IN THE UNITED STATES COURT APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Lawrence G. Hutchins III, Appellant.	))))))))	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. No. 200800393 USCA Dkt No. 12-0408/MC

TO THE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

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Statement of Statutory Jurisdiction

Appellant received a sentence that included a punitive discharge, bringing his case within the lower court's jurisdiction. Art. 66(b)(1), Uniform Code of Military Justice

(UCMJ), 10 U.S.C. § 866(b)(1) (2006). Appellant filed a petition for grant of review properly bringing his case within this Court's jurisdiction. Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A general court-martial, composed of members with enlisted representation, tried Sergeant Lawrence G. Hutchins III, U.S. Marine Corps ("Appellant"), from 23 July to 3 August 2007. Contrary to his pleas, he was found guilty of violating Article 81, conspiracy[1]; Article 107, false statement; Article 118, unpremeditated murder; and Article 121, larceny.[2] In accordance with his pleas, he was found not guilty of premeditated murder, assault, housebreaking, kidnapping, obstruction of justice, and one specification of false official statement.[3] Sgt Hutchins was sentenced to be discharged from the U.S. Marine Corps with a dishonorable discharge, to be confined for 15 years, to be reduced to the pay grade of E-1, and to receive a reprimand. On May 2, 2008, the convening authority approved the findings and sentence as adjudged, with the exception of the reprimand and all confinement in excess of 11-years.

On May 30, 2008, the record of trial was docketed at the Navy-Marine Corps Court of Criminal Appeals (NMCCA) for review

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1 Through exceptions and substitutions.
2 *See* 10 U.S.C. § 881, 907, 918, and 921 (2000).
3 *See* 10 U.S.C. § 907, 918, 928, 930, 934 (2000).

pursuant to Article 66, UCMJ. After receiving the pleadings of the government and defense, NMCCA specified two additional issues for supplemental briefing. On May 20, 2009, upon NMCCA's consideration of the supplemental pleadings, it remanded the case for a *Dubay* hearing, which was conducted at Camp Pendleton on August 18, 19 and 28, 2009. The record was returned to NMCCA on November 2, 2009.

On March 15, 2010 *en banc* oral argument was held for the supplemental issue. NMCCA issued its opinion on April 22, 2010, setting aside the findings and sentence (*Hutchins I*).[4] On June 7, 2010, the Judge Advocate General of the Navy ("the JAG") certified the case to this Court, and oral argument was held on October 13, 2011. On January 11, 2011, this Court issued its opinion, affirming in part and reversing in part, and remanding the case back to NMCCA for consideration of the remaining issues (*Hutchins II*).[5] The case was re-docketed at NMCCA on February 18, 2011. On March 20, 2012, NMCCA issued an unpublished opinion, affirming the findings and sentence (*Hutchins III*).[6] A petition for grant of review was filed with this Court on March 26, 2012.

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[4] *United States v. Hutchins*, 68 M.J. 623 (N. M. Ct. Crim. App. 2010).
[5] *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011).
[6] *United States v. Hutchins,* No. 200800393, unpub. op (N.M.Ct.Crim.App. March 20, 2012)

Statement of Facts

On January 28,2006, Sergeant (then Corporal) Larry Hutchins, U.S. Marine Corps, squad leader for 1st squad, 2d platoon, Kilo Co, 3d Battalion, 5th Marine Regiment (3/5) was leading his Marines on a patrol through the Zaidon district of Iraq to conduct a weapons cache sweep. Sgt Hutchins, who represented the third generation of his family to serve in the Marine Corps, was well respected by his Marines and his superiors as a professional and competent combat leader.[7]

During the 28 January patrol at Zaidon, Sgt Hutchins and his squad came under heavy enemy fire.[8] After more than two hours of fighting, close air support arrived to assist Sgt Hutchins' squad.[9] By that point the enemy had consolidated into a nearby house. Sgt Hutchins' platoon sergeant attempted to guide in an air strike, but misidentified the target house, and an air strike destroyed a neighboring house.[10]

Sgt Hutchins was familiar with the family that lived in the neighboring house, as just a few days previously he had used the house as an overwatch position and become friendly with them.[11] As the bomb fell on the house, Sgt Hutchins was in complete shock

[7] R. at 1625.
[8] Prosecution Exhibit ("PE") 1 at 2.
[9] *Id.*
[10] PE 1 at 2.
[11] *Id.*

and could not move; he felt as though time had been suspended.[12] After the house was destroyed, Sgt Hutchins and his Marines swept through a field as they approached the house. During this sweep, they came across two men hiding in a fighting hole who immediately raised their hands and surrendered when they saw the Marines approaching.[13] After they tested positive for gunpowder residue, Sgt Hutchins concluded that they had been part of the complex ambush and detained them.[14] However, the battalion judge advocate later told Sgt Hutchins he had decided to let the men go free.[15]

As he finally made his way to the house, the first things Sgt Hutchins could hear were the screams of women and children. He saw one woman crying uncontrollably and throwing dirt on her back to indicate that there were people buried in the rubble of the house.[16] Sgt Hutchins realized an entire family had been killed: a husband, his two wives, and their three children.[17] This incident deeply affected Sgt Hutchins; he was unable to get the images out of his mind.[18] Although he began to suffer from adverse mental health consequences, such as emotional numbing,

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[12] AE LXI at 4.
[13] *Id.*
[14] *Id.*
[15] PE 1 at 3.
[16] *Id.*
[17] *Id*; R. at 1144.
[18] AE LXI at 4.

anxiety, restlessness, and agitation, Sgt Hutchins was afraid to discuss his reaction to the incident for fear of appearing weak.[19]

After this incident, Sgt Hutchins' squad and the rest of Kilo Company, in late February 2006, were transferred from Zaidon to assume control of the neighboring Hamdaniyah AO from the Army. Because 2d platoon was operating independently out of its patrol base, which was isolated in the midst of hostile territory, operations were continuous, and the Marine's received little sleep.[20]

Intelligence sources determined that one of the leaders of the local insurgency, Saleh Gowad, was living within 2d platoon's AO. Saleh Gowad was involved with planting improvised explosive devices ("IEDs"), kidnapping, murder, torture, and recruiting people to serve as suicide bombers,.[21] In addition, intelligence reported that Gowad's father and four brothers, who all shared a home, were also involved with the insurgency and they were therefore listed as targets as well.[22] Saleh Gowad was captured by 2d platoon, but only a few days later was ordered to be released by the battalion—no explanation was provided for why he was being released.[23] This had also occurred previously where 2d

[19] *Id.*
[20] R. at 1883.
[21] *Id*; DE E at 9.
[22] DE F at 22-24; R. at 1536.
[23] R. at 1489.

platoon had captured another suspected insurgent, only to have him released without explanation.[24]

Shortly after these incidents, Lt Phan, the platoon commander, began directing Sgt Hutchins to mistreat suspected insurgents, in an effort to develop more intelligence. During the interrogation of a suspected trigger man for an IED which had killed a U.S. Army soldier, Lt Phan ordered Sgt Hutchins to choke the suspect to unconsciousness. After losing and regaining consciousness, the suspect began to cry and to provide intelligence.[25]

For Sgt Hutchins, the experience of being ordered to torture the suspect and watching him break down was shattering. Afterwards, he had to step into a different room to try to calm his nerves, as he did not recognize who he was anymore or what he had become.[26] Although he had previously experienced combat, he had never before so intimately and deliberately applied pain to another human being who posed no immediate threat to him.[27]

Lt Phan subsequently aggressively interrogated the father of a suspected insurgent, with the assistance of Sgt Hutchins. Sgt Hutchins was ordered to periodically blood choke the father to

[24] R. at 1491,1492.
[25] PE 1 at 4; R. at 1496.
[26] AE LXI at 4.
[27] *Id.*

unconsciousness.[28] When this did not work, Lt Phan escalated the interrogation and placed his pistol into the father's mouth; Sgt Hutchins could recall hearing Lt Phan's pistol clanking off the teeth of the father.[29]

After this latest interrogation, Lt Phan spoke to Sgt Hutchins about Saleh Gowad.[30] They had recently received information that Saleh Gowad, after his release, had been involved in planting an IED that had killed a Marine just south of the 2d platoon AO. Lt Phan spoke with Sgt Hutchins about how it would be nice to take matters into their own hands and kill Saleh Gowad. At trial, Lt Phan admitted to having these conversations but attempted to minimize them as merely "idle chit-chat."[31]

On April 26, 2006, Lt Phan assigned Sgt Hutchins' squad to set up an ambush within the vicinity of Saleh Gowad's house.[32] Sgt Hutchins understood this to be the opportunity to execute their plan to kill Saleh Gowad. After discussing the plan with the fireteam leaders, the whole squad was briefed. It was decided that one fireteam would go to Gowad's house, capture him, leave him by the side of the road with an AK-47 and shovel, and the rest of the squad would kill him from their ambush position. This would make it appear as though Gowad was engaged and killed while

[28] PE 1 at 5.
[29] PE 1 at 5.
[30] R. at 1515, 1516; PE 1 at 5; R at 1649
[31] R. at 1516.
[32] PE 1 at 6.

trying to plant an IED.[33] Each member of the squad individually agreed to participate in the plan, with the understanding that the plan would not be executed if any one of them wanted to back out.[34] With the unanimous agreement established, the plan was then executed and a "snatch team" left the ambush position to get Gowad.

After a significant period of time elapsed, the snatch team came back with a man Sgt Hutchins believed to be Gowad and left him on the road with a shovel and AK-47.[35] The squad then reported to the platoon headquarters that there was a man digging by the side of the road who had begun firing at them, and then opened fire on the man.[36] The squad then took steps to ensure that the scene was consistent with a man digging by the side of the road and waited for the quick reaction force.[37]

Several days later, local sheiks complained to the coalition that Marines had wrongly kidnapped an Iraqi from his bed and killed him.[38] In response, an investigation was begun by the Naval Criminal Investigative Service (NCIS) into the allegations.[39] When questioned by NCIS, the squad, including Sgt

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[33] PE 1 at 6.
[34] R. at 1126.
[35] PE 1 at 7.
[36] *Id.*
[37] PE 1 at 7.
[38] R. at 421, 422.
[39] R. at 422.

Hutchins, maintained the original story concerning the April 26th shooting.[40]

However, during the course of the investigation, NCIS began to suspect that the incident on April 26th was not as alleged by the squad and, on May 11, 2006, sought to interrogate Sgt Hutchins as a suspect at Camp Fallujah.[41] Sgt Hutchins was read his rights and, in response, he requested to terminate the interview and be provided with the assistance of a lawyer.[42] The interrogation was terminated and Sgt Hutchins was taken to a trailer, where he was kept sequestered and under guard and not permitted to use a phone or otherwise contact a lawyer.[43]

On May 18, 2006, the isolation was ended when NCIS agents unexpectedly entered Sgt Hutchins' trailer. One of the agents was Special Agent John Connelly, who was present during the previous May 11, 2006 interrogation.[44] The agents reminded Sgt Hutchins that they were still investigating him for charges of conspiracy, murder, assault and kidnapping, and indicated that they desired to search his trailer for evidence in support of those charges.[45] The NCIS agents further discussed Sgt Hutchins' constitutional

[40] R. at 423, 424.
[41] R. at 426.427
[42] R. at 428.
[43] R at 428.
[44] R. at 428.
[45] AE XVI at 15.

rights with him, to include the right to refuse the search.[46] In responding to this discussion, Sgt Hutchins consented to the search and also indicated that he would like to talk more about the investigation. The next day NCIS arrived at his trailer and took Sgt Hutchins to their office, where he made a sworn statement.[47] Sgt Hutchins was subsequently charged at a general court-martial with conspiracy, premeditated murder, and other offenses related to the April 26th shooting.

Sgt Hutchins was subsequently convicted of unpremeditated murder, conspiracy, false official statement and larceny of the AK-47 and shovel.[48] **However, the members found Sgt Hutchins "not guilty" of premeditated murder, assault, housebreaking and kidnapping, thereby rejecting the most serious allegations, which were that Sgt Hutchins did not care who was eliminated, and directed his squad to seize any Iraqi if the insurgent leader could not be found.[49]**

Sgt Hutchins was sentenced to 15-years confinement and a dishonorable discharge by the members. After clemency, the final approved sentences for Sgt Hutchins and his squad were as follows:

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[46] R. at 125-26.
[47] R. at 429.
[48] CA Action.
[49] *Id.*

Name	*Convictions*	*Type of discharge*	*Confinement*
Sgt Hutchins	Unpremeditated murder Conspiracy False statement Larceny	Dishonorable	**11 years**
2ndLt Phan[50]	None	None	None
Cpl Thomas	Conspiracy Kidnapping	Bad-conduct	None
Cpl Magincalda	Conspiracy Wrongful appropriation Housebreaking	None	449 days
LCpl Pennington	Conspiracy Kidnapping	Bad-conduct	525 days
LCpl Jackson	Conspiracy Aggravated Assault	None	454 days
LCpl Shumate	Obstruction of Justice Assault w/ intent to inflict grievous harm	None	453 days
PFC Jodka	Conspiracy Assault	None	440 days
HM3 Bacos	Conspiracy Kidnapping	None	297 days

After Sgt Hutchins' case was docketed for appellate review, significant appellate issues were raised both by the defense and by the Court. In February 2009, the Naval Clemency and Parole Board examined Sgt Hutchins case, noted the sentence disparity,

[50] Although implicated by the evidence and testimony of the squad, 2ndLt Phan was never charged for the Gowad operation. He did, however, receive NJP for the detainee abuse.

and voted to reduce his sentence to 5 years, but their vote was rejected by the Assistant Secretary of the Navy.[51]

In November 2009, despite ongoing appellate review and the annual Naval Clemency and Parole Board process, Secretary of the Navy Ray Mabus provided further response to Sgt Hutchins' case. Secretary Mabus issued a press release, and gave telephonic interviews as part of a coordinated series of widely disseminated articles appearing, *inter alia*, in the Associated Press[52], *The Marine Times*[53], and *The North County Times*.[54] In the *Marine Times* article, it noted that Secretary Mabus had "reviewed transcripts and trial records in each of the eight Hamdaniya prosecutions."[55] During his *North County Times* telephonic interview, Secretary Mabus stated of Sgt Hutchins and his squad: "None of their actions lived up to the core values of the Marine Corps and the Navy. This was not a 'fog of war' case occurring in the heat of battle. This was carefully planned and executed, as was the cover-up. The plan was carried out exactly

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[51] *Hutchins*, unpub. op. at *9.

[52] *See, e.g.,* Associated Press, "Clemency denied for Plymouth Marine convicted of murder in Iraq," *Patriot-Ledger*, November 19, 2009. Note: This AP article was reproduced in multiple other media outlets.

[53] Gidget Fuentes, "SecNav: No clemency in Iraqi murder plot," *The Marine Times*, November 17, 2009.

[54] Mark Walker, "Navy Secretary boots 4 Pendleton troops involved in Iraqi's killing," *The North Country Times*, November 17, 2009.

[55] Gidget Fuentes, "SecNav: No clemency in Iraqi murder plot," *The Marine Times*, November 17, 2009.

as it had been conceived."[56] Secretary Mabus also noted that he believed the sentence Sgt Hutchins received was appropriate, that Sgt Hutchins had already received sufficient clemency from the convening authority, and that Sgt Hutchins would not receive additional clemency.[57] As justification (and in contradiction to the members' "not guilty" findings), Secretary Mabus noted to the *Marine Times* that the killing was "so completely **premeditated**, that it was not in the heat of battle, that not only was the action planned but the cover-up was planned, and that **they picked somebody at random**, just because he happened to be in a house that was convenient. He was murdered. . . **It wasn't somebody coming apart under pressure**. It wasn't in the middle of action, in the middle of battle. It was completely planned and completely executed. That was disconcerting."[58] Finally, Secretary Mabus noted that he was "surprised" that members of the squad had been permitted to remain on active-duty and directed that they be immediately separated. "I thought that by leaving them on active duty, it degraded the actions of tens of thousands of other Marines and sailors who served . . . and

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[56] Mark Walker, "Navy Secretary boots 4 Pendleton troops involved in Iraqi's killing," *The North Country Times*, November 17, 2009.
[57] Gidget Fuentes, "SecNav: No clemency in Iraqi murder plot," *The Marine Times*, November 17, 2009.
[58] *Id.* (emphasis added).

didn't act this way."[59] The interview with Secretary Mabus was the cover story of the Marine Times:

(Sgt Hutchins was subsequently denied clemency and parole by the Naval Clemency and Parole Board in January 2010.[60])

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[59] *Id.*

[60] *Hutchins*, unpub. op. at *9.

On April 22, 2010, the lower Court issued an *en banc* opinion in the case, reversing the findings and sentence due to the improper severance of a detailed defense counsel on the eve of trial. In a separate partial concurrence/partial dissent, Judge Price agreed that the severance was improper, but did not find it prejudicial for findings. Echoing Secretary Mabus' talking points (which rejected the members' findings), Judge Price stated that Sgt Hutchins did not have any valid mental health defense, and stated that Sgt Hutchins had targeted a man "with no suspected insurgent ties because he was a military-aged male who lived near a suspected insurgent, after their plan to kill a suspected insurgent was compromised."[61] Judge Price later reinforced that Appellant's conspiracy, "included contingency planning to abduct and kill any nearby military-aged male in the event their efforts to abduct suspected insurgent(s) was compromised."[62] The inconsistency with the members' "not guilty" findings was not noted by the majority opinion, which responded to Judge Price's dissent only by reiterating that the improper severance of counsel was not amenable to a speculative prejudice analysis.[63]

Subsequently, the recommendations provided to the Judge Advocate General of the Navy by his principal advisors, to

[61] *Hutchins*, 68 M.J. at 636-37.
[62] *Id.*
[63] *Hutchins* 68 M.J. at 631.

include the Assistant Judge Advocate General for Military Justice was that he not certify an appeal to this Court.[64] Nevertheless, the Judge Advocate General, who reports directly to Secretary Mabus, certified the appeal, and this Court later reversed the lower court.

REASONS TO GRANT REVIEW

I.
WHETHER THE FINDINGS AND SENTENCE MUST BE DISMISSED WITH PREJUDICE WHERE UNLAWFUL COMMAND INFLUENCE FROM THE SECRETARY OF THE NAVY HAS UNDERMINED SUBSTANTIAL POST-TRIAL RIGHTS OF THE APPELLANT.

A. Background

Article 37, UCMJ specifically prohibits unlawful command influence (UCI) against any "approving or reviewing authority...with respect to his judicial acts." [65] Under the UCMJ, Articles 60, 62, 64, 66, 67, 67a, 69, 72, 73, 74 and 75, all encompass reviewing/approving functions and "judicial acts," i.e. acts which can affect the findings and/or sentence of a court-martial. Thus, the plain language of Article 37 extends to all aspects of the military justice process, to include all post-trial review. In *United States v. Hagen* this Court

[64] *See* Associated Press, "Government Appeals Overturning Marine's Conviction," available at www.expose-the-war-profiteers.org/archive/media/2010-2/20100607.htm (last visited April 30, 2012). Note: This AP article was reproduced in multiple other media outlets.
[65] Art 37, UCMJ.

reinforced that the prohibition against UCI applies to civilian as well as military leadership. [66]

Hence, Secretary Mabus, the senior leader of the Navy and Marine Corps, committed UCI through his press release and pre-planned media interviews, as they made clear to the officers responsible for the post-trial disposition of Sgt Hutchins' case that the evidence was sufficient to prove that Sgt Hutchins had sought to kill a randomly selected Iraqi, and that Sgt Hutchins' adjudged sentence was appropriate. Secretary Mabus further made clear to these officers that any perceived leniency for Sgt Hutchins and his squad was inconsistent with his expectations for the Department of the Navy, and that the prior perceived leniency they had received was unacceptable.

Accordingly, Secretary Mabus' comments *directly* impacted post-trial review, to include the discretion and decisions of the Navy-Marine Corps Court of Criminal Appeals, the Judge Advocate General of the Navy, the Naval Clemency and Parole Board, and the officers designated Article 74 authority under JAGMAN §0158, all of whom are subordinate to his authority. An objective member of the public, aware that every member of the Navy and Marine Corps ultimately reports to the Secretary of the Navy, and aware of his unprecedented public statements, would

[66] *United States v. Hagen*, 25 M.J. 78, 87 (C.M.A. 1987)(Sullivan, J. concurring).

"harbor a significant doubt" about the fairness of the review of Appellant's case by these very same individuals--whether it is the lower court's Article 66 review, a certification decision by the JAG under Article 67, or Article 74 review for clemency or parole.[67]

The only remedy is dismissal with prejudice. In *United States v. Gore*, this Court held that dismissal with prejudice was an appropriate remedy for UCI, where further proceedings would continue to be tainted by the prejudice.[68] In the present case, all military participants in the ongoing proceeding as well as any potential future proceedings will continue to be tainted.

B. The lower court opinion

Hutchins III does not engage in any substantive analysis of Secretary Mabus' statements. Instead, *Hutchins III* misleadingly indicates in a footnote that Secretary Mabus' statements were limited to expressing "surprise and disappointment with the sentences awarded and the prospect of continuing service for the personnel involved in this case."[69] *Hutchins III* further states, "We hold that under the circumstances present in this case, the comments by the Secretary of the Navy related to his prerogatives in clemency, were separate and legally distinct

[67] *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).
[68] *United States v. Gore*, 60 M.J. 178, 189 (C.A.A.F. 2004).
[69] *Hutchins*, unpub. op. at *6.

from proceedings under *Article 66*, UCMJ, and could not reasonably be perceived by a disinterested member of the public as UCI or otherwise indicative of an unfair proceeding in this court-martial."[70] However, *Hutchins III* omits any reference to Secretary Mabus' declaration that he had specifically reviewed the transcript in Sgt Hutchins' case, his promulgation of factual findings, and his commentary on sentence appropriateness—-all of which directly address Article 66 review. Moreover, Secretary Mabus has never taken remedial action or otherwise acted to limit the scope of his influence. Accordingly, the holding in *Hutchins III* is wholly unsupported by any interpretation of the facts.

Additionally, even if Secretary Mabus' diatribes were in fact limited solely to clemency, they would still constitute unlawful command influence. As seen from this Court's holding in *United States v. Tate*, the protection of fair access to Article 74 clemency is a function of military appellate courts.[71] If Secretary Mabus did not want Sgt Hutchins to receive consideration under Articles 74 and 75, the proper method would have been for him to issue an order withdrawing that authority, *not* unlawfully influencing those to whom it was properly

[70] *Hutchins*, unpub. op. at *11.
[71] *See United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007).

delegated under SECNAVINST 5815.3J and JAGMAN §0158.[72] The method utilized by Secretary Mabus serves to undermine the legitimacy and credibility of the military justice process as an independent legal system.

Hutchins III also notes that any appearance of UCI against its Article 66 review is dissipated due to its previous reversal of the findings and sentence in 2010 (*Hutchins I*). Of course, if the reversal in *Hutchins I* should be interpreted as de facto evidence that there is no UCI, then the affirmance in *Hutchins III* should be de facto evidence of the opposite conclusion. More importantly, both *Hutchins I* and *Hutchins III* demonstrate an adherence to Secretary Mabus' unlawful direction. Specifically, both opinions are consistent with Secretary Mabus' factual determination that Sgt Hutchins had plotted to seize and kill any random Iraqi.

Of note, the *Hutchins I* reversal was predicated on longstanding military law that required per se reversal for an improper severance of counsel. As such, *Hutchins I* did not implicate Secretary Mabus' comments concerning the factual circumstances of the case and the sentence.[73] However, as

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[72] *See* SECNAVINST 5815.3J; JAGMAN §0158.

[73] Indeed, in the Government's subsequent appeal to this Court, it explicitly acknowledged that existing case law required the lower court's result, but that case law should instead be overruled. *See* Govt July 2010 CAAF brief at 52.

discussed in the statement of facts, Judge Price's concurrence/dissent, without challenge from the majority, explicitly stated that Sgt Hutchins had planned to kill a random Iraqi.[74] Additionally, the statement of facts in *Hutchins I* indicates that Sgt Hutchins had conspired to "kidnap" an Iraqi male.[75] As discussed, the members excepted the kidnapping (and housebreaking) predicate offense language from the conspiracy charge, and also found Sgt Hutchins not guilty of the stand alone kidnapping charge. Additionally, *Hutchins I* does not acknowledge the other offenses and language to which Sgt Hutchins was found "not guilty." Thus, there is nothing in *Hutchins I* to indicate that the court had rejected Secretary Mabus' interpretation of the case.

Hutchins III, unlike *Hutchins I*, was specifically required to make determinations regarding the underlying facts of the case, and, moreover, was required to explicitly assess factual sufficiency and sentence appropriateness. Yet, similar to *Hutchins I*, *Hutchins III* reinforced Secretary Mabus' incorrect findings, writing:

> The court-martial received testimony from several members of the squad that indicated the intended ambush mission morphed into a conspiracy to deliberately capture and kill a high value individual (HVI), believed to be a leader of the insurgency. **The witnesses gave varying testimony as to the depth of**

[74] *Hutchins*, 68 M.J. at 636-37.
[75] *Id.* at 624.

> **their understanding of alternative targets, such as family members of the HVI or another random military-aged Iraqi male.**[76]

In addition to gratuitously noting the "varying" testimony, *Hutchins III* also fails to anywhere recite the charges, specifications and language to which Sgt Hutchins was found "not guilty." Such a recitation would have conclusively demonstrated that the members resolved the "varying" testimony in favor of Sgt Hutchins (and against Secretary Mabus).[77] In addition, the remainder of *Hutchins III* held against Sgt Hutchins on every issue (to include factual sufficiency and sentence appropriateness), and did not otherwise provide any indication that it was free from Secretary Mabus' factual determinations and influence.

Finally, *Hutchins III* incorrectly claims, "We have granted the appellant's every motion to attach documents to the record, to include matters from proceedings unrelated to our jurisdictional prerogatives, to permit a full and public vetting of the UCI claim." As seen from the record of trial, however, the lower court denied two defense motions to attach these documents, to include extensive documentary evidence concerning the impact of the UCI on the JAG and on the Article 74 review process, as well as a declaration from a detailed counsel

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[76] *Hutchins*, unpub. op. at *4-5 (emphasis added).
[77] *Compare Hutchins,* unpub. op. at *4-6, *with* CA Action (indicating the members' findings).

concerning the impact and perception of Secretary Mabus' comments at Camp Pendleton.[78] The court's refusal to attach these documents to the record is referenced in both parties' briefs to the lower court.[79] Accordingly, the lower court's profession that it had reviewed all offered evidence in order to conduct a "public vetting" is puzzling, and materially false.

C. Reasons to Grant

Secretary Mabus' diatribes are utterly unprecedented, in that a sitting Service Secretary has criticized the outcome of an ongoing case, stated his own findings in contradiction to "not guilty" findings, and used this admonishment as part of a calculated media blitz.

When drafting the UCMJ, Congress was aware that the uniformed officers who comprise the military justice system would always be subject to this type of illegal influence. As a result, Congress intended this Court to serve as a neutral authority which could remain above command influence. As stated by this Court in *United States v. Thomas*, "[A] prime motivation for establishing a civilian Court of Military Appeals was to

[78] On April 26, 2012, with the assistance of Mr. DeCicco, undersigned counsel reviewed the original record of trial docketed with this Court, and verified that the lower court had in fact stamped "Denied" on the motions to attach, and the documents for one of the motions had been returned to counsel and was not present in the record.

[79] *See* July 2011 Government Answer Brief at 23; September 2011 Appellant Reply Brief at 2-3.

erect a further bulwark against impermissible command influence."[80]

Indeed, the lower court itself acknowledges the limitations of its review, as it explicitly refused to make any holdings regarding the influence of Secretary Mabus on the JAG's 2010 decision to certify the appeal.[81] Yet, under 10 USC §5148 and SECNAVINST 5430.27C, the JAG reports *directly* to the Secretary of the Navy, and carries the additional title of Staff Assistant to the Secretary of the Navy.[82] Thus, the unlawful influence of a major aspect of the military justice system has currently escaped judicial review.

This issue should be granted because in approving of Secretary Mabus' manipulation of post-trial review, the lower Court has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a person acting under the authority of the UCMJ, as to call for an exercise of this Court's power of supervision.[83]

WHEREFORE, Appellant requests this Court grant this issue.

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[80] *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)(citing Hearings on H.R. 2498 Before a Subcomm. of the House Committee on Armed Service, 81st Cong., 1st Sess. 608 (1949)).
[81] *Hutchins*, unpub. op. at *10.
[82] *See* 10 USC §5148; SECNAVINST 5430.27C
[83] *See* United States Court of Appeals for the Armed Forces RULES OF PRACTICE AND PROCEDURE, Rule 21(b)(5)(F).

II.

DID THE MILITARY JUDGE ERR WHEN, WITHOUT REFERENCING THE LIBERAL GRANT MANDATE, HE DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO HAD BEEN RESPONSIBLE FOR THE PRE-DEPLOYMENT URBAN WARFARE TRAINING RECEIVED BY THE APPELLANT AND HIS ALLEGED CO-CONSPIRATORS, WHERE THE QUESTION OF APPROPRIATE TACTICS AND LEADERSHIP IN URBAN WARFARE WAS A CONTESTED TRIAL ISSUE?

During *voir dire* of the members, the defense challenged Major [D] for cause. Maj [D] had been responsible for the "Mojave Viper" pre-deployment urban warfare training for Sgt Hutchins' unit, and would be invested in the integrity and effectiveness of his training.[84] As part of his duties, Maj [D] would patrol with the training units, help them refine their SOPs, and provide the unit leadership with after-action review.[85] Although Maj [D] could not specifically remember Sgt Hutchins' chain of command, he did recall that he provided training to the unit.

An objective observer from the public would conclude that Maj [D] would be personally and professionally invested in having his training be successful and effective. An objective observer would find that Maj [D] would be personally affronted when presented with facts that Sgt Hutchins deviated from the training. Maj [D] would also be less likely to accept the allegations of leadership failures by Lt Phan and Capt Correa.

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[84] R at 967.

[85] R. at 969, 974

During argument on the challenge, the military judge's demeanor was diametrically opposed to the principle of the liberal grant mandate. The military judge was hostile and abrupt to defense counsel, repeatedly cutting him off and denying the challenge without allowing defense counsel to fully articulate the basis.[86] As a result, the military judge incorrectly perceived the challenge to be limited to the differing concepts of a proper "dead check." The military judge failed to consider that regardless of dead checks, Maj [D] would have a vested interest in the outcome of the court-martial.

The lower court confused and conflated the separate concepts of the implied bias analysis and the liberal grant mandate, incorrectly finding that because the military judge conducted an implied bias analysis, he *de facto* applied the liberal grant mandate.[87] As stated by this Court in *United States v. Clay*, "The liberal grant mandate has been recognized since the promulgation of the *Manual for Courts-Martial, United States* . . . this Court has enjoined military judges to follow a liberal grant mandate in evaluating challenges for cause."[88] The lower court, without justification or analysis, further found that Maj [D] would not have a personal stake in the outcome of the court-martial.[89]

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[86] R. at 1001.
[87] *Hutchins*, unpub. op. at *22-23.
[88] *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).
[89] *Hutchins*, unpub. op. at *23.

This issue should be granted because the lower Court has decided a question of law in a way that conflicts with applicable decisions of this court, specifically, *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007).[90]

WHEREFORE, Appellant requests this Court grant this issue.

III.

THE APPELLANT WAS INTERROGATED BY NCIS CONCERNING HIS INVOLVEMENT IN THE ALLEGED CRIMES, AND TERMINATED THE INTERVIEW BY INVOKING HIS RIGHT TO COUNSEL. APPELLANT WAS THEREAFTER HELD INCOMMUNICADO AND PLACED IN SOLITARY CONFINEMENT, WHERE HE WAS DENIED THE ABILITY TO COMMUNICATE WITH A LAWYER OR ANY OTHER SOURCE OF ASSISTANCE. APPELLANT WAS HELD UNDER THESE CONDITIONS FOR 7 DAYS, WHEREUPON NCIS RE-APPROACHED APPELLANT AND COMMUNICATED WITH HIM REGARDING THEIR ONGOING INVESTIGATION. IN RESPONSE, APPELLANT WAIVED HIS PREVIOUSLY INVOKED RIGHT TO COUNSEL AND SUBSEQUENTLY PROVIDED NCIS A SWORN STATEMENT CONCERNING THE ALLEGED CRIMES.

DID THE MILITARY JUDGE ERR WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S STATEMENT? *SEE EDWARDS v. ARIZONA*, 451 U.S. 77 (1981) *AND UNITED STATES v. BRABANT*, 29 M.J. 259 (C.M.A. 1989).

A. Law

When a suspect invokes his right to an attorney during an interrogation, all questioning must stop until: (1) an attorney is provided, or (2) the suspect himself initiates a discussion.[91]

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[90] *See* United States Court of Appeals for the Armed Forces RULES OF PRACTICE AND PROCEDURE, Rule 21(b)(5)(B).

[91] *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981).

"The [Supreme] Court has further established that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial interrogation unless and until the accused (1) 'initiates' further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel. . . ."[92] Voluntariness of a confession is a question of law reviewed *de novo* by examining the totality of the circumstances, including the details of the interrogation and the characteristics of the suspect.[93]

B. Discussion

There is no dispute that Sgt Hutchins unambiguously invoked his right to counsel on May 11, 2006. There is also no dispute that the Government's response was to hold him incommunicado for 7 days, and to deprive of him of any opportunity to actually exercise that right. Nor is there any dispute that NCIS independently approached Sgt Hutchins in furtherance of its criminal investigation, and that this contact led to Sgt Hutchins providing a sworn statement.

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[92] *United States v. Huxhold*, 20 M.J. 990, 996-97 (N.M.C.R. 1985)(citing *James v. Arizona*, 469 U.S. 990, (1984) (J. Brennan dissenting from denial of certiorari) (memorandum decision); *Wyrick v. Fields*, 459 U.S. 42 (1982); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Edwards v. Arizona*, 451 U.S. at 486 n.9.)

[93] *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002).

1. Reinitiation

The lower court determined that because NCIS's communication with Sgt Hutchins putatively related to a search it was of no legal relevance.[94] The lower court's holding is inconsistent with the *Edwards v. Arizona*, which focuses the analysis solely on whether it was the suspect or law enforcement who initiated a communication related to the criminal investigation. Crucially, the specific format of this communication is irrelevant: whether the communication is a search, a question, or a directed comment, it is impermissible if it specifically relates to the investigation, and is not merely an inquiry incident to confinement (a request for water, or to use the phone, etc.).[95]

In the present case, far from an innocuous communication incident to confinement, NCIS specifically reminded Sgt Hutchins that he was being investigated for murder, conspiracy, kidnapping and assault, and they discussed with him the waiver of his Constitutional rights.[96] And it was during this communication that Sgt Hutchins agreed to waive his previously invoked right to counsel (a right that had proven illusory) and speak further to NCIS. Hence, Sgt Hutchins did not initiate the communication; the communication was initiated by NCIS.

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[94] *Hutchins*, unpub. op. at *31-32.
[95] *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983)
[96] AE XVI at 15; R. at 125-26.

2. Voluntariness

Aside from the question of reinitiation, the lower court erred in finding under a totality of the circumstances that the confession was voluntary.[97] To the contrary, the totality of circumstances evidence that Sgt Hutchins' sworn statement was the involuntary result of coercive pressure, to wit: he was suffering from PTSD and nightmares; he had been abruptly ripped from the organic and combat-forged brotherhood of his infantry squad and placed into cold seclusion; he was completely isolated in the midst of a war zone, and with no weapon; he was told he was facing serious criminal charges, to include murder; he was held incommunicado for 7 days in solitary confinement, with no hope of contact with a lawyer or any other help despite his invocation of his right to counsel; and NCIS unexpectedly arrived at his trailer, specifically reminded him that he was the subject of an ongoing criminal investigation, and re-stated the charges he was facing.

In short, these circumstances broke Sgt Hutchins; his will was overborne and he surrendered to the human contact and release provided by NCIS arriving at his trailer. What should be conscience shocking to this Court is that Sgt Hutchins' request for the opportunity to speak to counsel was blocked by the Government for the entire 7 days of solitary confinement.

[97] *Hutchins*, unpub. op. at *32.

The UCMJ does not contemplate such treatment, as R.C.M. 305(f) proscribes that a confined servicemember must be provided a lawyer within 72 hours of requesting one.[98] Although the terms of Sgt Hutchins' confinement were characterized as restriction, at trial the Government properly conceded that these conditions were in fact confinement.[99]

Finally, the erroneous admission of Sgt Hutchins' statement at trial was not harmless, as his state of mind and perceptions were essential for the members to evaluate any possible mental health defense on the merits. Moreover, Sgt Hutchins' demeanor in the sworn statement concerning the alleged offenses was highly relevant for sentencing.

Hence, a grant of this issue is vital, as it will allow the Court to correct the lower court's misapplication of the law, and further allow the Court to reinforce protection for servicemembers' Constitutional rights to communicate with counsel, even in combat environments. Accordingly, this issue should be granted because the lower Court has decided a question of law in a way that conflicts with applicable decisions of this court and the U.S. Supreme Court, specifically, *Edwards v. Arizona,* 451 U.S. 477

[98] *See* R.C.M. 305(f).
[99] *Hutchins*, unpub. op. at *29.

(1981), *Oregon v Bradshaw*, 462 U.S. 1039 (1983) and *United States v. Brabrant*, 29 M.J. 259 (C.M.A. 1989).[100]

WHEREFORE, Appellant requests this Court grant this issue.

IV.

WHETHER THE MILITARY JUDGE ERRED WHEN HE REFUSED TO INSTRUCT THE MEMBERS THAT THEY COULD CONSIDER THE IMPACT OF THE COMBAT ENVIRONMENT ON THE APPELLANT'S STATE OF MIND AND PERCEPTIONS FOR THE CHARGE OF VOLUNTARY MANSLAUGHTER?

In instructing the members on voluntary manslaughter, the military judge, over defense objection, limited their ability to apply the realities of Sgt Hutchins's operational environment to the reasonableness of his efforts to kill Saleh Gowad. The record concerning the rationale of the military judge's decision is limited, as he elected to conduct all discussion concerning instructions at an R.C.M. 802 conference in violation of military case law.[101] This is an independent basis for reversal, as an Article 66 review could not properly be conducted in the absence of a record for such a critical stage of the trial.

Military case law has not yet provided direction as to the dimensions of manslaughter and murder as they apply to killings of

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[100] *See* United States Court of Appeals for the Armed Forces RULES OF PRACTICE AND PROCEDURE, Rule 21(b)(5)(B).

[101] *See, e.g.*, *United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990) ("Discussion of instructions should be conducted on the record, rather than in a conference under R.C.M. 802 . . . .").

perceived enemies in a combat environment. The instructions the military judge ultimately provided to the members in this case led them to believe that they could not consider the effect of the combat environment on Sgt Hutchins's perceptions and state of mind; they were not permitted to consider the impact of the continuous operations, lack of sleep, the botched airstrike, the abuse of the detainees, and the overall threat level on how a reasonable person in that situation would have responded upon being informed that Saleh Gowad was responsible for the death of yet another Marine.

Although the military judge claimed that he would leave for the members to decide whether a "reasonable person" for voluntary manslaughter should include a reasonable person serving in combat, in the context of his other instructions this had quite the opposite effect.[102] Specifically, the military judge instructed the members that they could not in any way consider the experiences related to Sgt Hutchins's PTSD or sleep deprivation. As these experiences formed the sum total of Sgt Hutchins's combat environment, the military judge's instruction had the practical effect of barring the members from considering the combat environment when determining whether the decision to kill Saleh Gowad was one a reasonable person could have made.

[102] R. at 1708.

Concurrently, while the defense was specifically barred from arguing that a reasonable person must be defined as one with Sgt Hutchins's experiences, the Government was unencumbered from making the opposite argument, that a reasonable person was someone who did *not* have Sgt Hutchins's experiences. During trial counsel's closing argument, he stated, "[T]he judge is going to tell you that adequate provocation you apply a reasonable person standard, **which means one free from Post-Traumatic Stress Disorder and acute sleep deprivation.**"[103] Hence, under the framework created by the military judge, the Government was free to argue that a "reasonable person" was free from the impact of combat and the defense was barred from arguing otherwise.[104]

The lower court found no error because, "both parties were free to argue their perspectives in closing arguments."[105] As discussed above, this assertion is contrary to the record. Additionally, the lower court found that any potential error was harmless beyond a reasonable doubt.[106] However, where there has been an instructional error for a contested issue, an appellate

[103] R. at 1759 (emphasis added).
[104] R. at 1708 ("I also indicated to the defense that they could not argue that a reasonable person has to be a person who has – or it could include a person that has those particular psychological conditions; and I told the government that they may object if the defense does argue that particular point.")
[105] Cite
[106] *Id.*

court cannot find such an error harmless without improperly supplanting the role of the members.[107]

The military justice system must be able to accurately adjust to the realities of the "incommunicable experience" of combat, and be able to properly balance the effects of post-traumatic stress, combat stress, and unethical leadership when it is called to judge the actions taken by Marines when fighting a war. A grant of this issue will allow this Court to ensure that the military justice system makes these adjustments and continues to respect both the rule of law and the integrity of individual justice when evaluating whether a killing is a legitimate combat action, manslaughter, or murder.

Accordingly, this issue should be granted because the lower Court has decided a question of law that has not been, but should be settled by this Court.[108]

WHEREFORE, Appellant requests this Court grant this issue.

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[107] *See United States v Rodwell*, 20 M.J. 264, 268 (C.M.A. 1985)).
[108] *See* United States Court of Appeals for the Armed Forces RULES OF PRACTICE AND PROCEDURE, Rule 21(b)(5)(A).

V.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS DEFENSE TEAM WAS UNPREPARED TO COMPETENTLY PRESENT CRITICAL MENTAL HEALTH EVIDENCE DURING A PRE-TRIAL *DAUBERT* HEARING, DURING THE MERITS AND DURING SENTENCING, AND FAILED TO OFFER ESSENTIAL EXTENUATION AND MITIGATION EVIDENCE DURING SENTENCING.

In the wake of a detailed defense counsel's improper severance from the case, civilian counsel Mr. Rich Brannon took over lead responsibility for the mental health aspects of the defense. However, Mr. Brannon failed to properly prepare for the *Daubert* hearing, and failed to file a brief with the Court prior to the hearing. During the hearing, Mr. Brannon appeared unsure of what he needed to articulate for the military judge, and even what his actual theory of defense was going to be.[109]

Mr. Brannon proved incapable of coherently identifying a nexus between PTSD and specific intent to the military judge.[110] Additionally, although a highly qualified defense expert was physically present at the hearing, Mr. Brannon did not lay any foundation to utilize his expertise for a theory of self-defense.[111] **This was not a tactical decision, as the expert's evaluation was still offered to the military judge.** Moreover, LtCol Cosgrove, who had been newly detailed to the case to replace the departed counsel, requested from the military judge

[109] R. at 750-51, 772-776,782-89, 809-814.
[110] R. at 750-51, 772-776,782-89, 809-814.
[111] R. at 824-26.

that the defense be allowed to preserve for future use the theories of self-defense, without any objection from Mr. Brannon.[112] The military judge indicated that the *Daubert* hearing was the time to lay such a foundation, and in response LtCol Cosgrove was forced to concede that the defense was **not prepared at that time to present the necessary evidence.**[113]

In addition, out of a **1922 page** total record of trial, and a case which resulted in convictions for, *inter alia*, murder and conspiracy to commit murder, the defense sentencing case, from start to finish, encompassed a mere **27 pages.** Sgt Hutchins faced life without the possibility of parole, yet the only extenuation and mitigation witnesses called by the defense were Sgt Hutchins' family.

There were no witnesses to testify about his specific good acts in the Marine Corps, and, more importantly, there were no witnesses presented to testify about his performance in Iraq and compassion for the Iraqi people. As seen from the letters by 2ndLt Phan, Bing West and David Bellavia, there was a wealth of information which was simply not used.[114] In particular, the letter from Lt Phan indicates that Sgt Hutchins had been deeply compassionate toward the Iraqi people, had saved the life of a

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[112] *Id.*
[113] *Id.*
[114] In July 2009, the lower court granted the defense motion to attach these letters to the record.

female Iraqi schoolteacher, and that his squad was jokingly referred to as "the humanitarians."[115]

The lower court summarily dismisses this issue without specifically addressing the deficiencies of the trial defense team.[116] Accordingly, this issue should be granted because the lower Court has decided a question of law in a way that conflicts with applicable decisions of this court and the U.S. Supreme Court, specifically, *Strickland v. Washington,* 466 U.S. 668 (1984), and *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007).[117]

WHEREFORE, Appellant requests this Court grant this issue.

VI.
WHETHER THE ERROR RESULTING FROM A MILITARY JUDGE'S IMPROPER DECISION TO CONDUCT, OVER DEFENSE OBJECTION, A CLOSED SESSION OF COURT CAN BE TESTED FOR PREJUDICE?

The defense filed a notice under Mil. R. Evid. 505(h) that it intended to use classified information at trial.[118] The Government response was not to assert privilege over the information under Mil. R. Evid. 505(i), but to instead argue that the information was not relevant and therefore should not be admitted as evidence. The military judge ruled that the

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[115] *Id.*
[116] *Hutchins*, unpub. op. at *12-13.
[117] *See* United States Court of Appeals for the Armed Forces RULES OF PRACTICE AND PROCEDURE, Rule 21(b)(5)(B).

[118] R. at 577.

Government did not need to comply with Mil. R. Evid. 505(i), as they were not asserting privilege, but were instead requesting a closed hearing under *United States v Grunden*, 2 M.J. 116 (C.M.A. 1977).[119] The Government presented evidence to satisfy the factors in *Grunden*, in the form of testimony from Captain Heredia, an intelligence officer. The military judge concluded that the Government had met its burden, and conducted a closed session of court to determine if the classified information identified by the defense was necessary and relevant evidence.[120] Notably, in conducting the closed session, the military judge was required to turn off the "media center" access to the courtroom. It had been previously noted on the record that there was "a lot going on" with several members of the media in the media center viewing the proceedings.[121]

The military judge erred by disregarding the requirements of Mil. R. Evid. 505(i), and instead following the *Grunden* procedures. Although this is an undeveloped area of the law, the decision in *United States v Lonetree* provides some indication that 505(i) compliance is a prerequisite to a 505(j) closed hearing.[122] As a matter of proper jurisprudence, where a statute has specified a certain procedure to be followed,

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[119] R. at 586.
[120] R. at 613-15.
[121] R. at 578-79.
[122] *See United States v Lonetree*, 35 M.J. 396 (C.M.A. 1991).

military judges should not be free to create their own alternative procedures—particularly where it concerns a fundamental right.

In *United States v Hershey*, this Court held that the test for prejudice is structural: "Once denial of the constitutional right to a public trial has been established, appellant is not required to prove specific prejudice in order to obtain relief."[123] Contrary to *Hershey*, the lower court found that any error from the improperly closed session was not structural, holding that any error "did not result in any material prejudice to the substantial rights of the appellant."[124]

Accordingly, this issue should be granted because the lower Court has decided a question of law that has not been, but should be, answered by this Court, and has decided a question of law a way that conflicts with applicable decisions of this court, specifically, *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985).[125]

WHEREFORE, Appellant requests this Court grant this issue.

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[123] *United States v Hershey*, 20 M.J. 433, 437 (C.M.A. 1985)
[124] *Hutchins*, unpub. op. at *32.
[125] *See* United States Court of Appeals for the Armed Forces RULES OF PRACTICE AND PROCEDURE, Rule 21(b)(5)(A) & (B).

VII.

WHETHER THE LOWER COURT ERRED WHEN IT FOUND THAT THERE WAS A RATIONAL BASIS FOR THE SENTENCE DISPARITY BETWEEN APPELLANT'S SENTENCE AND THE SENTENCES RECEIVED BY HIS ALLEGED CO-ACTORS, WHERE THE APPELLANT HAS A SENTENCE WHICH INCLUDES 11 YEARS CONFINEMENT, AND THE 7 OTHER CO-ACTORS SERVED NO MORE THAN 18-MONTHS CONFINEMENT.

The lower court erroneously found that there was a rational basis for the nearly 10-year sentence disparity between Sgt Hutchins' sentence and the sentences received by Cpl Thomas and Cpl Magincalda. There is nothing in the record to indicate that Sgt Hutchins' role in the incident was significantly more involved, as all three were alleged to have taken part in the planning. Accordingly, this issue should be granted because the lower Court has decided a question of law that conflicts with applicable decisions of this court, specifically, *United States v. Lacy*, 50 M.J. 286 (C.A.A.F. 1999).[126]

[126] *See* United States Court of Appeals for the Armed Forces RULES OF PRACTICE AND PROCEDURE, Rule 21(b)(5)(B).

WHEREFORE, Appellant requests this Court grant this issue.

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APPENDIX

A. *United States v. Hutchins,* unpub. op. No. 200800393 (N.M.Ct.Crim.App. March 20, 2012).

B. JAGMAN §0158

C. SECNAVINST 5815.3J excerpt

D. SECNAVINST 5340.27C excerpt

E. List of Media Articles which Reference Secretary Mabus' Comments

Certificate of Compliance with Rule 24 (d)

1. This brief complies with the type-volume limitations of Rule 21(b) and Rule 24(d) because: This brief contains eight-thousand nine-hundred and sixty-six (8966) words.

2. This brief complies with the typeface and type style requirements of Rule 37 because 12 point "Courier New" font was used.

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Certificate of Service

I certify that the foregoing in the case of *United States v. Hutchins* was delivered to the Court and a copy served on opposing counsel on April 30, 2012.

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APPENDIX A

UNITED STATES OF AMERICA v. LAWRENCE G. HUTCHINS III SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800393

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2012 CCA LEXIS 93

March 20, 2012, Decided

SUBSEQUENT HISTORY: Motion granted by *United States v. Hutchins, 2012 CAAF LEXIS 291 (C.A.A.F., Mar. 26, 2012)*

PRIOR HISTORY: [*1]

GENERAL COURT-MARTIAL. Sentence Adjudged: 3 August 2007. Military Judge: LtCol Jeffrey Meeks, USMC. Convening Authority: Commanding General, U.S. Marine Corps Forces Central Command, MacDill Air Force Base, FL. Staff Judge Advocate's Recommendation: LtCol G.W. Riggs, USMC. *United States v. Hutchins, 69 M.J. 282, 2011 CAAF LEXIS 25 (C.A.A.F., 2011)*

COUNSEL: For Appellant: Maj S. Babu Kaza, USMCR; Maj Jeffrey Liebenguth, USMC.

For Appellee: Capt Mark V. Balfantz, USMC; Mr. Brian K. Keller, Esq.; Capt Geoffrey S. Shows, USMC.

JUDGES: Before J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI, Appellate Military Judges. Senior Judge CARBERRY and Judge MODZELEWSKI concur.

OPINION BY: J.R. PERLAK

OPINION

OPINION OF THE COURT

PERLAK, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiracy, making a false official statement, unpremeditated murder, and larceny, violations of Articles 81, 107, 118, and 121, Uniform Code of Military Justice, *10 U.S.C. §§ 881*, *907*, *918*, and *921*. The members sentenced the appellant to a dishonorable discharge, a reprimand, confinement for 15 years, and reduction to pay grade E-1. The convening authority (CA) approved only so much of the sentence that included a dishonorable discharge, reduction to pay [*2] grade E-1, and confinement for 11 years.

The appellant initially advanced three assignments of error, averring that: (1) the military judge erred by refusing to instruct the members that they could consider the impact of the operational environment and the appellant's state of mind for the lesser included offense of voluntary manslaughter; (2) the military judge

erred in denying the defense challenge for cause against a member who had been in charge of pre-deployment urban warfare training for the appellant and his co-conspirators, and; (3) the military judge erred by denying the defense motion to suppress the appellant's confession. We then specified two additional issues: (4) was the trial defense counsel's release valid and, if not, was there good cause to terminate the attorney-client relationship; and, (5) did the military judge err by conducting a closed session of court when the Government had not asserted a privilege claim under MILITARY RULES OF EVIDENCE 505, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The matter involving the irregular disappearance of the trial defense counsel required additional proceedings pursuant to *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411, (C.M.A. 1967)*.

This [*3] court issued an opinion *en banc* in which we determined that the appellant's trial defense counsel's representation was improperly terminated. *United States v. Hutchins, 68 M.J. 623, 630 (N.M.Ct.Crim.App. 2010)*. Finding that we were unable to assess for prejudice, we set aside the appellant's convictions. *Id. at 631*. The Court of Appeals for the Armed Forces (CAAF) reversed our decision, finding that the relief of the trial defense counsel was a matter which could be assessed for prejudice and that the errors surrounding his release did not materially prejudice the substantial rights of the appellant. *United States v. Hutchins, 69 M.J. 282, 293 (C.A.A.F. 2011)*. The CAAF then remanded the case to this court for *Article 66(c)*, UCMJ, review.

On remand, the appellant submitted four supplemental assignments of error, asserting that: (6) the Secretary of the Navy's comments concerning the appellant's case amounted to unlawful command influence (UCI) that undermined the appellant's post-trial rights; (7) his defense team was ineffective because it was unprepared to present mental health evidence at the pretrial *Daubert* hearing, and failed to offer such evidence as extenuation and mitigation [*4] in sentencing; (8) the appellant's sentence was excessive and disproportionate to that of his co-conspirators; and, (9) the evidence was factually insufficient to support guilty findings for conspiracy and unpremeditated murder.

After thoroughly reviewing the record of trial and with the benefit of the parties' briefs, we conclude that the findings and the sentence are correct in law and fact and that the appellant suffered no error materially prejudicial to his substantial rights. *Arts. 59(a)* and *66(c)*, UCMJ.

Background

The appellant was assigned as squad leader for 1st Squad, 2nd Platoon, Kilo Company, 3rd Battalion, 5th Marines, assigned to Task Force Chromite, conducting counter-insurgency operations in the Hamdaniyah area of Iraq in April 2006. In the evening hours of 25 April 2006, the appellant led a combat patrol to conduct a deliberate ambush aimed at interdicting insurgent emplacement of improvised explosive devices (IEDs). The court-martial received testimony from several members of the squad that indicated the intended ambush mission morphed into a conspiracy to deliberately capture and kill a high value individual (HVI), believed to be a leader of the insurgency. The witnesses [*5] gave varying testimony as to the depth of their understanding of alternative targets, such as family members of the HVI or another random military-aged Iraqi male. Considerable effort and preparation went into the execution of this conspiracy. Tasks were accomplished by various Marines and their corpsman, including the theft of a shovel and AK-47 from an Iraqi dwelling to be used as props to manufacture a scene where it appeared that an armed insurgent was digging to emplace an IED. Some squad members advanced to the ambush

site while others captured an unknown Iraqi man, bound and gagged him, and brought him to the would-be IED emplacement. The stage set, the squad informed higher headquarters by radio that they had come upon an insurgent planting an IED and received approval to engage. The squad opened fire, mortally wounding the man. The appellant approached the victim and fired multiple rifle rounds into the man's face at point blank range. The scene was then manipulated to appear consistent with the insurgent/IED story. The squad removed the bindings from the victim's hands and feet and positioned the victim's body with the shovel and AK-47 rifle they had stolen from local Iraqis. [*6] To simulate that the victim fired on the squad, the Marines fired the AK-47 rifle into the air and collected the discharged casings. When questioned about the action, the appellant, like other members of the squad, made false official statements, describing the situation as a legitimate ambush and a "good shoot." The death was brought to the appellant's battalion commander's attention by a local sheikh and the ensuing investigation led to the case before us.

Unlawful Command Influence

We begin our analysis with the appellant's first supplemental assignment of error, alleging that the Secretary of the Navy's public comments about his case constituted UCI. The comments were publically made and their content and timing are not in dispute.[1]

> 1 The Secretary's comments expressed surprise and disappointment with the sentences awarded and the prospect of continuing service for the personnel involved in this case.

The Secretary of the Navy does not fall within the statutory ambit of Article 2, UCMJ, and the statutory interplay of Articles 2 and 37, UCMJ (*10 U.S.C. 802* and *837*), does not contemplate an actual UCI paradigm applicable to the secretariat or civilian leadership. Article 37 states: "No [*7] *authority convening a general . . . court-martial*, nor *any other commanding officer*, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court . . . ." (Emphasis added). The Article further provides that: "*No person subject to this chapter* may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." (Emphasis added). Assuming *arguendo* only that it was legally possible for the Secretary of the Navy to commit actual UCI, there is nothing before us indicating he did so.

However, the matter of apparent UCI remains, and the admonitions from the CAAF about the potential insinuation of UCI by the civilian leadership of the Department are not lost on us. *See United States v. Hagen, 25 M.J. 78, 87 (C.M.A 1987)* (Sullivan, J., concurring).

The appellant bears the initial burden of raising UCI. *United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999)*. Acknowledging [*8] the insidious nature of UCI, the threshold for raising the issue at trial is quite low, "some evidence," but "more than mere allegation or speculation." *Id*. In order to raise UCI on appeal, an appellant must show: (1) facts, which if true, constitute UCI; (2) that the proceedings were unfair; and (3) that UCI was the cause of the unfairness. *United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999)* (quoting *Biagase, 50 M.J. at 150*). We review claims of UCI *de novo*. *United States v. Wallace, 39 M.J. 284, 286 (C.M.A. 1994)*. We must consider both actual and apparent UCI in our review. *United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003)*.

In determining whether the appearance of UCI exists, we objectively evaluate "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)*. An appearance of unlawful command influence exists where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id*.

The timeline of events in this case, to include any comments made by [*9] the Secretary of the Navy, is critical to our resolution of this assignment of error. We have granted the appellant's every motion to attach documents to the record, to include matters from proceedings unrelated to our jurisdictional prerogatives, to permit a full and public vetting of the UCI claim. Portions of those unrelated matters appear in the chart below in italics.

3 Aug 2007	Members Adjudge Sentence at General Court-Martial
15 Feb 2008	Staff Judge Advocate's Recommendation (SJAR)
2 Apr 2008	Addendum to SJAR
2 May 2008	CA's Action (granting clemency)
12 Jun 2008	Record Docketed at N.M.Ct.Crim.App. for Art. 66 Review
Feb 2009	Navy Clemency and Parole Board (NCPB)
	Voted to Reduce Sentence to five Years
17 Nov 2009	***SECNAV Comments About Appellant's Case Made Public***
Jan 2010	NCPB Voted Against Clemency or Parole
22 Apr 2010	N.M.Ct.Crim.App. Issued Opinion
	Setting Aside Findings and Sentence
7 Jun 2010	Judge Advocate General (JAG) Certified Case to the CAAF
14 Jun 2010	Appellant Released From Confinement
11 Jan 2011	The CAAF Reversed the N.M.Ct.Crim.App.
	Decision and Remanded to N.M.Ct.Crim.App.
17 Feb 2011	N.M.Ct.Crim.App. re-docketed Case for Art. 66 Review

The sequence of events is apparent; evidence in support [*10] of the appellant's claim is absent. We have no claim of error before us of any unlawful influence of the CA at the trial level. The CA approved the sentence of the court-martial, but granted significant clemency post-trial. He sent the record to this court for review. The Secretary of Navy made his comments eighteen months later, during a time where the approved sentence was properly a matter under the cognizance of his Clemency and Parole Board. This court, upon its *en banc* review of this case, operating under its own jurisdictional mandate, made the decision to set aside the findings and sentence based on the anomalous relief of counsel. We find no merit in appellant's unsupported assertion that this court was somehow unlawfully influenced by the Secretary of the Navy--in a court-martial we collectively voted to reverse. We make no findings or holdings relative to the Secretary of the Navy's putative influence upon the JAG or the CAAF. On the record before us, significant, legitimate questions of law were certified by

the JAG to a court empowered by Congress to answer them; CAAF did so.

Based on the timeline above and all matters of record in this case, we hold that the appellant [*11] has failed to meet his threshold burden of showing facts which, if true, would constitute apparent UCI. We hold that under the circumstances present in this case, the comments by the Secretary of the Navy related to his prerogatives in clemency, were separate and legally distinct from proceedings under *Article 66*, UCMJ, and could not reasonably be perceived by a disinterested member of the public as UCI or otherwise indicative of an unfair proceeding in this court-martial. We hold that the Secretary of the Navy's actions did not constitute either actual or apparent UCI and the assigned error is without merit.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense team was ineffective in two instances: (1) during the pretrial *Daubert* hearing, by being unprepared to present mental health evidence; and (2) at trial by failing to offer mental health evidence as extenuation and mitigation in sentencing. We resolve this assignment adversely to the appellant.

In assessing the effectiveness of counsel, we apply the standard established in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and presume competence absent evidence to the contrary. *United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*; [*12] *see also United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001)*. An appellant must demonstrate both that his counsel's performance was deficient and that the deficiency resulted in prejudice. *Strickland, 466 U.S. at 687*. We will not second-guess strategic or tactical trial decisions of defense counsel absent the appellant's showing of specific defects in his counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)* (quoting *United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006))*. We review ineffective assistance of counsel claims *de novo*. *Id. at 474*.

We decline to accept the Government's argument that the initial CAAF decision in this case, regarding the irregular relief of trial defense counsel, was somehow of broader effect, to include a prophylactic ruling on the issue of ineffective assistance of counsel. However, reviewing the matter *de novo*, we conclude that the defense team was not ineffective during the pretrial *Daubert* hearing, cross-examination of witnesses at trial, presentation of the defense case, presentation of sentencing matters, or in their overall representation of the appellant. [*13] The appellant's defense team consisted of multiple attorneys experienced in military justice who, as reflected in the record, engaged in an effective and aggressive defense during all stages of the appellant's court-martial. The assigned error takes issue with aspects of the defensive strategy and presentation that, collectively, fails to establish anything approaching counsel ceasing to meaningfully function as counsel. Reviewing the matter *de novo* and in light of the requirements under *Strickland*, this assignment of error has no merit.

Sentence Appropriateness and Proportionality

Next, the appellant asserts that his sentence was excessive and disproportionate to other members of his squad. We disagree. A table summarizing the essential charges and disposition for every member of the squad involved in this case is provided below.

Name / Pleas	**Convictions**	**Adj. Discharge/App. Discharge**
Appellant		
Not Guilty	Unpremeditated	Dishonorable/
	Murder; Larceny;	Dishonorable
	False statement;	
	Conspiracy	
LCpl[2] Pennington	Conspiracy;	Dishonorable/
	Guilty	Bad-Conduct
HM3[3] Bacos	Conspiracy;	Dishonorable/
Guilty	Kidnapping	None
LCpl Jackson	Conspiracy;	Dishonorable/
Guilty	Aggravated assault	None
LCpl Shumate	Obstr. of Just.;	Dishonorable/
	Aggravated assault	None
PFC[4] Jodka	Conspiracy;	Dishonorable/
Guilty	Aggravated assault	None
Cpl[5] Magincalda	Conspiracy;	None
Not Guilty	Wrongful approp.;	
	Housebreaking	
Cpl Thomas	Conspiracy;	Bad-counduct/
Not Guilty	Kidnapping	Bad-conduct

Name / Pleas	**Adjudged Confinement**	**Approved Confinement**
Appellant		
Not Guilty	15 years	11 years
LCpl Pennington	14 years	21 months
HM3 Bacos	10 years	345 days
Guilty		
LCpl Jackson	9 years	Susp. excess of time
Guilty		served (454 days)
LCpl Shumate	8 years	Susp. excess of time
		served (453 days)
PFC Jodka	5 years	Susp. excess of 18
Guilty		months
Cpl Magincalda	448 days	448 days

Name / Pleas	**Adjudged Confinement**	**Approved Confinement**
Not Guilty		
Cpl Thomas	None	None
Not Guilty		

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2 Lance [*14] Corporal.
3 Hospital Corpsman Third Class.
4 Private First Class.
5 Corporal.

We conduct separate reviews to determine the appropriateness of a sentence and whether a sentence is disproportionate to companion cases. We review the appropriateness of sentences *de novo*. *United States v. Roach, 66 M.J. 410, 412 (C.A.A.F. 2008)*. We may only affirm a sentence that we find correct in law and fact based on our review of the entire record. *Art. 66(c),* UCMJ. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy, 26 M.J. 394, 396 (C.M.A. 1988)*. Our analysis requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)* (quoting *United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959))*.

This court is not required to "engage in sentence comparison with specific cases 'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)* [*15] (quoting *United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985))*. Closely related cases include those with "coactors involved in a common crime, service members involved in a common or parallel scheme, or some other direct nexus between the service members whose sentences are sought to be compared." *Id.* An appellant alleging sentence disparity bears the burden of demonstrating that any cited cases are "closely related" and that the sentences are "highly disparate." *Id.* If the appellant meets this threshold, the burden shifts to the Government to demonstrate a rational basis for the differences. *United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)*; *Lacy, 50 M.J. at 288*. Sentence comparison does not require sentence equation. *United States v. Durant, 55 M.J. 258, 260 (C.A.A.F. 2001)*. The test in sentence disparity cases is "not limited to a narrow comparison of the relative numerical values of the sentences at issue." *Lacy, 50 M.J. at 289*. In evaluating sentence disparity, we examine the adjudged sentence vice the approved sentence; but in evaluating the appropriateness of the sentence generally, we may consider both adjudged and approved sentences. *United States v. Roach, 69 M.J. 17, 21 (C.A.A.F. 2010)*.

We [*16] first turn our attention to the appellant's sentence disparity claim. Applying the first step of the *Lacy* analysis, we find the appellant's case is closely related to every member of his squad, since each member participated in the same plan ultimately leading to murder. As to the second *Lacy* factor, we find that the appellant's adjudged sentence is not disparate from these closely related cases. The variations are readily attributable to the prerogatives of members granted by Congress. *Lacy, 50 M.J. at 287*. Assuming, *arguendo* only, that we found only the contested general courts-martial before members to be closely-related, and assuming without deciding that the

length of confinement for the appellant was highly disparate, he still has not met his burden to demonstrate an entitlement to relief. Even in this skewed hypothetical scenario, we find that the record amply demonstrates a rational basis for the disparity. First, the appellant was the squad leader and senior Marine among his co-conspirators. Second, the appellant initiated the idea and proposed the scheme to various squad members who then brainstormed how to perfect the appellant's plan. Third, the appellant was the only team [*17] member convicted of murder, and was sentenced by the members as such. Fourth, the appellant received a greater number of convictions than the co-conspirators. Additionally Cpl Magincalda and Cpl Thomas had previous combat experience prior to this tour, while the appellant committed his crimes during his first deployment. The members were permitted to consider evidence of prior deployments for mitigation in sentencing, and the significant combat histories of these Marines would have played a significant role in the determination of their sentences.

Turning to the issue of sentence appropriateness, although a dishonorable discharge is a harsh punishment with serious ramifications, in this particular case it is not an unjustifiably severe punishment. Neither is the appellant's remaining approved punishment. We reach that conclusion after careful consideration of the entire record of trial, including the evidence presented in extenuation and mitigation, and the matters submitted in clemency. However, we balance that consideration against the nature of the offenses committed by the appellant. After giving the appellant "individualized consideration . . . on the basis of the nature and seriousness [*18] of the offense and the character of the offender," we are convinced that his sentence is not inappropriately severe, nor is it unlawfully disparate from the sentences imposed upon his Marine co-conspirators. *Snelling, 14 M.J. at 268*. Granting relief absent a substantive legal error would be an act of clemency, a congressionally allocated function entrusted to other authorities, but not to this court.[6] *Healy, 26 M.J. at 395-96*. In light of the forgoing, we resolve this assignment adversely to the appellant, finding no error in his adjudged or approved sentence based upon either disparity or severity.

> 6 We note that the appellant has benefitted from the CA granting substantial clemency in the form of a four-year reduction in sentence and disapproval of the adjudged reprimand. On 30 March 2011, the appellant also received clemency in the form of a 251-day reduction in his sentence from officials exercising the authority of the Secretary of the Navy.

Member Challenge for Cause

We now turn to the appellant's second assignment of error from his initial brief -- that the military judge erred by denying the defense's challenge for cause against Major D, a member who provided pre-deployment urban warfare [*19] training for the appellant and his co-conspirators.

Major D was an instructor for a nearly one-month pre-deployment program that consisted of both live-fire and urban warfare training provided to infantry battalions. During the training, Major D reviewed various unit standard operating procedures to determine whether they were tactically sound and offered suggestions for improvement. The appellant's battalion was but one of numerous battalions that Major D trained during his instructor tour and he had no specific recollection of any individual Marine in the appellant's battalion. In response to questioning on *voir dire*, Major D related his understanding of a "dead check" as a practice to confirm whether someone was feigning death, accomplished by the application of contact to some body part to elicit an involuntary physical reflex. Upon further

inquiry, Major D acknowledged that he had heard of "dead checks" in which Marines would shoot wounded individuals out of a sense of mercy. Record at 972.

The defense challenge for cause was premised on the proposition that Major D would somehow bring some predisposition related to the differing usages of the term "dead check." However, his responses [*20] were forthcoming as to what his doctrinal-type understanding was as a trainer, also acknowledging a more colloquial use by combat units. Major D did not express any predisposition to disbelieve or be unduly critical of a witness discussing the topic. The military judge denied the defense challenge for cause and found nothing that would create an appearance that either Major D or the proceedings would be unfair or biased. He found that no apparent bias existed as the internal "dead check" training provided within the appellant's unit even if it was not what Major D taught in his program, and that Major D indicated he could follow the military judge's instructions and evaluate the case solely on the evidence presented. The defense team then used its peremptory challenge on a different member, thereby preserving the denied challenge for cause for his appeal. *See* RULE FOR COURTS-MARTIAL 912(F)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

We review a military judge's ruling on a challenge for cause for an abuse of discretion. *United States v. Armstrong, 54 M.J. 51, 53 (C.A.A.F. 2000)* (citing *United States v. Napoleon, 46 M.J. 279, 283 (C.M.A. 1997)*. "Actual and implied bias are [*21] separate legal tests, not separate grounds for challenge." *United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007)* (citation and internal quotation marks omitted). We test for implied bias using the totality of the factual circumstances. *United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008)* (citing *United States v. Strand, 59 M.J. 455, 459 (C.A.A.F. 2004)*. We test for actual bias by determining if any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007)* (citation and internal quotation marks omitted).

We test for implied bias using an objective standard: "whether, in the eyes of the public, the challenged member's circumstances do injury to the perception of appearance of fairness in the military justice system." *United States v. Albaaj, 65 M.J. 167, 171 (C.A.A.F. 2007)* (citation and internal quotation marks omitted). We review a military judge's ruling on a challenge for implied bias "under a standard less deferential than abuse of discretion but more deferential than *de novo*." *Id.* (citation and internal quotation marks omitted). Because the determination of actual bias is a question [*22] of fact driven by the military judge's observations during trial, we are generally deferential to a military judge's determinations of actual bias. *Id.*

The military judge in this case correctly applied the tests for both actual and implied bias and noted his analysis of the facts and law for the record. While he did not expressly mention the actual words "liberal grant mandate," the record demonstrates his proper application of the doctrine. The liberal grant mandate is tailored to the public's perception of the trial and should govern defense challenges. *See United States v. Townsend, 65 M.J. 460, 463-64 (C.A.A.F. 2008)*. "Where a military judge does not indicate on the record that he has considered the liberal grant mandate in ruling on a challenge for implied bias, we will accord that decision less deference during our review of the ruling." *Id.* While there is an obvious prophylactic effect to the practice of a military judge stating the words "liberal grant mandate," we do not find those words alone to be an incantation that, if absent, erodes the deferential standard accorded to the ruling of the military judge in this case. The military judge was clearly addressing the mandate

[*23] and the public's perception of the trial as a factor used in his determination: "With respect to apparent bias on his part, what the public would see . . . ." Record at 1003.

Considering the record as a whole, we find that the appellant did not meet his burden of establishing that grounds for challenge against Major D based on implied bias existed. There was no evidence presented that Major D's training program taught the type of "dead check" that the appellant performed, and Major D stated that he had previously heard of the technique. There is no indication in the record that Major D had any personal stake in such tactics. We find that most people in the member's position would not be prejudiced and that any reasonable member of the public would not have any doubt as to the fairness of the military justice system or the impartiality of the appellant's court-martial panel. During *voir dire*, Major D clearly demonstrated his willingness to judge the appellant's case based on the evidence presented at trial in accordance with the military judge's instructions. There was neither actual nor apparent bias demonstrated by this member and his service on this court-martial did not serve to [*24] undermine the appearance of fairness or otherwise "diminish[] public perception of a fair and impartial court-martial panel." *United States v. Leonard, 63 M.J. 398, 403 (C.A.A.F. 2006)*. Accordingly, we hold that the military judge did not err by denying the appellant's challenge for cause.

Findings Instructions

The appellant next contends that the military judge erred by refusing to instruct the members that they could consider the impact of the operational environment on the appellant's state of mind for the lesser included offense of voluntary manslaughter. We find that the military judge did not err in denying the instruction.

Whether a jury was properly instructed is a question of law we review *de novo*. *United States v. Schroder, 65 M.J. 49, 54 (C.A.A.F. 2007)*. The military judge must bear the primary responsibility for assuring that the jury is properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. *United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008)* (citing *United States v. Graves, 23 C.M.A. 434, 1 M.J. 50, 53, 50 C.M.R. 393 (C.M.A. 1975))*. Generally, a military judge has substantial discretionary power to decide whether to issue [*25] a jury instruction. *United States v. Maynulet, 68 M.J. 374, 376 (C.A.A.F. 2010)* (citing *United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002))*. A failure to provide correct and complete instructions to the members prior to deliberations carries constitutional implications, specifically if the failure amounts to a denial of due process. *See United States v. Jackson, 6 M.J. 116, 117 (C.M.A. 1979)*. Assuming without deciding that the instructional error alleged would trigger due process concerns, we test for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006)*.

In order to convict for voluntary manslaughter, the lesser included offense of unpremeditated murder, members must find that heat of passion was caused by adequate provocation. *Art. 119*, UCMJ. Provocation is determined using a reasonable person standard, which is tested objectively, while heat of passion is a subjective test. *See United States v. Curtis, 44 M.J. 106, 151 (C.A.A.F. 1996)* ("A reasonable person is judged by an objective standard, not a subjective one . . . .") (citing *McKinney v. Israel, 740 F.2d 491, 495 (7th Cir. 1984)* ("Testimony on appellant's [*26] subjective anger and passion would not have been relevant due to the lack of evidence of objectively adequate provocation."); *United States v. Duncan, 36 M.J. 668, 671*

(N.M.C.M.R. 1992) ("An accused must, subjectively, be in the heat of sudden passion when the killing occurs, but what provokes that passion 'must have an objective existence outside the mind of the one who kills unlawfully . . . .'" (quoting *United States v. Garza, 37 C.M.R. 814, 828 (A.B.R. 1966))).

At trial, the appellant requested that the military judge instruct the members that they could consider the impact of the operational environment on the appellant and his physical and mental conditions at the time of the offense in deciding whether he was guilty of voluntary manslaughter. Specifically, the appellant points to the impact from suffering from post-traumatic stress disorder, acute sleep deprivation, his state of constant provocation, and the effect from his chain of command creating a climate of vigilantism and abuse towards suspected insurgents. The military judge instructed the members that they could consider such evidence for the unpremeditated murder offense, but could not for the voluntary manslaughter [*27] offense. In doing so, the military judge applied an objective reasonable person standard vice a subjective standard requested by the defense.

We find that the military judge accurately instructed the members on the lesser included offense of voluntary manslaughter. The objective standard for provocation was appropriately given during instructions for voluntary manslaughter, and both parties were free to argue their perspectives in closing arguments. Even assuming *arguendo* that the military judge had erred in not providing the instruction, we hold that such error was harmless beyond a reasonable doubt, because we are convinced beyond a reasonable doubt that the error did not contribute to the appellant's conviction or sentence. *Wolford, 62 M.J. at 420*. Accordingly, we hold that the military judge did not err in denying the defense's proposed findings instruction.

Suppression of the Appellant's Confession

The appellant asserts that the military judge erred when he denied the defense motion to suppress his confession. We review this ruling for an abuse of discretion and accept a military judge's findings of fact unless they are clearly erroneous. *United States v. Simpson, 54 M.J. 281, 283 (C.A.A.F. 2000)*. [*28] When a suspect invokes his right to an attorney during an interrogation, all questioning must stop until: (1) an attorney is provided, or (2) the suspect himself initiates a discussion. *Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*. If an appellant unambiguously invokes his rights, investigators are required to "scrupulously honor his invocation before engaging in any further discussion regarding waiver." *United States v. Delarosa, 67 M.J. 318, 324 (C.A.A.F. 2009)* (citation and internal quotation marks omitted). Voluntariness of a confession is a question of law we review *de novo* by examining the totality of the circumstances, including the details of the interrogation and the characteristics of the appellant. *United States v. Ellis, 57 M.J. 375, 378 (C.A.A.F. 2002)*. In this case, we find that the military judge's findings of fact were not clearly erroneous and adopt them for our analysis.

The appellant advised of his rights under *Article 31(b)*, UCMJ, waived those rights, and initially made an official statement describing the killing of the unidentified Iraqi man as a "good shoot" and the product of a combat patrol encountering an insurgent. However, when subsequently informed that [*29] a member of the squad had confessed to his role in a staged homicide, the appellant requested to speak with an attorney. The interview was terminated.

The appellant and his squad had previously been relocated from Patrol Base Bushido and were billeted in berthing trailers in Fallujah during the conduct of the investigation. The appellant was assigned an escort, who remained

with him at all times. The appellant was permitted to meet with the chaplain and use the head and shower facilities outside the trailer, but was not allowed to use MWR facilities, telephones, computers, the postal service or other methods of communication. As a matter of investigative sequestration, he was not allowed to speak with the other members of his squad. The appellant remained in these conditions from 10 through 18 May, a circumstance conceded by the Government during presentencing to be restriction tantamount to confinement.

On 18 May 2006, Naval Criminal Investigative Service (NCIS) agents approached each member of the squad, including the appellant, to request permissive authorizations to search their belongings. The appellant authorized the search both orally and in writing. During the search, the agents [*30] did not attempt to reinitiate any questioning of the appellant. However, the appellant, unprompted, asked the NCIS agents if the door was still open to tell his side of the story. The lead investigator replied that they could not speak to him because he had invoked his right to counsel. The appellant said that he wanted to speak with the agents and did not need an attorney. The agents nonetheless declined to speak with the appellant. They indicated they would follow up the next day.

On 19 May 2006, NCIS brought the appellant to their trailer and he was again fully advised of his Article 31(b) rights. He again waived them. The appellant indicated that he desired to reinitiate the interview, just as he had indicated the previous night. He then described the murder and events leading up to the murder and he typed a detailed confession and provided a short handwritten statement. The appellant now claims that despite initiating the second interrogation and waiving his right to a lawyer, his confession was involuntarily because NCIS agents approached him for a permissive search authorization after he had invoked his right to counsel a week earlier. The facts as developed at trial do not indicate [*31] that NCIS agents approached the appellant for the purpose of reinitiating a custodial interrogation. Rather, their purpose was to inquire into obtaining authorization to search for evidence in the appellant's belongings. It is the appellant who reinitiated the interview and desired to make an additional statement, distinguishing this case in this critical way from *Edwards.* Consistent with *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966),* the facts in this case establish circumstances that make it clear that the appellant, ". . . knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id. at 475* (citation omitted).

From the date he invoked his right to counsel, the NCIS agents conspicuously honored his request to terminate the interview and did not re-initiate a custodial interrogation. There is nothing in the facts as found by the military judge to indicate any events that would challenge, in a military context, the concerns in *Michigan v. Harvey, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990),* "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Id.* (citation omitted).

Reviewing the military judge's [*32] denial of the motion to suppress the appellant's confession, we conclude he did not abuse his discretion in this case. We find nothing in his findings of fact to be clearly erroneous. *See Simpson, 54 M.J. at 283*. Based upon our *de novo* review and in light of the entire record, we find the appellant's confession was voluntary and the ruling on its admission at trial did not constitute an abuse of the military judge's discretion.

Remaining Assignments of Error

We find no basis to grant relief based on the remaining assigned error challenging factual

sufficiency. The specified issue regarding the relief of trial defense counsel has been decided by the Court of Appeals for the Armed Forces. As for our remaining specified issue regarding a closed session of court, assuming without deciding that there was error in the military judge's handling of the session, any such error did not result in any material prejudice to the substantial rights of the appellant.

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge CARBERRY and Judge MODZELEWSKI concur.

APPENDIX B

JAGMAN §0158

REMISSION AND SUSPENSION

a. Authority to remit or suspend sentences in general courts-martial, and special courts-martial in which the sentence includes a bad-conduct discharge. Pursuant to article 74(a), UCMJ, and subject to the limitations in section 0159a, the Under Secretary of the Navy, the Assistant Secretaries of the Navy, the Judge Advocate General, and all officers exercising general courtmartial jurisdiction over the command to which the accused is attached are designated as empowered to remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President. A sentence to death may not be suspended.

b. Authority to remit or suspend sentences in summary courts-martial, and special courts-martial in which the sentence does not include a bad-conduct discharge. Notwithstanding the limitations in section 0159a, if the accused's commander has authority to convene a court-martial of the kind which adjudged the sentence, that commander may suspend or remit any part of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial which does not include a bad-conduct discharge. R.C.M. 1108(b), MCM.

c. Probationary period. Suspensions shall conform to the conditions, limitations, and termination requirements of R.C.M. 1108(c)-1108(e), MCM. See also R.C.M. 1109(b)(4), MCM, which governs interruptions of a period of suspension due to unauthorized absence of the probationer or the commencement of proceedings to vacate suspension. For instructions concerning voluntary extension of enlistment for the purpose of serving probation, see SECNAVINST 5815.3 series.

d. Liaison with Naval Clemency and Parole Board. Officers taking clemency action pursuant to the authority of this section on any sentence including a punitive discharge or confinement for 12 months or more shall coordinate such action with the Naval Clemency and Parole Board under the provisions of SECNAVINST 5815.3 (series). This obligation to coordinate does not limit the authority any officer otherwise has to take clemency action.

APPENDIX C

SECNAVINST 5815.3J excerpt

PART II
AUTHORITY

201. General Policy. This regulation implements the clemency and parole systems authorized by 10 U.S.C. sections 874 and 952-954. It must be read in a manner that is uniform and consistent with good order and discipline within the military as defined by the UCMJ (10 U.S.C. sec. 801-946), the Manual for Courts-Martial, other rules and procedures of the Departments of Defense and Navy and, where appropriate, enforced by corrections policy established by law and regulations implementing 10 U.S.C. sec. 951 (Military Correctional Facilities).

202. Statutory Authority. Title 10 U.S. Code sections 874 and 951-954.

a. 10 U.S.C. sec. 874 states in pertinent part:

The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President.

The Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

b. 10 U.S.C. sec. 951 states in pertinent part:

(1) The Secretary concerned shall:

(a) provide for the education, training, rehabilitation, and welfare of offenders confined in a military correction facility of his department; and

(b) provide for the organization and equipping of offenders selected for training with a view to their honorable restoration to duty or possible reenlistment.

(2) Under regulations prescribed by the Secretary concerned, the officer in command shall have custody and control of offenders

confined within the facility which he commands, and shall usefully employ those offenders as he considers best for their health and reformation, with a view to their restoration to duty, enlistment for future service, or return to civilian life as useful citizens.

c. 10 U.S.C. sec. 952 states:

The Secretary concerned may provide a system of parole for offenders who are confined in military correctional facilities and who were at the time of commission of their offenses subject to the authority of that Secretary.

d. 10 U.S.C. sec. 953 states:

For offenders who were at the time of commission of their offenses subject to his authority and who merit such action, the Secretary concerned shall establish—

(1) a system for the remission or suspension of the unexecuted part of the sentences of selected offenders;

(2) a system for restoration to duty of such offenders who have had the unexecuted part of their sentences remitted or suspended and who have not been discharged;

(3) a system for the enlistment of such offenders who have had the unexecuted part of their sentences remitted and who have been discharged.

e. 10 U.S.C. sec. 954 states:

The Secretary concerned may provide for persons who were subject to this authority at the time of commission of their offenses a system for retention of selected offenders beyond expiration of normal service obligation in order to voluntarily serve a period of probation with a view to honorable restoration to duty.

203. Regulatory Authority. This instruction must also be read in a manner that promotes uniformity and consistency of application of military justice as set forth in the Manual for Courts-Martial (MCM), the JAGMAN as well as the corrections policy set forth in references (f) and (i).

a. The general principles governing confinement of military personnel within the Department of Defense are, in pertinent part:

(1) Discipline should be administered on a corrective rather

than a punitive basis, and military correction facilities should be administered on a uniform basis. It is desirable for persons under sentence of courts-martial or other military tribunals to be accorded uniform treatment, in furtherance of equality within the Department of Defense and in justice to individuals concerned.

(2) The Secretaries of the Military Departments shall provide programs for education, training, rehabilitation, and the welfare of military offenders consistent with this Directive.

b. The general policy governing confinement in the Department of the Navy is as follows:

[The] treatment of persons in naval confinement [will] be uniform and in full accord with the provisions of the UCMJ. The major purpose of all confinement is deterrence, punishment, and rehabilitation.

It is also the policy of SECNAV that confined naval personnel retain all of the rights and responsibilities of other service personnel in a duty status except those which are expressly, or by implication, taken away under the provisions of the UCMJ and such regulations as may be promulgated by competent authority.

c. The Department of the Navy's correctional philosophy is set forth in reference (i) and includes a recognition of the fact that punishment alone is seldom corrective. Confinement is punishment because it denies members their liberty and separates them from their families, friends, and most normal activities. It means loss of status and disapproval of the individual offender by society. Confinement sharply limits the offenders, privileges, freedom of action, and opportunities for personal/professional growth.
204. Other Statutes and Regulations. The NC&PB is guided by statutory and regulatory requirements during the clemency and parole review process. The NC&PB will keep itself informed of any programs that have as their purpose the protection of the individual and society from a recurrence of conduct that is either criminal or has a high probability of resulting in criminal conduct, and programs that have as their purpose the implementation of the rights of crime victims and services to crime victims. (See references (p), (u) and (v).) These programs may be required by statute or independently implemented within the Department of Defense and Department of the Navy by instruction or regulation. Upon becoming aware of a statutory or regulatory requirement that has as its purpose providing a service member with the opportunity for treatment and rehabilitation of the underlying problem that has or may have caused or contributed to criminal conduct, the NC&PB will recommend to SECNAV in writing, via

the Director, NCPB, that it intends to abide by such statutory or regulatory requirement and will implement such recommendation within 30 days unless directed otherwise. Without further direction and at the expiration of 30 days, the NC&PB will review each offender's case in light of the statutory or regulatory requirement to determine eligibility. If an offender is determined eligible, the NC&PB shall direct that the offender be afforded the opportunity to participate in the program.

205. Delegation of Authority. Except in cases involving the death penalty, life without parole and national security; the Assistant SECNAV for Manpower and Reserve Affairs ASN(M&RA) is delegated the authority to act for SECNAV in matters of clemency and parole. (See SECNAVINST 5430.7M (NOTAL).)

APPENDIX D

SECNAVINST 5430.27C excerpt

3. Supervision of Legal Services. The JAG is the Chief of the Judge Advocate General's Corps and commands OJAG. As the capability sponsor for the Navy legal community, the JAG is responsible for building a coherent legal community and determining the best possible allocation of personnel assets.

a. The JAG has primary responsibility for ensuring the ethical and professional practice of law by judge advocates and other covered U.S. Government (USG) and non-USG attorneys. This supervision extends to active duty and reserve judge advocates in the Navy and Marine Corps. It also extends to the following attorneys when they practice under the cognizance of the JAG: uniformed attorneys from other Services, civilian USG attorneys, and non-USG attorneys.

b. The JAG is responsible for certifying that military trial counsel, military defense counsel and military judges are competent and qualified. Civilian defense counsel who represent an accused must also follow the military rules of professional responsibility.

4. Responsibilities of the JAG. The JAG serves as a Staff Assistant to the Secretary of the Navy (SECNAV) and performs duties relating to legal matters arising in the Department of the Navy as may be assigned. Additionally, the JAG is responsible for providing and supervising the provision of legal advice and related services throughout the Department of the Navy in the following areas:

a. Military Justice. The JAG is responsible for the military justice function within the Department of the Navy. The military justice function includes, but is not limited to, the implementation, execution, management, and oversight of the military criminal justice system at the trial and appellate levels. In performing this function, the JAG has primary responsibility for military justice matters within the Navy, including: inspecting Naval Legal Service Command legal offices; certifying military judges for practice on the bench; certifying trial and defense counsel for practice in military courts-martial; taking action in certain courts-martial if the convening authority fails to do so; receiving records of trial

from military courts-martial; establishing and staffing the Navy and Marine Corps Court of Criminal Appeals; and ordering review of certain cases by the Court of Appeals for the Armed Forces;

Appendix E

Chronological List of News Articles which contain Secretary Mabus' Comments

(This list is not comprehensive, but is a significant sampling through May 2011)

Military Times Media Group, November 17, 2009
Gidget Fuentes, "SecNav: No Clemency in Iraqi Murder Plot"
http://www.militarytimes.com/forum/showthread.php?1582365-Pvt.-Lawrence-G.-Hutchins-III-SecNav-No-clemency-in-Iraqi-murder-plot
http://www.marinecorpstimes.com/news/2009/11/marine_mabus_hamdaniya
http://navytimes.com/news/2009/11/marine_hamdaniya_111709w/
http://www.chandlerswatch.com/2009/11/18/secnav-no-clemency-in-iraq-murder-plot/
http://www.navaleadership.blogspot.com/2009_11_01_archive.html
http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=259x27385
http://www.militarydailynews.com/2009/11/secnav-no-clemency-in-iraqi-murder-plot/
http://www.facebook.com/notephp?note_id=176980514794
http://www.militarylearningcenter.com/tag/secretary-ray-mabus

North County Times, November 17, 2009
Mark Walker, "Exclusive: Navy Secretary Boots 4 Pendleton Troops Involved in Iraqi's Killing"
http://www.nctimes.com/news/local/military/article_5cee7c58-56e0-546d-93c7-99fb4f9604dc.html
http://www.conservativeunderground.com/forum505/showthread.php?t=22216
http://www.facebook.com/topic.php?uid=28134458856&topic=10661&post=40015
http://www.canadafreepress.com/index.php/articles-health/17448

The Patriot Ledger, November 19, 2009,
AP, No author listed, "Clemency Denied for Plymouth Marine Convicted of Murder in Iraq"
http://www.patriotledger.com/homepage/x1792901664/Clemency-denied-for-Plymouth-Marine-convicted-of-murder-in-Iraq
http://www.foxnews.com/us/2009/11/18/marines-connected-iraqi-mans-death-removed-military/
http://www.dailypress.com//www.news/kswb-marines-iraqi-shooting,0.1093697.story
http://www.inform.com/crime-and-law/marines-corpsman-removed-iraqi-death-746465a
http://www.facebook.com/topic.php?uid=28134458856&topic=10666
http://www.thefreelibrary.com/Marines,+corpsman+to+be+removed+in+Iraqi+death-a01612063384

Fox News.com, June 7, 2010
AP, Julie Watson,
"Government Appeals Military Court's Overturning of Marine's Conviction in Iraqi War Crime Case"
http://www.foxnews.com/us/2010/06/07/government-appeals-miltary-courts-overturning - marines-conviction-iraqi-war/
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.)
http://www.marinecorpstimes.com/news/2010/06/ap_hutchins_0607101/
http://www.ldsliving.com/story/29542-government-appeals-military-courts-overturning-marines-conviction-iraqi-war/
http://www.expose-the-war-profiteers.org/archive/media/2010-2/2100607.html
http://www.military.com/news/article/marines-overturned-conviction-appealed.html
http://www.signonsandiego.com/news/2010/jun/07/government-appeals-overturning-marines-conviction/ http://www.boston.com/news/nation/articles/2010/06/07/government-appeals-overturning-marines-conviction-/
http://www.facebook.com/note.php?note_id=438870835729

North County Times, June 7, 2010
Mark Walker, "Military: Navy to Appeal Hutchins' Dismissal"
http://www.nctimes.com/news/local/military/article_d397d92e-d53c-56a5-bdb6-47ac443d0f3.html
http://www.expose-the-war-profiteers.org/archive/media/2010-2/20100607.html
http://www.facebook.com/topic.php?uid=28134458856&topic=13560

Fox News.com, June 7,2010
AP, Julie Watson,
"Government Appeals Military Court's Overturning of Marine's Conviction in Iraqi War"
http://www.foxnews.com/us/2010/06/07/government-appeals-military-courts--overturning-conviction-in-iraqi-war/
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.")
http://www.marinecorpstimes.com/news/2010/06/ap_hutchins_060710/
http://www.facebook.com/note.php?note_id=438870835729
http://www.ldsliving.com/story/29542-government-appeals-military-courts-overturning-marines-conviction-iraqi-war/
http://www.expose-the-war-profiteers.org/archive/media/2010-2/2100607.html
http://www.military.com/news/article/marines-overturned-conviction-appealed.html

North County Times, June 7, 2010
Mark Walker, "Military: Navy to Appeal Hutchins' Dismissal"
http://www.nctimes.com/news/local/military/article_d397d92ed53c-56a5-bdb6-47ac443d0f3.html
http://www.facebook.com/topic.php?uid=2813445885&topic=13560

Boston.com, June 14, 2010
AP, Julie Watson, "Calif. Marine Released in Iraqi War Crimes Case"
http://www.boston.com/news/nation/articles/2010/06/14/ca;if-marine-released-in-iraqi-war-crimes-case/
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full
sentence.")
http://www.marinecorpstimes.com/news/2010/06/ap_marine_iraq_shootings_061410/
http://www.breitbart.com/article.php?id=D9GBF2N00&show_articles=1
http://www.politifi.com/Calif-Marine-Released-In-Iraqi-War-Crimes-Case-929237.html
http://seinow.com/?p=9990
http://www.expose- the-war-profiteers.org/archive/media/2010/2/20100614.htn
http://www.theunion.com/article/20100614/APA/1006141036
http://www.katc.com/news/calif-marine-released-in-iraqi-war-crimes-case/
http://www.theodoresworld.net/archives/2010/06/calif_marine_released_in_iraq.htmlhttp://www.patriotledger.com/news/cops_and_courts/x1057819470/Plymouth-Marine-released-in-Iraqi-war-crimes-case#axzz1GF9AtBdW
http://www.aipnews.com/talk/forums/thread-view.asp?tid=14925&posts=1
http://www.patriotledger.com/news/cops/cops_and_courts/x1057819470/Plymouth-Marine-released-in-Iraqi-war-crimes-case

Fox News, June 14, 2010
AP, Julie Watson, "California Marine Accused of Iraqi War Crime Returns to Unit After Being Released"
http://www.foxnews.com/us/2010/06/14/california-marine-released-iraqi-war-crime-case-murder-conviction-overturned/
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.")
http://www.SunSentinel.com/20/sns-ap-us-marines-iraq-shootings-/10?sort=asc
http://www.cbs8.com/global/story.asp?s=12648531
http://www.politifi.com/news/Marine-in-Iraqi-war-crimes-case-to-return-to-unit-1469597.html
http://www.wopular.com/calif-marine-released-iraqi-war-crimes-case-great-news
http://www.timestranscript.canadaeast.com/front/article/1094495

http://tactical-life.com/online/news/california-marinereleased-in-iraqi-war-crime-case-after-murder-conviction/
http://militarytimes.com/forum/showthread.php?1586747-Marine-in-Iraqi-war-crimes-case
http://www.wtnh.com/dps/military/Judge-releases-Marine-in-Iraqi-war-crimes-case_3425048
http://www.usatoday.com/news/military/2010-06-14-Marine-Iraq_N.htm
http://www.gazette.com/articles/marine=100294-case-return.html
http://www.usalaboragainstwar.org/article.php?id=22438http://www.wavy.com/dpp/military/Judge-releases-marine-in-Iraqi-war-crimes-case
http://www.facebook.com/note.php?note_id=456553830328
http://www.wavy.com/dpp/military/Judgereleases-Marine-in-iraqi-war-crimes-case

Marine Corps Times, June 14, 2010
AP, Julie Watson, "Marine in Iraq War Crimes Case Returns to Unit"
http://www.marinecorpstimes.com/news/2010/06/ap_marine_iraq_shootings_061410/
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.")
http://www.navytimes.com/news/2010/06/ap_marine_iraq_shootings_061410/
http://www.weshallneverforget.com/news/marine-in-iraq-war-crimes-case-returns-to-unit-2.html
http://www.newsvine.com/_news/2010/06/14/4509965-marine-in-iraqi-war-crimes-case-returns-to-unit
http://www.huffingtonpost.com/huff-wires/20100615/us-marines--iraq-shootings/
http://www.union-trib.com/news/2010/jun/15/marine-in-iraqi-war-crimes-case-to-return-to-unit/
http://www.breitbart.com/article.php?id=D9GBRUMO0&show_article=1
http://www.abcnews.go.com/US/wireStory?id=10915657

CBS News, June 15, 2010
Camp Pendleton, Calif, Posted by CBS "Military Judge Frees Marine in Iraq Murder Case"
http://www.cbsnews.com/stories/2010/06/15/national/main6583014.shtml
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.")
http://www.cbsnews.com/stories/2010/06/15/national/main6583014.shtml
http://www.ktvq.com/news/military-judge-frees-marine-in-iraq-murder-case/
http://www.buzzbox.com/news/2010-06-15/iraq-war:military/?clusterId=1214097
http://www.anhourago.in/show.aspx?l=4641018
http://www.anhourago.co.uk/show.aspx?l=4637908

Military.com, June 15, 2010
AP Julie Watson, "Judge Releases Marine in Hamdania Murder Case"
http://www.militarynews.com/news/article/judge-releases-marine-in-hamdania-murder-case.html
("Navy Secretary Ray Mabus said last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.")
http://www.newsmaxworld.com/global_talk/us_marines_iraq_shootings/2010/06/15/321803.html
http://www.fox19.com/Global/story.asp?S=12650488
http://www.grandforksherald.com/article.cfm?id=165325
http://www.seattletimes.nwsource.com/html/nationworld/2012118218_apusmarinesiraqshootings.html
http://www.medhelp.org/posts/Current-Events---/Judge-Releases-Marine-in-Hamdania-Murder-Case/show/1265858
http://www.straitstimes.com/BreakingNews/World/Story/STIStory_540707.html
http://www.professionalsoldiers.com/forums/showthread.php?t=29314
http://www.militarydailynews.com/2010/06/judge-releases-marine-in-hamdania-murder-case/
http://www.savannahnow.com/latest-news/2010-06-15/judge-releases-marine-iraqi-war-crimes-case
http://www.cnsnews.com/node/67728/
http://www.grendelreport.posterous.com/judge-releases-marine-at-center-of-iraqi-war
http://www.opensubscriber.com/message/osint@yahoogroups.com/14099744.html

Arab News.com, June 15, 2010
AP, Julie Watson, "US Marine Convicted of Murdering Iraqi Walks Free"
http://www.arabnews.com/world/article66735.ece
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.")
http://www.dinardiscussions.com/viewtopic.php?f=29&t=2082#axzz1HUnwJqcb

Boston.com, June 15, 2010
AP, Julie Watson, "Judge Releases Marine in Iraqi War Crimes Case"
http://www.boston.com/news/local/massachusetts/articles/2010/06/15/judge_releases_marine_in_iraqi_war_crimes_case/
("Navy Secretary Ray Mabus told the Marine Corps Times last year that he believes Hutchins was the ringleader in the premeditated plot and attempted cover-up, and that he should complete the full sentence.")
http://www.justpiper.com/2010/06/judge-releases-marine-in-iraqi-war-crimes-case-/
http://www.signonsandiego.com/news/2010/jun/15/judge-releases-marine-in-iraqi-war-crimes-case/
http://www.wordpress.com/2010/06/15/judge-releases-marine-in-iraqi-war-crimes-case/
http://www.deseretnews.com/article/7000404301/Judge-releases-Marine-in-Iraqi-war-crimes-case.html
http://www.romenews-tribune.com/view/full_story/7935874/article-Judge-releases-Marine-in-Iraqi-war-crimes-case
http://www.wfaa.com/news/world/96376184.html
http://www.kitsapun.com/news/2010/jun/14/calif-marine-released-in- iraqi-war-crimes-case/
http://www.kens5.com/internal?st=print&id=96348869&path=/news/world
http://www.capitalbay.com/law-and-crime/judge_releases_marine_in_iraqi.html
http://www.enewscourier.com/statenews/x1996927887/Judge-release-Marine-in-Iraqi-war-crimes-case
http://www.gosanangelo.com/news/2010/jun/15/bc-us--marines-iraq-shootings-2nd-ld-judge-in-ap/

Al Jazeera English, June 15, 2010
No author, "Marine Jailed for War Crimes Freed"
http://www.aljazeera.net/news/americas/2010/2010/06/20106155511376820.html
("Ray Mabus, the Secretary of the Navy, told a US newspaper last year that he believed Hutchins was the leader of the plot, and that he should serve his full sentence.")
http://www.deftmag.com/news/marine-jailed-for-war-crimes-freed/
http://old.cageprisoners.com/articles.php?id=31468 (This is the way the link is listed)
http://www.hotlism.org/forums/marine-jailed-war-crimes-freed-t71458.html
http://www.thefreelibrary.com/Marine+jailed+for+war+crimes+freed,-a0228950638
http://www.legalift.wordpress.com/2010/06/22/marine-jailed-for-war-crimes-released/
http://www.modrnghanaweb.com/marine-jailed-for-war-crimes-freed-40223.html

MSN News UK, June 15, 2010
Pa.press.net, "Iraq War Crimes Case: Freed"
http://www.news.uk.msn.com/world/articles.asp?cp-documentid=153778303
("Navy Secretary Ray Mabus told the Marine Corps last year that he believes Hutchins was the ringleader in the premeditated murder plot and attempted cover-up, and that he should complete the full sentence.")
http://www.argus.ie/breaking-news/world-news/iraq-war-crimes-case-marine-freed-2221045.html
http://www.forum.lowyat.net/topic/1460450
http://www.belfasttelegraph.co.uk/breaking-news/world/iraq-war-crimes-case-marine-freed-14843247.html

Union-Tribune, June 29, 2010
Gretel C. Kovach, "Marine Caught Between Crime, Punishment"
http://www.signonsandiego.com/news/2010/jun/29/marine-caught-between-crime-punishment/
("Secretary of the Navy Ray Mabus has said Hutchins should serve his whole sentence instead of gaining clemency.")
http://www.mca-marines.org/node/3530?quicktabs_3=2&quicktabs_mca-custom-mca=search-site

Union-Tribune, June 29, 2010
AP, Julie Watson, "Marine Accused in Iraqi War Crimes is Back On Duty"
http://www.union-trib.com/news/2010/jun/29/marine-accused-in-iraqi-war-crimes-case-is-back-on-duty/
http://www.newsday.com/news/nation/marine-accused-in-iraqi-war-crimes-is-back-on-duty-1.2064173
http://www.huffingtonpost.com/html/2010/06/09/lawrence-hutchins-iii-mar_n_630047.html
http://www.springfieldnewssun.com/news/nation-world-news/marine-accused-in-iraqi-war-crimes-is-back-on-duty789327.html
http://www.newsvine.com/_news/2010/06/29/4582722-marine-accused-in-iraqi-war-crimes-is-back-on-duty
http://www.vcstar.com/news/2010/jun/29/marine-in-iraq-war-crimes-case-reports-back-to/?print=1
http://www.inform.com/politics/marine-iraq-war-crimes-case-reports-duty-978322a

The Patriot Ledger, June 30, 2010
John P. Kelly,
"Plymouth Marine Hutchins is Free After 4 Years in Military Prison But Fate is Still Undermined"
http://www.patriotledger.com/features/x1849212184/Plymouth-Marine-Lawrence-Hutchins-III-reversed#axzz/GF9AtBdW

Sign On San Diego, June 29, 2010
Gretel C. Kovach, "Marine Caught Between Crime and Punishment"
http://signonsandiego.com/news/2010/jun/29/marine-caught-between-crime-punishment
("Secretary of the Navy Ray Mabus has said Hutchins should serve his whole sentence instead of granting clemency.")
http://www.mca-marines.org/node/3530?quicktabs_mca-custom-mca=search-site
http://www.yasni.com/babu+kaza/check+people/defense

The Patriot Ledger, June 30, 2010
John P. Kelly,
"Plymouth Marine Hutchins is Free After 4 Years in Military Prison But Fate is Still Undetermined"
http://www.patriotledger.com/features/x1849212184/Plymouth-Marine-Lawrence-Hutchins-III-returns-to-duty-after-murder-conviction-reversed-

The North County Times, January 12, 2011
Mark Walker. "Military: Court Reverses Dismissal of Conviction for Marine")
http://www.nctimes.com/news/local/military/article_7b848ca0-b10a-5600-9b04-elb460757df5.html?print=1
("In 2009, Navy Secretary Ray Mabus said he believed Hutchins was the ringleader in a premeditated murder plot and failed cover-up and should serve the full sentence.")
http://www.freerepublic.com/focus/f-news/2657302/posts

The North County Times, February 15, 2011
Mark Walker, "Military: Marine Convicted in Iraq Killing Ordered Back To Brig"
http://www.nctimes.com/news/local/military/article_c4096de1-f3ec-5ccb-b4f5-396f91a6a377.html
("In 2009, Navy Secretary Ray Mabus said he believed Hutchins was the ringleader of a premeditated murder plot and failed cover-up and should serve the full sentence.")
http://www.airmaxl.i.ph/blogs/airmaxl/?p=100

The North County Times, February 24, 2011
Mark Walker, "Military: Hutchins Family Focuses on Upcoming Clemency Hearing"
http://www.nctimes.com/news/local/military/article_70476937-c3ca-57e1-8c93-a03c872cd896.html
("In late 2009, that same panel voted to grant his release but saw its decision overturned by the Secretary of the Navy, who said he believed Hutchins should serve the full sentence because he was the highest-ranking member of the squad and led it in the kidnappings and slaying.")