admitted, without objection by the Appellant, Pvt Marshall's testimony about the "fleshy undulating sound" from the Victim's neck and Dr. Foxtrot's testimony about the Victim's fractured windpipe and the unusual size and jaggedness of the incisions from the cricothyrotomy. Appellant fails to show how this testimony about the cricothyrotomy was "new ammunition" against him.[98] The military judge's ruling is entitled to deference because he properly conducted a Mil. R. Evid. 403 balancing test and his decision will not be overturned unless there is a clear abuse of discretion.[99] As the military judge found, Dr. Foxtrot's testimony was relevant under R.C.M. 1001(b)(4) and provided "greater context" to what occurred that evening; specifically relating to the mechanism of death and "the different risk factors that were present describing the events directly relating to the assault consummated by a battery."[100] We agree with the military judge that the probative value was high, the evidence was not cumulative, and the probative value was not substantially outweighed by the dangers of unfair prejudice. Accordingly, the military judge did not abuse his discretion in admitting the aggravating evidence.

We also agree with the Government that the trial counsel did not "ambush" Appellant. Arguments by counsel are not evidence, and trial counsel appropriately argued Appellant performed the cricothyrotomy to obstruct evidence. Appellant's claim is better framed as alleging prosecutorial misconduct and, as discussed in detail later in this opinion, trial counsel may argue evidence of record "as well as all reasonable inferences fairly derived from such evidence."[101] We conclude that the trial counsel did not "ambush" Appellant by arguing he performed the cricothyrotomy to obstruct justice.[102]

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[96] *See Vickers*, 13 M.J. at 406.

[97] *United States v. Barker*, 77 M.J. 337 (C.A.A.F. 2018).

[98] *See Barker*, 77 M.J. at 384; Appellant's Brief at 55.

[99] *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010).

[100] R. at 899–900.

[101] *United States v. Akbar*, 74 M.J. 364, 394 (C.A.A.F. 2014).

[102] *See* Appellant's Brief at 54.

Finally, we note that the military judge admitted the cricothyrotomy evidence during sentencing without defense objection, and the fact that Appellant pleaded guilty to obstruction of justice and conspiracy to obstruct justice, trial counsel appropriately argued "reasonable inferences fairly derived" from the cricothyrotomy evidence.[103]

C. Sentence Appropriateness

We review sentence appropriateness de novo.[104] "The military system must be prepared to accept some disparity even in the sentences of co-defendants, provided each military accused is sentenced as an individual."[105] With this in mind, the appropriateness of a sentence should be determined without reference or comparison to sentences in other cases.[106] This Court is not required to compare specific sentences "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases."[107] In order to challenge his sentence as inappropriate, an appellant must first demonstrate it is "highly disparate" when compared to a "closely related" case.[108] Only upon a successful showing does the burden then shift to the United States to demonstrate the difference in sentences rests upon a rational basis.[109]

Appellant asks that, should we find his sentence inappropriately severe, we conduct a sentence reassessment to correct the error.[110] As we have already found error in Appellant's first AOE which resulted in this Court ordering a sentence rehearing, a reassessment of Appellant's sentence based on this third AOE would be without any effect. Because there would be no further practical effect on the outcome of Appellant's appeal arising from review of the sentence

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[103] *See id.*

[104] *United States v. Patrick*, 78 M.J. 687, 718–19 (N-M. Ct. Crim. App. 2018).

[105] *United States v. Durant*, 55 M.J. 258, 261–62 (C.A.A.F. 2001) (internal quotations omitted).

[106] *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985).

[107] *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *Ballard*, 20 M.J. at 283).

[108] *Lacy*, 50 M.J. at 288.

[109] *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

[110] Appellant's Brief at 64.

appropriateness question, we find that this third AOE is moot and decline to analyze it further.

D. Prosecutorial Misconduct

When an objection at trial properly preserves the issue, appellate courts review questions of improper argument and prosecutorial misconduct de novo.[111]

"Prosecutorial misconduct is 'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'"[112] Prosecutorial misconduct can arise out of improper argument and occurs when the "argument overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[113] Appellate courts "should gauge the overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness."[114] Improper argument is "one facet of prosecutorial misconduct."[115] Challenged statements are reviewed in the "context of the entire court-martial" rather than in isolation.[116] As it relates to sentencing, prosecutors are to "steer clear of any improper arguments that may produce a wrongful sentence."[117]

If we find prosecutorial misconduct occurred the next step is to assess for prejudice. In assessing prejudice, this Court is directed to look at the "cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial."[118] *United States v. Fletcher* outlines a three factor test to determine whether trial counsel's improper arguments were prejudicial: "(1) the severity of the misconduct, (2) the measures adopted

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[111] *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017).

[112] *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (quotation omitted).

[113] *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (cleaned up).

[114] *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citations omitted).

[115] *Sewell*, 76 M.J. at 18.

[116] *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).

[117] *Baer*, 53 M.J. at 237.

[118] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005).

to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[119] These same *Fletcher* factors apply to inquiries into improper sentencing arguments.[120]

Appellant asserts that the Government presented improper argument in three ways. First, they argued about other possible mechanisms of death that violated the stipulation of fact and tended to impeach the military judge's acceptance of Appellant's plea. Second, the Government argued that Appellant performed the emergency cricothyrotomy on SSG Mike in order to obstruct justice – a theory Appellant argues was unsupported by the evidence, inflammatory, and speculative. Finally, Appellant argues the Government committed prosecutorial misconduct by displaying a misleading slide to the members after being specifically instructed by the military judge to no do so.

We find no merit in these arguments and determine there was no prosecutorial misconduct. In this case, trial counsel presented aggravating evidence that did not contradict the stipulation of fact or impeach the military judge's findings that Appellant's chokehold caused the Victim's death. The evidence presented by trial counsel about other mechanisms of death appropriately provided "greater context of exactly what occurred that night."[121] The aggravation evidence and trial counsel's argument provided explanations for exactly how the chokehold brought about the Victim's death—namely, what took place internally to the Victim's body as a result of the chokehold. The military judge properly admitted the evidence after thorough consideration.[122]

Trial counsel's argument regarding how the chokehold brought about asphyxiation and death did not inject inadmissible evidence into the proceeding and did not constitute prosecutorial misconduct.[123] Trial counsel's argument that Appellant performed the cricothyrotomy to obstruct justice was also not improper – in fact, it was admitted into evidence without defense objection.[124] Because trial counsel's argument was based on reasonable inferences

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[119] *Fletcher*, 62 M.J. at 184.

[120] *United States v Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

[121] R. at 900.

[122] Id.

[123] *Cf.* Dep't of the Navy, Judge Advocate General Instr. 5803.1E , Navy-Marine Corps Trial Judiciary [JAGINST 5803.1E], rule 4.a.5. (Jan. 20, 2015)..

[124] *See generally* R. 804–60.

from that evidence and did not allude to inadmissible evidence, it did not constitute prosecutorial misconduct.[125] Appellant's motives for performing the cricothyrotomy were addressed and discussed throughout the course of the court-martial. The military judge: (1) found evidence and surrounding circumstances of the cricothyrotomy were admissible under R.C.M. 1001(b)(4) because they directly related to or resulted from Appellant's offenses, and; (2) did not abuse discretion in ruling the evidence was admissible. Accordingly, trial counsel's argument was not improper.

We agree with the Government that trial counsel did not commit prosecutorial misconduct during sentencing argument by mistakenly displaying content on a presentation slide to the members. Rule of Professional Conduct 3.4 forbids "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation."[126] This Court has found no improper argument where trial counsel simply misspeak and immediately correct themselves. In *United States v. Masga*, this Court concluded the trial counsel did not improperly argue propensity when he said, "[i]s there any lawful, logical, or innocent person—a reason for searching [search terms] like this?"[127] This Court found, "trial counsel briefly misspoke and immediately corrected the sentence to refer to an 'innocent reason' why a person would use such search terms."[128] Similar to *Masga*, upon realizing he had not corrected his slide, trial counsel immediately corrected the error.[129] The military judge noted trial counsel had not yet discussed that portion of the slide and, upon the members' return after the Article 39(a) session, instructed the members that argument is not evidence.[130] Trial counsel's mistake, as evidenced by his apology and the beginning of his explanation that he had deleted something else, did not "overstep the bounds of propriety and fairness" and did not meet the threshold of prosecutorial misconduct.[131]

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[125] *See Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008)); *cf.* JAGINST 5803.1E, rule 4.

[126] JAGINST 5803.1E, rule 8.4(a)(3).

[127] *United States v. Masga*, No. 201700276, 2019 CCA LEXIS 56, at *7 (N-M Ct. Crim. App. Feb. 13, 2019).

[128] *Id.* at *10.

[129] *See id.*; R. 1308.

[130] R. 1310.

[131] *See United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018).

Even assuming error, Appellant suffered no prejudice. Under Article 59(a), UCMJ, "a finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[132] The first and second factors favor the United States. Assuming arguendo that all of the misconduct alleged by Appellant is true, Trial Counsel's argument was confined to sentencing argument and did not excessively refer to the questionable matters. We note, too, that even if we assumed error and prejudice, the proper remedy in that instance would be to order a sentencing rehearing. As Appellant's first AOE has already resulted in this Court ordering a sentencing rehearing, a finding of error and prejudice would be rendered moot in any event since such findings would have no further practical effect on the outcome of this appeal.

E. Post-Trial Mistrial Motion

Appellant alleges that the military judge erred in denying his post-trial motion based on what he described as "pervasive errors throughout Appellant's court-martial.[133] The basis for Appellant's post-trial motion was "the [G]overnment's impeachment of the stipulation of fact, impeachment of the guilty plea, improper sentencing evidence and argument, and violating *Brady v. Maryland*."[134] Appellant requested a new sentencing hearing as the remedy. Additionally, Appellant alleged trial counsel improperly presented evidence of and argued that: (1) Appellant killed the Victim by "crush[ing] the Victim]'s throat," (2) the Victim died from suffocation, and (3) Appellant performed the cricothyrotomy to cover-up the crushed throat.[135] Appellant's motion also noted that trial counsel "repeatedly attempted to introduce allegations" that the co-conspirators "were going to commit a sexual offense" during the hazing. The military judge noted Appellant was "moving the Court, in essence, to reconsider its rulings and reverse itself," and the military judge declined to do so.[136]

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[132] Article 59(a), UCMJ.

[133] App. Ex. XXXVII.

[134] Appellate Ex. XXXVII at 1.

[135] *Id*. at 3.

[136] Appellate Ex. XXXVII(c) at 2.

The military judge held that Appellant's three bases for mistrial were "sufficiently argued and ruled on" through the trial.[137] Even considering "their potential cumulative effect," the military judge held the issues did not "warrant the severe remedy of a mistrial."[138]

A military judge's decision on a motion for a mistrial is will be reversed only if there is clear evidence of an abuse of discretion.[139] A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."[140] "On motion for mistrial or when it otherwise appears that grounds for a mistrial may exist, a military judge shall inquire into the views of the parties on the matter."[141] A military judge has "considerable latitude in determining when to grant a mistrial."[142] "The trial court has a superior point of vantage, and … it is only rarely— and in extremely compelling circumstances—that an appellate panel, informed by a cold record, will venture to reverse a trial judge's on-the-spot decision."[143]

This court agrees with the Government that none of the issues raised by Appellant in his mistrial motion cast substantial doubt as to Appellant's court-martial. The military judge was correct when he determined all of the issues were "sufficiently argued and ruled on" at trial.[144] Appellant also argues that the military judge's R.C.M. 1001(b)(4) ruling "was in error" and that his denial of the mistrial "was influenced by his then-existing erroneous view of

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[137] *Id.*

[138] *Id.*

[139] *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015).

[140] R.C.M. 915(a).

[141] R.C.M. 915(b).

[142] *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998); *see also Arizona v. Washington*, 434 U.S. 497, 509 (1978) (a judge "exercise[s] broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury"); *Illinois v. Sommerville*, 410 U.S. 458, 461 (1973) (trial judge has "sound discretion" and "broad discretion" in determining manifest necessity).

[143] *United States v. Diaz*, 59 M.J. 79, 90–91 (C.A.A.F. 2003) (citations and internal quotation omitted).

[144] Appellate Ex. XXXVII(c) at 2; *cf. Coleman*, 72 M.J. at 189; *Commisso*, 76 M.J. at 322–24.

the law."[145] We disagree and, as discussed previously in this opinion, have determined that the military judge's ruling on the aggravating evidence under R.C.M. 1001(b)(4) was proper. Finally, we agree with the Government that even though the military judge incorrectly noted that trial defense counsel did not cross-examine Dr. Fisher, the military judge did not rely on this incorrect fact to support his denial of the mistrial. He "simply note[d]" it, along with three other facts, in relation to discussion of possible forfeiture of the alleged *Brady* violation.[146] The military judge did not make a ruling on the sua sponte issue of forfeiture, instead emphasizing that the issues were sufficiently argued at trial, did not warrant the severe remedy of mistrial, and identified no new facts or law to merit reconsideration. Appellant's motion for a mistrial was properly denied and the military judge did not abuse his discretion by denying Appellant's request. Once more, we note that even if we found error, the proper remedy, a sentencing rehearing, has already been ordered by this Court as a result of Appellant's first AOE. Accordingly, were we to find error related to the military judge's ruling on Appellant's post-trial motion for a mistrial, the error would be moot.

F. Cumulative Error

Allegations of cumulative error are reviewed de novo.[147] "Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"[148] Assertions of error without merit are insufficient to invoke the cumulative error doctrine.[149]

We agree with the Government that every error alleged in this AOE (with the exception of AOE 1) has been addressed and rebutted in detail and that Appellant's claim therefore lacks merit.[150] Even assuming errors occurred, we find that they were not so severe as to "substantially sway" the findings or

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[145] *See* Appellant's Brief at 70.

[146] Appellate Ex. XXXVII(c) at 2.

[147] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

[148] *Id*. (quoting *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992)).

[149] *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

[150] *See Gray*, 51 M.J. at 61.

"materially prejudice Appellant's substantial rights."[151] The prosecution's sentencing case in aggravation was substantial, spanning three days and approximately 233 pages of documentary evidence, Appellant admitted guilt during his pleas, and, with the exception of the first AOE, there were no other alleged errors that denied Appellant the right to a fair trial.[152]

III. Conclusion

The findings are **AFFIRMED**. A sentence rehearing is authorized. The sentence is **SET ASIDE** and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with authority to order a sentencing rehearing. [153]

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[151] *See Banks*, 36 M.J. at 171; *Pope*, 69 M.J. at 335; Article 59(a), UCMJ.

[152] *Cf. Pope*, 69 M.J. at 335.

[153] Articles 59 & 66, UCMJ.