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PROCEEDINGS

of a

COURT MARTIAL

held at

MILITARY COURT CENTRE BULFORD

on the

6th and 7th days of November 2012

in the case of

24951951 Sergeant Danny Harold NIGHTINGALE
The Duke of Lancaster's Regiment (King's, Lancashire and Border)

JUDGE ADVOCATE

Judge McGrigor
Assistant Judge Advocate General

PRESIDENT OF THE BOARD

Lieutenant Colonel P J McNulty
Army Air Corps

MEMBERS

Major C N Bowman
The Royal Logistic Corps

Captain P R Snow
Corps of Royal Engineers

Warrant Officer Class One J S Marriott
The Rifles

Warrant Officer Class Two J H Fretwell
Royal Regiment of Artillery

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Colonel C M J Barnett MBE, Adjutant General's Corps (Army Legal Services), The Service Prosecuting Authority, assisted by Major M Dorey, Adjutant General's Corps (Army Legal Services), The Service Prosecuting Authority, and Mr R Fensome, The Service Prosecuting Authority (United Kingdom), appeared on behalf of the Prosecution and took their seats in court.

B I Winter, Esquire, of Counsel, assisted by Mr S McKay, Solicitor, of Messrs McKay Law, Solicitors of Leeds, and Major A Townsend, The Duke of Lancaster's Regiment (King's Lancashire and Border), appeared on behalf of the Defence and took their seats in court.

(The Learned Judge Advocate entered the Court.)

C JUDGE ADVOCATE: So the matter of Sergeant Nightingale with Colonel Barnett for the prosecution and Mr Winter for the defence. Yes, now I have received in the last few minutes a bundle of documents which I understand is agreed between the prosecution and defence. I have not had a chance to look through it in its entirety but I am sure I shall recognise most of the matters in there. Who is going to start off and tell me where we have to?

D MR WINTER: Yes, well perhaps I can assist your honour and may I think your honour for the time you have already afforded us. As your honour knows I have only recently come in to the case.

JUDGE ADVOCATE: Yes.

E MR WINTER: I had the opportunity of a lengthy conference with Sergeant Nightingale last night which was extremely helpful and advanced matters considerably. I have spoken to Colonel Barnett this morning at some length, which again was a very helpful conversation, but unfortunately I have not quite had time to finish getting some advice to Sergeant Nightingale this morning and I would welcome a little more time. I can tell your honour that I am hopeful, whatever the outcome of those discussions, certainly it is unlikely that the trial process would take the 3 full days that have been set aside for it and therefore I do not anticipate a little time now impacted upon the overall conclusions of these proceedings.

F JUDGE ADVOCATE: No. Well as long as progress is being made then I am quite willing to allow that to happen as I know that experienced counsel can often bring matters to a sensible conclusion that way. I wonder perhaps Mr Winter if I could just turn to the Colonel for a moment.

MR WINTER: Certainly.

G JUDGE ADVOCATE: Colonel, I have had a quick look at the charge sheet which does seem to have changed slightly, not in any great respect but I suspect that the pyrotechnic items have come out have they?

H COL BARNETT: Yes your honour. The short description of what has taken place here is that the defence expert, Mr Boyce, has done a report which says that the item that he inspected was not a firearm contrary to section 51(aba). The prosecution has got, though, an expert report which says yes it is not a firearm contrary to that but it is a firearm contrary to section 1(1)(a) and the reason that the two experts are of differing opinions is because the box

A said Mark III whereas one of the items inside the box if a Mark I. The Crown as you will be well aware, your honour, has not really seen this as the main event in any event and so I simply would seek your leave to---

JUDGE ADVOCATE: You have taken a pragmatic view that the reality is that it will not make much difference one way or the other.

B COL BARNETT: Indeed your honour. We do not need to trouble the court and yourself with that matter so I would simply be seeking your leave under Rule 60 of the Courts-Martial (Army) Rules and section 125 to amend the charge sheet to delete as we have done all reference to the Signal Kit Pyrotechnic.

JUDGE ADVOCATE: Yes, Mr Winter, I do not suppose you have any objection to that?

C MR WINTER: There is no objection.

JUDGE ADVOCATE: Well so be it. Can you just for my assistance confirm which of these engages, if not both of them, engages section 51A in the Firearms Act with a mandatory custodial term?

D COL BARNETT: It is the first charge your honour, it is the section 5(1)(aba) offence, subject of course as you will be well aware you will recollect that in exceptional circumstances, which I think we would have little difficulty in concluding will apply, the authorities provide that it does not have to be applied in these situations.

JUDGE ADVOCATE: Yes, well obviously I am aware of the previous matter but that of course was a guilty plea and I see this at the moment it is a not guilty pleas to both charges.

E COL BARNETT: In the simple answer your honour is that it is the first charge only.

JUDGE ADVOCATE: Yes, I see, and just to make sure that I have got it right, is that should this matter be found ... a guilty finding be found, then in relation to it if exceptional circumstances do not apply then there is no reduction for a guilty plea on---

COL BARNETT: That is correct your honour.

F JUDGE ADVOCATE: And it is a significant period of imprisonment. All right, well it seems to me that it is very sensible that both counsel continue to look at this with hopefully achieving a way ahead. Now what sort of time are we going to need for that?

MR WINTER: Would you give us till half past eleven?

G JUDGE ADVOCATE: Yes, by which time I think things should have become clear to both counsel.

MR WINTER: They certainly will have crystallized by then

JUDGE ADVOCATE: All right. Mr Winter you are aware that I dealt with the previous matter I am sure of this nature.

H MR WINTER: I am, yes.

A JUDGE ADVOCATE: All right, well I will rise till 1130. If of course progress has been achieved before then you will let me know.

The Court adjourned at 1101 hours.

The Court reopened at 1200 hours.

B JUDGE ADVOCATE: Yes, Mr Winter.

MR WINTER: May I thank your honour for the additional time and indeed the further time that I sought. It has proved to be fruitful and I am going to in a moment invite your honour to have the charges put again to Sergeant Nightingale, but before that happens may I just explain in respect of the time taken this morning that your honour will know as a result of having read the medical reports in this case that dealing with these various issues is very difficult and absolutely exceptional and therefore explaining to Sergeant Nightingale and how his mind focused back on issues that are very, very difficult for him to understand in terms of whether they are genuine memories or not obviously requires more time than might otherwise be the case, and as your honour knows having come into the case recently considerable progress has been made in that regard and I am very grateful for the time, and having said that may I invite you to put at whatever time is convenient, it maybe this is convenient, if both charges are put again and Sergeant Nightingale will plead guilty to both.

D JUDGE ADVOCATE: Yes. I am looking at the charge sheet dated 6th October 2012 which was slightly amended, but I think there is no reason why I should not use that to re-arraign your client.

E MR WINTER: Yes, I think the only difference, as we discussed this morning, is that the Signal Flares have been removed from it, otherwise it remains the same and he will plead guilty to both those charges as amended this morning.

JUDGE ADVOCATE: Yes, certainly. All right.

(THE DEFENDANT IS RE-ARRAIGNED)

F JUDGE ADVOCATE: Sergeant Nightingale would you please stand? I am going to put the charge sheet to you again and re-arraign you on Charges 1 and 2 and I am going to ask you then respectively to each charge whether you plead guilty or not guilty.

G This is a charge sheet in the court martial that you, the accused, 24951951 Sergeant Danny Howard Nightingale, The Duke of Lancaster's Regiment, a non-commissioned officer of the regular forces who is charged as follows: ' that charge sheet being signed by C M J Barnett MBE, Colonel, Prosecuting Officer on the 6th October 2012, and the first charge is:

COMMITTING A CRIMINAL OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY POSSESSION OF A PROHIBITED FIREARM CONTRARY TO SECTION 5(1)(aba) OF THE FIREARMS ACT 1968

H **In that you on or about the 16th day of September 2011, had in your possession at your Substitute Single Service Accommodation address 1 x Glock 9mm Pistol serial number FZF745.**

A JUDGE ADVOCATE: Now do you plead guilty or not guilty to that charge?

DEFENDANT: Guilty your honour.

JUDGE ADVOCATE: The second charge is:

B **COMMITTING A CRIMINAL OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY POSSESSION OF AMMUNITION CONTRARY TO SECTION 1(1)(b) OF THE FIREARMS ACT 1968**

In that you on or about the 16th day of September 2011, had in your possession at your Substitute Single Service Accommodation address items listed in the Schedule below:

C **SCHEDULE**

**122 x 9mm live rounds of ammunition
40 x 7.62mm live rounds of ammunition
50 x 9mm frangible rounds of ammunition
50 x 338 armour piercing live rounds of ammunition
2 x .308 live rounds of ammunition
74 x 5.56mm live rounds of ammunition**

D Do you plead guilty or not guilty to that charge?

DEFENDANT: Guilty your honour.

E JUDGE ADVOCATE: All right, please be seated.

MR WINTER: Your honour can I just for the sake of the record correct the charge sheet in just a very minor respect, the second name of Sergeant Nightingale is in fact Harold not Howard. I suspect it ought to be corrected for the sake of---

F JUDGE ADVOCATE: Yes, all right, so there are some clerical amendments have been so made.

MR WINTER: Your honour I have just received literally in the last 10 or so minutes some further information that amounts to important mitigation. In addition Doctor Young, who is one of the medical experts, has been arranged to attend tomorrow and I would like to call her as part of my mitigation.

G JUDGE ADVOCATE: Yes.

H MR WINTER: What I am therefore going to propose I hope, with respect that meets your honour's approval, is that the matter be adjourned until first thing tomorrow at which the full court martial can be empanelled, the formalities can be done then, my learned friend can then open the matters I imagine relatively briefly to the court, I can then present the mitigation, briefly call the few witnesses that I need to call, and make my submissions tomorrow morning.

A JUDGE ADVOCATE: Colonel?

COL BARNETT: No objection at all your honour. It seems very sensible.

JUDGE ADVOCATE: We have got plenty of time for this case, have we not?

B COL BARNETT: We do your honour, yes.

JUDGE ADVOCATE: And in view of the charges and Mr Winter's application I accede to that and so 10 o'clock tomorrow morning.

The Court adjourned at 1207 hours.

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DAY TWO

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A **The Court reopened at 1019 hours.**

Wednesday, 7th November 2012

(The President of the Board and Members entered the Court.)

JUDGE ADVOCATE: Yes, Sergeant Nightingale please stand. I come to identify you for the purpose of these proceedings. Are you 24951951 Sergeant Harold Nightingale, The Duke of Lancaster's Regiment (King's, Lancashire and Border)?

B DEFENDANT: I am your honour, yes.

JUDGE ADVOCATE: All right, please be seated. Now I have in front of me a Notification of Court Martial Proceedings, I am going to read it out and at the end of it I am going to ask you a single question so please pay close attention.

C **The Notification of Court Martial Proceedings is read over in the hearing of the Defendant.**

The names of the President of the Board and Members are read over and they severally answered to their names.

D JUDGE ADVOCATE: Yes, Sergeant Nightingale please stand. The single question is this: do you object to any of the officers whose names you have heard read out in court today?

DEFENDANT: I do not your honour, no.

The Waiting Member is released.

The Court is duly sworn.

E JUDGE ADVOCATE: Yes, well Mr President, Members, before we commence there are one or two things I need to say to you.

F Now I know that you have all received and duly certified you have read the Court Martial Guide for Court Members. Please keep its contents constantly in mind during this court martial and your duties and obligations as contained in it. I will summarise some of the more important points at this stage.

Reports: now you are specifically excluded by Queen's Regulations from any reports being made upon you in respect of your performance at this court martial. This is so that if it is the right thing to do, you may take decisions which may be thoroughly unpopular with the powers that be. There is nothing to be gained or lost by any decision taken so far as your own futures are concerned and that is why that rule has been brought in.

G Undue influence: now any previous attempt by any person to influence you in the performance of your duties at this court martial or to discuss with you any aspect of this case must be reported to me now. If, in the very unlikely event during this short court martial, there is any such attempt so to do at any stage, you should report it to me immediately. Any such acts by any person will be dealt with as a potential criminal offence or an offence under Service law.

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A And finally confidentiality: at the conclusion of this court martial you must maintain the confidentiality of the proceedings and there must be no disclosure of any discussion in closed court except in accordance with your oath. Of course anything that takes place in open court is already in the public domain and is not confidential.

Thank you very much.

B Well, Colonel, I think the charge sheet please now.

(Copies of the charge sheet are handed in and distributed to the President of the Board and Members.)

C JUDGE ADVOCATE: Yes, well you will see that the defendant, Sergeant Nightingale, has got two charges against him. One of them is having possession of a prohibited firearm, namely a Glock 9mm Pistol at his private accommodation, SSSA accommodation on the 16th September 2011, and also at the same address having those items of ammunition that is in the schedule, and he has pleaded guilty to both the charges and we are now going to hear the facts from Colonel Barnett.

Yes, thank you, Colonel.

D COL BARNETT: Your honour, before I open the facts can I pass you a very small note if I may for a point of clarification in relation to the unit?

JUDGE ADVOCATE: Yes, certainly.

(The note is handed up to the learned Judge Advocate.)

E JUDGE ADVOCATE: Yes.

COL BARNETT: Your honour in that case clearly before I open the facts it may be appropriate for the board members to see that so that we can all proceed on the basis of referring to "The Unit".

JUDGE ADVOCATE: All right.

F **(The note is passed along to the Board Members.)**

JUDGE ADVOCATE: Of course Mr Winter has seen that has he not?

COL BARNETT: He has your honour.

G JUDGE ADVOCATE: Yes Colonel.

(THE PROSECUTION OUTLINES THE FACTS OF THE CASE)

H COL BARNETT: Your honour, I am grateful. Your honour, gentlemen, as you have heard I am Colonel Barnett and I appear for the prosecution. My learned friend, Mr Winter, appears for Sergeant Nightingale.

A As this is a guilty plea to those charges that you have seen on the charge sheet in front of you, my task is simple and is twofold: firstly to outline the facts of the case, and secondly to present to you the formal record of this accused's service.

B Turning to the facts of the case; this is a relatively simple case of possession of a prohibited firearm and ammunition on or about the 16th day of September when those items were found in the possession of the individual where they were located at his Substitute Single Service Accommodation. How did it come about? Unrelated matters in relation to another serving individual were reported to the civilian police force and those matters need not trouble you greatly here. Suffice it to say that they were nothing to do with this accused. What that led to, though, was a search of two premises, one belonging to the other accused and then a search of the Substitute Single Service Accommodation, which is the accommodation in Hereford, 7 Claypond Road, and that accommodation was shared by the both Servicemen. During that search the items that are detailed in the charges at Charges 1 and 2 were recovered. The search was recovered lawfully and the items at Charge 2 were found in a plastic box under the bed, an administration box which had pens and pencils and all the like in as well as the ammunition, and the item which is the subject of Charge 1, the Glock Pistol, was found in the wardrobe, in the top shelf area if you like of the wardrobe in a black case that it comes in.

D The black hand gun was accompanied with three magazines and it was examined, as is required in charges of this nature, by a forensic expert on firearms, and it was found to be an Austrian manufactured Glock Model 19 Self-Loading Pistol bearing serial number FZF745 designed to discharge 9mm bulleted cartridges loading from a spring-operated box type magazine, had a barrel length of approximately 9.8 cms and overall length of approximately 20.8 cms. In fair condition due to the level of wear on the black finish and was in working order and it was recovered in the hard plastic Pelican case along with three x 15 shot double-stat spring-operated box type magazines. Each of the magazines was suitable use with the pistol. The forensic expert confirmed that the Glock Pistol constituted a firearm for the purposes of section 57 of The Firearms Act and that it was a prohibited weapon for the purpose of section 5(1)(aba) of The Firearms Act 1968.

E Not that it need trouble the members of the board greatly indeed what these items look like, but for ease of reference I have prepared photographic supplements which I will now hand up your honour.

F **(Copies of photographic supplements depicting the various items are handed in and distributed to the President of the Board and Members. A copy of the photographic supplement is signed by the learned Judge Advocate, marked as Exhibit 1, and attached to the record.)**

G The first two pages are photographs of the ammunition and the first photograph on the third page, and then you have the box at the bottom of the third page, followed by photographs of the Glock Pistol and magazines and the box it was contained within.

(Pause)

H A point has been raised as often happens with various technical types of ammunition, that one of the sets of ammunition may actually be an incorrect photograph which is the one above the picture of the box with blue tips to them, which may be paint rounds as opposed to the ones that they were felt to be, which I think would have been frangible rounds. Apologies your

A honour, the wrong photograph has been inserted in the supplement. I think it probably adds little. The same numbers are there.

JUDGE ADVOCATE: Yes. So is that in addition to the frangible rounds or are frangible rounds painted?

B COL BARNETT: I think the schedule which is the subject to the charge sheet is accurate, and I think the numbers in these photographs if I were to count them through is accurate. The photograph is just the incorrect photograph. They did not belong to this accused but there was another set that did.

JUDGE ADVOCATE: Oh I see.

C COL BARNETT: We have inserted the wrong photograph into the supplement, apologies your honour.

D Both individuals were deployed on operations while these searches were taking place and liaison as ever is affected between police forces with a view to identifying whether anything more sinister had taken place other than perhaps you might view the improper possession of these items, and it was quickly identified that nothing more sinister, and it is only fair for the Crown to point out that nothing more sinister was identified in any shape or form, these items were in the possession of the accused in the first instance lawfully, but then of course as you will all well appreciate from your own service there are ways and means these matters must be dealt with and they become unlawful in your possession after that. But following that liaison the individuals were returned from operations to be interviewed after caution. And indeed following their return, given that this was essentially a military matter and the military nexus was such that this is a matter which could more properly dealt with by the military authorities, the matter was transferred quite properly from the civilian authorities through the Military Police and hence to the Service Prosecuting Authority and hence it finds its way to this court as opposed to any other.

F Two interviews were conducted, one in September 2011 when Sergeant Nightingale was interviewed by West Mercia Police, and in that interview he spoke freely, accepted that the items were his and were in his personal belongings, accepted that he had brought the pistol back on the conclusion of operations in Iraq in 2007, and accepted that the ammunition he had retained in the course of his duties as a Training Officer in the Training Squadron and that he had not effectively handed them in appropriately because his administration was poor and poor working practices.

G In the interview he gave a full explanation to West Mercia Police saying that he was given the Glock as a present by local nationals with whom he had worked whilst deployed on operations there. It was his intention that at the time to have the pistol deactivated and mounted as a souvenir for his squadron when he left the unit. He said he had not been intending to keep the item in its present form, wished to have it decommissioned but had never got around to it. He said the ammunition found in his bedroom in the SSSA was there because he had not also got around to handing that in. He had been incredibly busy whilst in his unit, as you will be able to imagine I have no doubt, with a very full round of duties, but he did accept that he could have handed the matters back into the amnesty boxes which are posted around the unit and he had time to do so. He also accepted that he knew that if there was a requirement for a trophy, if you like, or a pistol which has been handed to him, that there were procedures which should be followed in order to deactivate that weapon in

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A accordance with the normal procedures and paperwork that would be required. Again I have no doubt that from your own knowledge you will be familiar with the procedures that must be followed to that way.

JUDGE ADVOCATE: Well Colonel I wonder perhaps if you can help me. It is a long time since I was in the Services but what is the procedure now with regard to bringing back items that would otherwise be trophies? I am sure there is a formal procedure.

B COL BARNETT: There is your honour. There is a Land Forces Standing Order and this is reproduced in unit orders, and the Land Forces Standing Order deals with what are called non-service weapons, and those are weapons which have not been issued to an individual in relation to their service, and it makes it quite clear that those weapons, which can be more than trophies, they can be other weapons which people may have, hunting rifles and the like, that they must be secured in proper armouries or the like, arms kotes, basically in lockable storage facilities and then there is an application procedure in order to deactivate the weapon and have it registered and dealt with in accordance with that Land Forces Standing Order. I make it clear at this stage that there are no special arrangements for this unit. The arrangements are identical for this unit as they are for any other unit as you will well appreciate. So I hope that assists, but also the Unit Standing Orders state that the fundamental principle for the security of arms and ammunition/explosives is when they are outside secure stores they are never to be left unattended or in the care of unauthorised persons or taken home in any circumstances, and that when they are no longer required they are to be taken---

JUDGE ADVOCATE: Sorry, can you just read that last but again please?

E COL BARNETT: Indeed. Unit Standing Orders specifically states supervision of army, ammunition and explosives. The fundamental principle for the security of arms, ammunition and explosives that when they are outside secure stores they are never to be left unattended or in the care of unauthorised persons or taken home in any circumstances.

JUDGE ADVOCATE: Yes.

COL BARNETT: It was also accepted, your honour, that Sergeant Nightingale did not have any authority to hold this pistol and no authority was given to him.

F Your honour is that sufficient in relation to trophy weapons or do you wish for any---

JUDGE ADVOCATE: That is helpful, thank you very much.

G COL BARNETT: In relation to the declarations required. Members are required to deal with ammunition in the normal way and that they are expected to provide declarations when leaving firing areas and ranges, but there is an amnesty procedure and matters which do inadvertently end up in the possession of individuals can be put into the amnesty box, i.e. things like ammunition.

H Whilst the ammunition was retained from various training serials at differing times, Sergeant Nightingale in his interview has accepted that he brought the pistol back in 2007 from Iraq, and it remained with his kit, he brought it back in his gorilla box. I think it only fair to say that you will appreciate whilst there are some formal procedures that may well have prevented this in a mainstream move back on a VC10 of the like, this came back in military kit and then was kept with Sergeant Nightingale's military possessions firstly in the Sergeants' Mess and

A then subsequently when he moved in January 2011 in triple SA accommodation and not within those formal procedures where it ought to have been retained.

JUDGE ADVOCATE: Sorry, Colonel, can you just give us a date as to when, as far as you are aware, it was moved to triple SA?

B COL BARNETT: January 2011 I understand your honour.

JUDGE ADVOCATE: Yes, thank you.

C COL BARNETT: It will become clear shortly, gentlemen, your honour, that there is some medical circumstances which my learned friend will raise, and it is only appropriate that the Crown mentions briefly, so that you are it were teed up as to where this going, that Sergeant Nightingale suffered a traumatic brain injury in late 2009, October 2009, so in other words during the period that the possession spanned 2007 to 2011. In 2009 he was conducting a jungle marathon and there is some complex medical terminology, which I will not go into now, I know my learned friend intends to hand up to you various documentation, but in short he suffered fits, seizures and a coma and a cognitive brain impairment that was both serious and was treated in Headley Court, and he made a very good recovery, but it is accepted by the Crown that there continues to be some cognitive brain impairment following that incident. He did make a good recovery and was declared fit for duty within current medical employment standards. Firstly, prior to the incident, of course, he was conducting full operations until October 2009 when he was hospitalised following the hyponatraemia, I think it is pronounced, following a collapse, but he then subsequently medically cleared to drive on the 6th November 2009, resumed physical training on the 6th January 2010, and was cleared fit to operate in hot environments on the 1st September 2010 and indeed was deployed on operations in his role in May 2011, where he was when these matters came to light. It is only appropriate, your honour, that I raise that matter at this stage.

E JUDGE ADVOCATE: Yes.

COL BARNETT: Your honour, unless I can assist you further, that is all I propose to say by way of the facts in this case.

F JUDGE ADVOCATE: Thank you very much Colonel. Record of Service then that will be Exhibit 2.

(The Prosecution adduced the formal Information for Service Courts in respect of the Defendant in accordance with The Armed Forces Act (Court Martial) Rules 2009, Rule 114(2). A copy of the Information for Service Courts is handed in, signed by the learned Judge Advocate, marked as Exhibit 2, and attached to the record.)

G JUDGE ADVOCATE: Thank you very much Colonel.

Mr Winter.

(PLEA IN MITIGATION)

H MR WINTER: May it please your honour, gentlemen, Sergeant Nightingale has served this country as an exemplary officer with distinction for 17 years; 11 of them in one of the most difficult and dangerous regiments that operate in this country; his bravery, loyalty and

A commitment to the Service has been total. That commitment has, as is inevitable, on occasion been underlined by each of his colleagues who have been killed in the line of duty and for each one of those it could easily have been Sergeant Nightingale who did not come back. As his wife has remarked to me, if you were to cut him half you would find the regiment printed through his very core. It is his life, he has lived for it, he is devoted to it and as a result of this incident has jeopardised everything.

B His plea of guilty to this means that that exemplary good character has gone forever. With it has gone his chances of working, as so often occurs post-service within the security industry, but on a more day-to-day level for example with it has gone the chances of sitting on the Board of Governors of his children's school, which he was very anxious to do until this occurred. Likewise he had intended to continue and expand his charitable works and to operate a charity. It is highly unlikely he will be able to do that, and there is of course a large question mark now as to whether the army will permit him to remain as a soldier. So with his conviction has gone his character, his prospects, his pride, his career and indeed his very *raison d'être*, but what has not gone is his integrity, because as you will hear shortly, as I expand the truly exceptional nature of the circumstances surrounding this offence and the extraordinary medical evidence that I will present for you, in the months prior to entering his plea of guilty he has had to confront the extremely difficult reality of the fact that he is now unable to trust his memory because he suffers from a form of clinical confabulation whereby his brain tends to invent memories to fill the gaps caused by the serious amnesia as a result of the coma he suffered in 2009, and he has therefore had to confront images and thoughts that he honestly believes to be genuine memories and face the prospects that some of them simply may not be, and very kindly an expert psychologist, Doctor Young, has travelled down from London to assist you gentlemen with the nature of that problem, briefly I hope, and to explain the serious nature of the injury he suffered and the manner in which it operated on his ability to remember things back in 2009, 10 and 11, and how the long road to recovery is taking, and we rely heavily in mitigation upon that.

E And may I just tell you a little bit about what happened in 2009? He decided that he wanted to raise money for injured soldiers and signed up for a 5-day 132-mile marathon race in the jungle in Brazil. He was hoping to raise many thousands of pounds for that charity. He trained extremely hard for it, he prepared extremely well for it, but it appears over hydrated himself with water in the course of the first day's 30-odd mile marathon, and at the end of that day he fell into a fit, which had that been the totality he would almost certainly have immediately recovered, but the medics in Brazil mistook the situation for a grave case of dehydration, they put him on an intravenous drip, indeed two drips, and aggressively sought to rehydrate him, but he was of course already over hydrated and they provoked a cerebral oedema, which is a massive swelling in the brain, which caused him to fall into a series of 13 epileptic fits, some of them lasting up to half an hour in length. He was in the middle of the jungle and they had to cart him on a series of boats and onto vehicles down the Amazon and away to a hospital, by which time he had fallen into a coma from which he did not emerge for three days. As you will hear from Doctor Young there really are very, very few individuals who would have survived this. At one point he had a temperature of 44 degrees, which in old money is I think a little over 111 degrees. A less exceptional man, a lesser man committed to survival would undoubtedly not have done so. But he did and as you will hear in a bit more detail he fought his way back not just to his health, not back to a recovery of his memory but back to the regiment, and his wife has stressed to me in the course of the last few days that it was his utter devotion to return to work and to service that really drove that quite remarkable recovery from such a life threatening event. Not just for a desk job, I stress, but to being placed on the 30-minute standby counter-terrorism operations in the latter part of 2010. Quite

A extraordinary and I invite you to conclude indicative of the exceptional man that you have to sentence this morning.

B We will invite you to conclude that whilst it must be the case that he received the Glock Pistol as a war trophy in Iraq in the latter part of 2007, and I will deal with this in a little bit more detail his memory of that event is extremely sketchy. One of the matters we have had to wrestle with is to whether that is in fact a genuine memory or not. His plea of guilty of course
C accepts that it must have happened in that way but is one of the difficulties we faced, because as I was asking him well where was it given to you; by whom; who was there; what presentation took place when it occurred; what time of day was it; what period of the year was it; he has no memory of any detail at all that would assist him to recall that event. It must have occurred but he has no recollection of it, and that, we submit, impacts in truly exceptional circumstances upon his knowledge of this item in the years thereafter. We invite you in these circumstances, therefore, and I would invite your honour to indicate in due
D course that this is appropriate, that he should be given a full credit for his plea of guilty ion this case. It is a little later than the other Sergeant to whom reference has been made, and I will come to that again in some detail, but in these circumstances we invite you to give him full and complete credit for that plea of guilty and I have every confidence that you will do so, of course assisted by the fact that in the interview conducted by the police in September of 2011 he made a full confession to these matters, both the Glock and the ammunition, and thereafter having sought medical attention has been wrestling with these very serious consequences.

JUDGE ADVOCATE: So Mr Winter would it be right that at the time of the interview at the latest he seemed to have regained his memory as to how he came by the Glock?

E MR WINTER: He may have done or he may have confabulated, that is the problem. By his plea we have accepted that he has regained a memory of having received it in Iraq but he does not know and the science is not sufficiently sophisticated to be able to say one way or the other, but this board is to proceed upon the basis that that is in fact an accurate memory for the purposes of this sentencing hearing and therefore is an honest and true confession. Of course if one is confabulating one believes it to be a genuine memory and therefore it is an honest statement of what one believes one's brain is telling one and it is not possible to know, and as Doctor Young will expand on, when she conducted some of her scientific tests upon
F him, he confabulated very heavily in a way that cannot be fabricated or faked so as to inject into a recollection things that had not been said and were not part of the true memory but he undoubtedly believes that they were.

JUDGE ADVOCATE: And so are you telling us that it may be a completely different way the Glock came into his possession?

G MR WINTER: If it came into his possession at all. Now we are accepting for these purposes that it was in his possession because he believes---

JUDGE ADVOCATE: Well I think you have to really.

H MR WINTER: Of course, and that is why all I am saying here is that this raises very serious difficulties which is explicative of why the plea was not entered earlier. I am not going beyond that to say that you should, as it were, regard that as a confabulated and unreal memory. We should proceed on the basis that it is an accurate memory. It is the sort of weapon that the people he was training in Iraq used. Of course it is not something the British

A Army uses and therefore it is consistent with the sort of present they would give and in all probability he did receive it in Iraq by way of a war trophy present for thanking him for the effort he had spent with the local people there in 2007.

JUDGE ADVOCATE: Yes.

B MR WINTER: So really we are constructing that on a basis of what really must have happened as opposed on his recollection that he did.

JUDGE ADVOCATE: I see, and the ammunition?

C MR WINTER: The ammunition I will come to shortly. The ammunition is a completely separate category because the ammunition in all probability is the leftover ammunition from serials training, and I will expand on this in due course. It is in fact consistent with not even the totality of what one serial might come off a training exercise with and he was training these serials and very often such people would give him their excess ammunition. He would have been using that ammunition the very next day and for a long period of time was staying in the mess, and as was accepted in the case of the other Sergeant who was sentenced earlier this year, the possession of some of these types of ammunition in the mess in locked cabinets in those circumstances is an acceptable way of dealing with that sort of ammunition. So whilst in the mess, and I will deal with that in a moment, whilst in the mess would not have been a problem. Obviously on the move into the triple SA accommodation becomes a problem hence his appearance here.

D JUDGE ADVOCATE: Yes, I was going to say, Mr Winter, I think probably---

MR WINTER: Well it was not clear I have to say in my defence---

E JUDGE ADVOCATE: ---even in the unit that your client belongs to, just having armour piercing ammunition in the mess room is probably not looked upon with any great favour.

MR WINTER: You are quite right. I misread it, you are quite right. I am grateful.

JUDGE ADVOCATE: All right.

F MR WINTER: Now may I just, your honour, just briefly in respect of the law, because as your honour mentioned yesterday obviously the provisions of section 51A are raised in this case, and for the benefit of you gentlemen this is a provision of The Firearms Act of 1968, which in certain circumstances requires there to be a minimum period of imprisonment for possession of prohibited firearms of 5 years unless there are exceptional circumstances in play. We submit that there are plainly such exceptional circumstances in play in this case, and we invite your honour to take a fairly short cut through this, because so as to explain to the gentlemen what occurred, the search of the triple SA premises occurred in this case as a result of a serious complaint that had been made about another Sergeant. And I do not know, your honour, whether it is appropriate for me to name that Sergeant or?

G JUDGE ADVOCATE: I do not think you need to name him but you can tell us the facts.

H MR WINTER: Yes. That person was sharing the accommodation at the triple SA with Sergeant Nightingale and as a result of quite serious allegations being by someone wholly separate against that Sergeant, those premises were searched, a large amount of ammunition

A and firearms and indeed a hand grenade were found in the possession of that Sergeant, and
whilst they were searching the flat these items were found in the possession of this Sergeant.
So both of them were charged and on the 20th June of this year the other Sergeant came before
a board in which the learned Judge Advocate, Judge McGrigor, this Judge Advocate,
appeared as Judge Advocate, and submissions were made before that board and this Judge
B Advocate in reliance upon an authority called *The Crown v. Reeman and Wood* [2006], 1
Cr.App.R. that there are exceptional circumstances in that case, and that board concluded to
be a correct submission, found there to be exceptional circumstances and thus did not need to
worry about the minimum period of imprisonment, the sentencing exercise being wholly
discretionary in those circumstances. Those exceptional circumstances found in that
Sergeant's case were that he pleaded guilty; that he was a man of exemplary character; that he
was cooperative entirely; that he was highly valued as a soldier in fact of the same unit; was
of great practical experience; that the gun had not been fired; that it was in a box in the
wardrobe, and that his work in this particular unit brought him into daily contact with
C weapons and ammunition of all kinds such that the familiarity with them caused him to lose
sight of the requirement for their proper safekeeping. Those eight features being found to
amount to exceptional circumstances in that officer's case, and I respectfully submit, your
honour, that each of those circumstances identified there in identical terms apply this case,
and in fact I will go beyond that and to say that as a result of the medical and other mitigation
that I am going to advance before you, Sergeant Nightingale is in a radically different and
better position than that Sergeant was, but the finding of exceptional circumstances for those
D reasons in that case would by themselves in this case equally apply such that section 51A does
not bite on this sentencing exercise and that we would therefore proceed hereafter on that
basis and upon the understanding that sentencing is therefore discretionary for this board, and
I hope that position is clear, and if your honour has any question or difficulty with that then I
would welcome dealing with that now because I am anxious to obviously resolve whether or
not I am having to confront a 5-year minimum or whether I am now seeking to persuade this
board in respect of the discretionary sentence?

E JUDGE ADVOCATE: Yes. Well if you are inviting---

MR WINTER: I am not asking you to rule.

JUDGE ADVOCATE: No.

F MR WINTER: I am simply inviting you to say well maybe we can continue in a way---

JUDGE ADVOCATE: I think you can continue with your submissions.

MR WINTER: I am very grateful. In that case, just so that you are clear what occurred, and
of course that sentence does not affect or bite on this, but a 2-year period of detention at
Colchester was ordered in respect of that soldier, just so you have the full picture in that
G regard, but I am going to submit that the appropriate sentence in this case is significantly less
than that and does not involve the necessity for an immediate period of detention, there are
truly exceptional circumstances applying to this soldier.

Firstly, the facts of this case are less serious, significantly so than they were in that other
officer's case. Why do I say that? First of all can I invite your attention to Charge 2 of the
charge sheet? In the schedule to Charge 2, item 5, is a reference thee to the 2 x .308 live
H rounds of ammunition. In fact they were not live, and if you are kind enough to turn to the
second page of the photograph bundle do you see at the top of what has got page 19 written in

A the bottom right-hand corner you see a magazine of ammunition and on that right-hand side
of the large block of ammunition, in the bottom left-hand corner and the one three columns
from the left and the second row up from the bottom of that, you will see that both are missing
the percussion cap that appears at the bottom of a bullet, and in fact they are also missing the
B cordite that will enable it to explode, and the reason why they are in that condition and is
another good example of the quality of this Sergeant, is that in his training serials he noticed
that those learning how to fire particular rifles were anticipating the bullet going off and
slightly having a snatch reflex in anticipation of the round firing obviously causing a slight
movement in the gun and the inaccuracy of the target, and he devised the concept of in order
to know that that was happening he needed to be able to hear the round going off so as he
could see the snatch reflex of going just in anticipation of the round firing, and he asked for
these types of cartridges to be designed so that they would make a noise but not fire, which
would enable him to identify that the inaccuracy was being caused as a result of this snatch
C reflex, as a result of which he has been able to improve the training efficacy in that regard
significantly, thus eradicating that sort of snatch reflex. So it may be appropriate to put a line
under or through or put a question mark over item 5, they fall into a different category and
would be relied on, as it were, by us as demonstrative of the quality of the man that you have
before you.

D Onto the substantive reasons why the facts of this case are significantly less serious than those
in the other officer's case; the ammunition found in relation to Sergeant Nightingale, that is
matters listed at 1 to 6 of the schedule, are significantly less in quantity than in the other
officer's case. As I said earlier it amounts in effect to the excess munition from a single
serial's training rounds which would frequently be handed over to him and brought back by
him, and to put it in context therefore, whilst there is obviously a lot of ammunition there
certainly from my point of view as a lay person, I understand that many thousands, sometimes
tens of thousands of rounds are fired in a single day's serial's training by this particular unit,
and that I hope puts it in a little context.

E JUDGE ADVOCATE: Yes, but Mr Winter, 122 rounds of 9mm which fits the Glock Pistol
are identified as an aggravating feature in the authorities, are they not?

MR WINTER: Of course we readily accept that indeed, so it is very clear the frangible
rounds would also be fireable.

F JUDGE ADVOCATE: Yes, well I suspect the frangible rounds possibly not quite so
important but---

MR WINTER: No. So it is clear that is absolutely correct.

JUDGE ADVOCATE: ---certainly the armour piercing and over 100 rounds of live 9mm.

G MR WINTER: I am not saying it is not serious, I am not saying it is not something that
should never happen, what I am saying is it is slightly less serious than the position was in the
other officer's case because he had more of them. He also of course had a live hand grenade
which was secured only with a pin, was not boxed or otherwise concealed, and which had
been put in the garage to the triple SA flat, which was a dilapidated insecure, unlocked
garage, it was a hand grenade that is fatal up to 10 metres and for many, many metres
thereafter as you will be well aware can caused serious disability, and that therefore was a
major aggravating feature in that officer's case that is not present in this case. He was of
H course the target of the search and this officer was not.

A The Glock weapon that that officer had is a very, very similar if not identical Glock to the one in this case, but in that officer's case the Glock was not in one of these heavy-duty Pelican plastic boxes that we see in the photographs that you have been handed up, what has got 56 at the bottom right-hand corner, which is a multi-purpose, multi-use heavy-duty box that might carry all manner of things, has no outside indicator on it that it contains a gun if you look at that photograph.

B JUDGE ADVOCATE: But Mr Winter, if anybody had gained access to the accommodation, it would not have taken them more than 30 seconds to spot the ammunition in a clear Perspex box and find the gun.

C MR WINTER: Correct. Your honour I am not making myself clear. I completely accept the seriousness of this. All I am saying is that it is less serious than it was in the other officer's case because his was not in a box like that, his was in one of the sometimes called the bun bag holsters whereby you can conceal it and it looks like it you are going out with your wallet or your two part in it, with a pair of gloves in the bum bag, and therefore the burglar in those circumstances would be able to walk out with what looks like a perfectly innocent bag, no one would think was carrying a gun, and therefore is a more aggravated version of this than one finds in this Sergeant's case. He also had ... the other officer had a Sig Saur gun barrel with the silencer unit, not present in this case, and of course as you know neither of the guns, either that gun or this gun had ever been fired at all by anybody, and the magazines, to which D mention has been made, were empty. We therefore submit that the factual nature of this sentencing exercise is significantly reduced in seriousness over the factual nature of the sentencing exercise in that other officer's case.

E Now may I then turn please to what is the central thrust of the mitigation on behalf of Sergeant Nightingale to explain how it came about that this Glock gun was in his possession in that triple SA accommodation on the 16th September of 2011 and indeed to explain the ammunition, and to do that I need to ask you to come back to January of 2007 when his wife, Sally, fell pregnant with their second daughter. In May whilst she was heavily pregnant and indeed with a difficult pregnancy, of which she suffered quite seriously as I will come to in a moment, Sergeant Nightingale was posted to Iraq where he served with distinction, but the illness and the problems surrounding the pregnancy of his wife resulted in July of 2007 in her falling ill with Bell's palsy, which as you I am sure know is a stress-provoked nerve problem in the face normally which causes the left-hand side of the face to flop down unsupported by F the nervous system there. It is quite a serious condition, it is quite painful, and with it, as is normally the case, other stress-related problems and illnesses occurred. Sergeant Nightingale was refused leave to visit her. It was a very, very difficult period for them and it culminated, happily, in the birth of their second daughter on the 4th October 2007 but only after an emergency caesarean section where there were very serious concerns as to the survival of the foetus but indeed also of the mother, and that operation resulted in his wife being unable to drive and indeed quite difficulty walking for several weeks after the 4th October, which G exacerbated the stress. In September, just before the birth, Sergeant Nightingale was given paternity leave to come back and did so, on the understanding that he would not need to return to Iraq and therefore be able to assist his wife with her illnesses and problems and indeed the new baby, but the exigencies of our situation in Iraq required unexpectedly that he return there at the end of October, so some three weeks after the birth.

H It is in this period, i.e. some time towards the end of October or early November of 2007, that it must be the case that the Glock was presented to him. That is an analysis that has been constructed really from his wife Sally's memory and what he said in interview. He now

A really has no recollection of that having occurred, it must have done. But on the 6th
November of 2007, his best friend, Lance Corporal John Ratisby, may he rest in peace, was
tragically killed in Iraq. He had known him since joining the army and on the first day of
joining the army in 1995, and it was he, Sergeant Nightingale, who persuaded John to join
this unit, and he was killed just two weeks before the end of that duty role. Sergeant
Nightingale flew his body back to the United Kingdom leaving behind all his kit because he
thought he would be returning to Iraq. But he did not return to Iraq. His equipment was
B packed by a colleague, we do not know whom, and we know that that occurred because when
Sally, and I have this information from his wife, unpacked his kitbag, one of his colleagues
had played a practical joke on him by putting some dodgy DVDs in the kitbag so that when
his wife opened it, but that I say it only no doubt happens frequently, who cares, I only say it
because it is the little piece of evidence that we have that somebody else had packed his kit.

C Now the Glock is in the Pelican black box that might have contained tools or other equipment
and there is no basis at all for thinking that whoever put it into the gorilla box knew that it
contained a gun. Probably just slung it in there as you would, told to get this stuff out of here,
slung it all in the gorilla box, go back to England, we'll sort it out, and the gorilla box arrived,
as you have been told, some time after Christmas, around January of 2008, where it was
moved either by Sergeant Nightingale, he does not know, he cannot remember, or somebody
else, it does not really matter, to the locked cage at the squadron block, and as you will be
well familiar those cages are about as secure an environment as it is possible to have. The
D box is locked, the cage is locked, the building is locked, it is inside the squadron facilities it is
difficult to contemplate a more secure environment for it.

E That we submit is very, very significant mitigation, because his state of knowledge as to the
existence of the gun in his possession at that time, at that time obviously is that he had been
presented with it in Iraq, that it was in his possessions, but obviously the problems with his
wife and then the death of his best friend perfectly understandable that it then should have
slipped his mind, he having not packed his box. And as you will be well aware, it is an
operations box that is only needed when you are on operations, contains the specialised
equipment that this unit needs to use if it is going on a hot mission or on a cold mission they
pack the relevant equipment in the operations box. But he was not on operations for the
whole of 2008 or the period of 2009 prior to the marathon. It therefore remained in the
locked secure cage for the whole of 2008 and the whole of 2009 and in fact for the first half of
2010. We invite you to conclude, therefore, that that is very substantial mitigation of this,
F because there was no risk to that gun landing in the hands of a burglar or other such
irresponsible persons.

G In October of 2009, whilst it is in the cage, he did the marathon, which as you know caused
the serious brain injury, and we have obtained an expert report from one of the world's
leading neuropsychologists, Professor M D Copelman PhD and a very considerable number
of other qualifications who is based at the King College London Institute of Psychiatry, and I
am not trouble your honour and gentlemen with the full report unless you would like to see it,
because it is obviously extremely detailed and makes reference to highly complex
neurological terminology and I suspect may not at the end of the day take the matter very
much further but I am not hiding it from you, if you would like to see it then of course please
say so and I will have copies provided.

H JUDGE ADVOCATE: No, I am sure, Mr Winter, you can tell us the important parts.

A MR WINTER: I am grateful. That is what I will do, and he explains, as I have already told
you, how the injury occurred and states that for the first three days in a coma, the next three
weeks serious lack of memory although there were, and I quote “islands of memory” in the
B amnesia, but over the period of time since then his memory has gradually returned. The
diagnosis, he having suffered a core temperature of up to 44 degrees centigrade I quote “a
value not often recorded in survivors”. That his sodium levels went down to 116, likewise not
very often recorded. There was a high degree of hyponatraemia. He had in effect suffered
C from I quote “water intoxication and status epilepticus”. He was remarkably confused,
confabulating with nominal dysphasia and profound amnesia, that is loss of memory, and he
concludes that he suffered a prolonged confusional state with prolonged impairment to the left
posterior lateral temporal lobe and remedial temple lobes and damage to the frontal lobes of
the brain. His conclusions are that in his opinion these cognitive and emotional changes, I
quote “will have made a significant contribution to his continued failure to decommission the
pistol and return of any ammunition to the amnesty box system during the period 2009 to
2011”.

I have obviously to Sergeant Nightingale at length about this and he has, if I may add
personally in my view, honestly wrestled to find a genuine memory of this gun and its
presence in that gorilla box and simply cannot, he does not remember having it, and we invite
you to conclude on that basis of that evidence and indeed the evidence of Doctor Young, who
D I will call in a moment, that it is wholly genuine that on return to health in the latter part of
2009, his memory of having been given the Glock had in effect been erased by the brain
damage caused by that injury.

Now sometimes memories can come back by themselves but obviously, and this is not exactly
science but common sense, if the memory is triggered by an event then it is more likely to
return, and as Doctor Young will explain when there is physical brain damage to the lobes
that contain the memory, those lobes cannot recover but the brain through plasticity has a
E remarkable ability to construct new pathways around the damaged areas of the brain and to
give rise to recovered memory and cognitive recall abilities, and that is what Sergeant
Nightingale has been working on with considerable devotion and indeed success in the 2½
years or nearly 3 years since that time in effect teaching his brain to create new pathways to
recollection of various events and indeed to full health. But if anything could mitigate the
gravity of this offence we submit this is it.

F The gun remained in the cage until mid-2010 when it was required to be moved from the cage
to his mess accommodation, not the triple SA but the mess accommodation that he was given
at that time. He does not believe he opened it because he would not need to open it, he has no
memory of it, but he says why would I open an operations box when I was not on operations,
and he believes he used it for his brew-up table, having put a cloth over it, in his mess room
where it remained from mid-2010 until January of 2011.

G In the latter part of 2009, as you have been told, he was cleared fit for work and came back to
work in the early part of 2010, and in the June to October had sufficiently recovered to be
placed upon the 30-minute response counter-terrorism team, for the training for that team
which took place between June and October of 2010, and during that time was made sniper
coordinator of a fast reaction counter-terrorism team, which is a position of considerable
responsibility, and as Doctor Young will tell you for him to have constructed strategies
whereby his brain could heal itself and whereby he could return to that sort of operation is
H quite frankly truly remarkable, and that is good evidence of his devotion and his desire to get
back to play a full role in this unit.

A
B
From October of 2010 he was on that 30-minute standby, and I do not know how many of you have done that, I certainly have not, but it seems to me to be extremely stressful, extremely hectic requiring you to remain very close to the unit for virtually all of the time whilst you are on duty, and indeed has been referred to in interview I think and certainly with the expert doctors as the wheel of death, whereby you do 6 months doing that and then there is a deployment to such places like Somalia, going pirate hunting, and then a 6-month tour as indeed occurred in this case to Afghanistan it is extremely stressful, and it is hardly surprising, even if you have not had brain damage, that you might not remember that you had in your possession this Glock gun.

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In the early part of 2011, in January, he was required to move out of the mess into the triple SA accommodation, but he was on the 30-minute standby and he therefore was given by his superiors about 2 hours to move his stuff out of the mess and get back. He believes, he is not sure about this, but he believes that he and the other officer, who has been dealt with in June, took a van and together moved all the contents of both their mess rooms to the flat at the triple SA accommodation in about 2 hours. It is a 20-minute drive each way and the loading accounted for the rest of the time, but they basically just ran in and dumped it in the room and he dumped all of his stuff in the upper rear bedroom of the triple SA accommodation. He does not remember putting the ammunition from where it probably was in his mess room, which he said in interview was probably in one of the drawers of the desk; he does not remember shoving that into the plastic box that you have seen in the photographs. It maybe that he did not do it, maybe that he did do it. If he did do it he is extremely sorry. Obviously that was a moment when he should have thought 'hang on a second, that can't come with me. In fact it should not be here but it certainly can't come with me to the triple SA accommodation'. He is gutted that if he did it, and he has no recollection of whether he did or not, if he did it he is extremely sorry and is paying very significant consequences for it. In any event it ended up in that plastic box under the bed in the triple SA accommodation, and the gun remained in its Pelican black box inside the locked gorilla box, which was just dumped in the back bedroom of the triple SA accommodation. So in January 2011 it moves from the mess to the triple SA but the gun remains in the locked gorilla box, which to a degree, we submit, does mitigate.

F
As a result of being on that 30-minute standby team, he said in interview and repeats through me to you that he does not believe that he stayed at that accommodation more than three or perhaps five times maximum having been given it because he would normally take a camp bed and sleep in the mess to cut down that 20-minute drive, they having to be airborne within 30 minutes of the call alerting them to that requirement, and therefore we invite you to conclude that his window to check the box under the bed or check the contents of the gorilla box is limited to about three to five days in the period between January and May of 2011.

G
H
He was told that he would deploy as a Disclosure Officer in London to assist multi-agency disclosure obligations and foreign agency obligations and understood that is what would be happening, but at very, very short notice he was changed to deploy to Afghanistan, which is plainly an operational role requiring the gorilla box, and as a result in mid-May he went to the flat, opened the gorilla box, took out the items that were not required and locked the box back up with the items that were required and took it off to freight shipping so it could be sent to Afghanistan. There is nothing on the outside of that black box that alerts one to the presence of a gun in it. He has some recollection of this day; he says it was a very hectic day, it was frenetic, he needed to get it back very quickly, he needed to be back quickly because of the 30-minute rule, he may well have placed the box in the cupboard, he has no specific

A recollection, but if he did he had no idea that it contained a gun, and we invite you to conclude that if your memory had been wiped as a result of the amnesia such that you had forgotten being given it and you are in this type of rush, that that again is very strong mitigation. Plainly he says ‘had I appreciated that I had that Glock, it would not have gone in the cupboard, it would have gone straight back to the unit for decommissioning’.

B JUDGE ADVOCATE: Well Mr Winter, it is a classic pistol carrying box is it not?

MR WINTER: No, it is not. They are designed for multi-use carrying. Indeed I checked them out on the internet. They are sold by a general supplier for multi-purpose carrying. They quite often use ... it is built to use them to carry drill rounds. Inside plainly its foam has been designed to carry a gun, but outside that is not so and my instructions are, no doubt the members of the board will know this much better than I do, that they are frequently used in the army for carrying all manner of things.

C So to summarise: we submit that his knowledge of it must be in respect of its gift in the last duty in Iraq; that his focus upon that was obscured by the death of his friend and the problems with his wife and not returning, not packing his stuff, but in any event from 2007 to the middle of 2010 the vast bulk of this it remained in that locked and secured cage; from mid-2010 to January 2011 lived in the mess, which was also secure, but from January 2011 to May 2011 it was in its gorilla box but in the non-secure or not very secure triple SA for which he deeply apologises, and from May 2011 to the 16th September it was in the cupboard for which he deeply apologises. But for the vast bulk of the period, indeed the entire period where it was in non-secure accommodation, he had no active knowledge or memory of it as a result of his medical injuries, and I am instructed that the ammunition, whilst in the plastic box, was not, I am told, visible to the naked eye unless you opened the box and went through it, obviously. I accept that a burglar does exactly that on occasion but it was not on display.

E We therefore invite you to conclude here that there are truly unique exceptional circumstances applicable to this sentencing exercise, and to ensure that I have made the medical position absolutely watertight and clear, I am going to call Doctor Young and I am going to invite for you to hear just a little evidence from her to put some flesh on the bones of what I say from somebody highly qualified to give opinion in this regard.

F JUDGE ADVOCATE: Well, Mr Winter, if it is of any assistance to you, I am sure myself and the board accept everything that you have said in relation to the injury and the medical prognosis.

MR WINTER: I am very grateful. Would you forgive me one moment?

(Mr Winter conferred with his client.)

G MR WINTER: Would you mind if I just call her literally for a few minutes just to make a few points?

JUDGE ADVOCATE: No, of course not, a matter entirely for you.

H MR WINTER: Unfortunately she is damaged she has broken her foot so she will hobble forward.

A **Doctor Susan Jane YOUNG having been called and duly sworn is examined by Mr WINTER as follows:**

MR WINTER: Could you give the board your full name please and your qualifications?

DR YOUNG: Yes, I'm Susan Jane Young. I'm a doctor of clinical psychology. I have a PhD and a BSc.

B Q: Have you conducted various scientific tests in respect of Sergeant Nightingale in relation to the injury that he suffered in the late period of 2009?

A: Yes, I did a whole comprehensive battery of assessments, whole neuropsychological battery to test all of his underling neuropsychological functions.

C Q: I want to take this quite shortly please. You have been in court this morning and I hope you heard me summarise the nature of the injuries suffered. Did I do so accurately?

A: Yes.

Q: Could you just in a few words give us the seriousness of that incident?

D A: Right, I think the issue to really emphasise is how very serious this brain injury was. You know to have a temperature of 44 or 111 is very serious and people don't often survive. If you think of a baby/child with a temperature of 102/103 they'd be admitted to hospital and looked at and it would be treated very seriously. This is 111, I'm a bit old-fashioned so I tend to think in the old figures, and the documents, the medical records have indicated that he had marked confusion and severe memory problems, amnesia, he couldn't even recognise people that he knew, and importantly this confabulation was noted very early in the medical records, and when I assessed him all these years later the confabulation was also present. It was present then in my assessment. He introduced new material into a task that I asked him to recall. When he gave me the verbal recall there was material in there that had not been presented to him in the stimulus.

E Q: And just help us, if one is confabulating as a result of this serious injury, does one have any personal awareness that that is what you are doing?

F A: No, none at all. You actually ... you believe its part of your memory system. It's like there's gaps in your memory and this obviously is disconcerting and so you fill the gaps with imagine material but you're not aware that this is imagined material, to you it's very real. It's an honest account of what you believe you have been told or has happened or you've seen.

G Q: Now the damage that we have heard from the psychiatrist to the various lobes of the brain, I told the board, and will you confirm it is correct, is non-reversible; in other words the physical damage to the lobes remains damaged.

H A: Yes, but what the brain does do is it finds ways around it. It's called plasticity and it finds new pathways and connectivity's. So, you know, but the part that's damaged is damaged and some parts, you know, are completely lost. The plasticity you can make new connections, some things can be recovered but some pockets can be completely lost.

A Q: I think you have brought with you one of the leading authorities on this type of injury, a Professor called Trevor Powell. Perhaps you could just briefly read two short sections from that so that the board fully understand what it is.

A: It explains plasticity very well and this is a practical guide about head injury that is produced by the Headway National Head Injuries Association, and it explains the process as:

B 'It may be useful to think of the brain in terms of the complex traffic system in a large city. Imagine the sort of disruption that would be caused by an earthquake or a bomb going off at a particularly busy traffic intersection. For a while traffic flow would come to a complete standstill. There will be long traffic jams and general congestion. However, gradually motorists would find new previously unused routes around back streets and across residential areas. If the roads were not too severely damaged they might be cleared and traffic flow might continue but at a slower pace. Traffic lights might be completely destroyed or temporarily out of action, later on being repaired.

C In most busy cities after a major disaster, people eventually find some way of reaching their destination. The process of recovery and rehabilitation could be due as the process of finding those new routes opening up new pathways and repairing old ones.'

D Q: And is that in effect what Sergeant Nightingale's brain has been doing over the last two to three years?

A: Yes, most commonly this process starts ... a lot is achieved in the first two years following traumatic brain injury, but this is a lengthy process so the brain will undergo a lot of recovery during the first two years and then the process slows down, and then it's a slower, longer process.

E Q: Are there strategies that one can adopt to assist the brain in this process?

F A: Yes. Part of the process of recovery involves the brain, the organic change in the brain, this plasticity that has been described. A second process, though, is that you can learn to support for example with a memory. You learn to support your memory systems by learning to apply strategies, compensatory strategies that you can apply to newly acquired memories and material, so this is very helpful. As a neuropsychologist I know this is very helpful to ... something that we work on with individuals that acquire brain injuries to get them back to work, to help them to support their memory.

Q: How hard has Sergeant Nightingale worked to get himself back to health?

G A: Well he seems to work very hard and he seems ... I mean actually it's remarkable first of all that he survived and then secondly it's also remarkable that he got himself back to work the way that he did, and he describes, you know, several strategies that he's used to me and I also noted strategies during my assessment he was automatically applying, like repeating. If I gave him instructions he would be repeating them over and over again. When I asked him to remember things, he would remember things ... he would give it back to me in bullet point format. People don't usually do that. This is something that he's learnt to apply to help remember small chunks of information rather than a long logical piece of information.

H Q: Thank you very much. I have no further questions.

A JUDGE ADVOCATE: Yes, can you tell us, are you aware when the defendant was first diagnosed with this problem?

A: Well it would have been shortly after the brain injury in 2009, October 2009.

B Q: Thank you. Would it be fair to say that he had recovered his faculties, including his cognitive faculties, to such an extent that by June to October 2010 he was examined and found fit to go back to work?

A: Well, yes, he clearly was examined and found fit to go back to work. I heard early the comment that he was driving, he was able to drive. That's quite a different thing to amnesia. One doesn't ... you might get---

C Q: No but fully back to work as someone who is capable of a high stress and physical job.

A: Well he was assessed as being able to do that but ... so he was able to acquire strategies and he'd recovered sufficiently to go back to work but that doesn't mean to say that there would be pockets in his memory for material that occurred prior to the event or prior to the insult to his brain that he then would no longer be able to access.

D Q: Thank you very much indeed.

MR WINTER: Thank you very much Doctor Young.

The witness is duly released.

E MR WINTER: I am asked by my learned friend to hand in the full report and I will of course do that once I get it copied.

JUDGE ADVOCATE: The full?

MR WINTER: Of Doctor Young's report.

JUDGE ADVOCATE: Oh I see, right. Are you inviting us to read through it?

F MR WINTER: I am not but if my learned friend wishes you to then I am more than happy that you do so.

JUDGE ADVOCATE: I really do not---

COL BARNETT: The conclusion. There is one page of conclusion your honour.

G JUDGE ADVOCATE: I see, all right.

MR WINTER: I will have that. I do not have a copy at the moment, I will have that copied.

JUDGE ADVOCATE: Yes.

H MR WINTER: I am very grateful. Can I conclude thus: this is an exemplary soldier, married, 37, two daughters, it's a very close-knit family, they are very supportive of him; they have suffered very greatly as a result of all of these events. He has suffered already because he has been suspended for 14 months with this hanging over him and I can tell you the stress of that

A is considerable even when one has not suffered this sort of injury, and his character is attested to by his Commanding Officer, and I am going to hand up the character reference but I am not going to read it out, you will see the manner in which he is regarded by those for whom he works, and I will invite you to look at that in detail when you retire.

(Copies of the character reference are handed in and distributed to the President of the Board and Members. A copy of the character reference is signed by the learned Judge Advocate, marked as Exhibit 3, and attached to the record.)

B In addition he took a medic course in respect of battlefield injuries in which he noted that there was a current defect in some of the field dressings that were at that time used, put his mind to the problem, again indicative of the type of man you are dealing with, and came up with a better field dressing for chest impact wounds, which is now in production. It is called the Nightingale Dressing. Obviously it is produced by an American firm. He has made no profit out of it and it is used by both the American and the British Forces and has had significant results in saving lives. So you are not dealing just with an ordinary soldier here, he is somebody who when he sees the problem would put his mind to it and identify the solution and then drive that forward into production and save lives as a consequence. That again is to his considerable credit.

C He has paid privately for his defence. The sums of money I am afraid that it costs to instruct lawyers such as he has instructed are very substantial I am afraid in the modern world. There are many tens of thousands of pounds that have been paid for him and his family insofar as put some of his pension into funding that, and if you thought about it in terms of a fine, it would be the equivalent to several tens of thousand pounds worth of fine. It cannot be recovered of course.

D JUDGE ADVOCATE: Are you saying, Mr Winter, that he was not eligible for Legal Aid or that he just chose to go down that route?

E MR WINTER: He chose to go down this route. That is his choice but the consequences is thus, and as you know if he were to be discharged, and I am going to invite you not yourselves to make that order, but if he were to be discharged dishonourably, the costs as you have seen on page 5 of the bundle are very, very substantial and therefore utterly ruinous to him.

F His remorse is complete. He is desperately sorry but there are truly exceptional circumstances here which mitigate in a way very, very rarely encountered we submit by a board such as yourself. They do not require an order of discharge as a result we invite you to conclude. Plainly the army will give its anxious consideration to that in due course and if that is appropriate well that will be the order made, but we invite you not to make that order, the board did not in fact make it in that other officer's case, and we invite you to conclude that the circumstances in which this gun and this ammunition was possessed do not require a sentence of immediate detention.

G JUDGE ADVOCATE: Well, Mr Winter, I think the authorities indicate that even where a court is minded to accept exceptional circumstances, they have to start off at 5 years imprisonment. Do not the authorities point in that direction?

H MR WINTER: Well I am not aware of any authority that would indicate that the sort of circumstances---

A JUDGE ADVOCATE: No, no, no, I am not talking about the process but that is where we have to start.

MR WINTER: Well the way I have approached it, your honour, is that the circumstances of this case are significantly less serious than they were in the other officer's case.

B JUDGE ADVOCATE: I take on board all that you have said.

MR WINTER: And therefore the sentence is significantly less than the two years that were passed in detention in that case, because that must be an appropriate sentence.

JUDGE ADVOCATE: But you have suggested that a non-custodial sentence---

C MR WINTER: No, I have suggested a sentence that does not involve immediate detention, a suspended sentence.

JUDGE ADVOCATE: Yes.

D MR WINTER: Because the factual nature of this offence is significantly less serious than it was in the other officer's case, which brings the two years period down, we submit, below, and I would submit well below, 12 months, and that sentence for the truly exceptional circumstances of his personal mitigation can be suspended in this case.

JUDGE ADVOCATE: I see.

E MR WINTER: And that is a proper and legitimate approach to a sentencing exercise. The two years was plainly an appropriate sentence in that officer's case. The facts of this case are significantly different, it brings it below 12 months, and then the medical and other personal mitigation enables you to suspend it. That therefore discharges your responsibility to the public and your duty to ensure that the public interest is protected, which is obviously very, very important, but a sentence of imprisonment does that and then it should be suspended because of the truly exceptional circumstances of this case.

JUDGE ADVOCATE: I see.

F MR WINTER: This is a case, gentlemen, where a merciful response is entirely appropriate and we really do urge you to find it in yourselves to give such a merciful result. Unless I can assist you further.

JUDGE ADVOCATE: Thank you very much.

G PRESIDENT OF THE BOARD: The court will now close for the board to deliberate on sentence.

The Court closed at 1159 hours.

The Court opened at 1418 hours.

H (REASONS FOR SENTENCE)

A JUDGE ADVOCATE: Sergeant Nightingale please stand. Now Sergeant Nightingale, we have listened most carefully to your counsel, Mr Winter, and taken into account the excellent character reference from your Commanding Officer and the medical evidence from Doctor Young.

B Let me say from the outset that it is clear to us that you have rendered very great service over the years both to the army and your country, particularly with regard to your current unit and your operational tours. You have an exemplary character so we put out of our minds the one previous service transgression due to its staleness. We accept you have demonstrated genuine remorse and that the offences come about primarily by way of your inaction.

C Now turning to the offence; you shared accommodation with another soldier who has already been dealt with for not dissimilar offences. As a result of information your house was searched and you were found to be in possession of a Glock automatic pistol along with a substantial amount of 9mm ammunition as well as armour piercing rounds. These were found in a cupboard under the bed in your home that was no tin any way secure as very often you were away on your duties. We are told and accept that this weapon came to you as a present in Iraq in 2007; that it was shipped back to you in the UK by colleagues. You say you forgot about it whilst it remained in your box in a cage. Whilst we accept that you gave little or no weight to it, we find it difficult to go on to accept it was out of your mind entirely.

D In 2009 you were involved in a very serious incident which resulted in serious injury, which we accept affected your memory to some extent. Nevertheless, mainly through your own determination, you had recovered sufficiently so that by October 2010 you were placed back on active service.

E Now in May 2010 the box, in which was the pistol, was moved into the mess for its cage and then, along with the ammunition into your home in January 2011. Subsequently you went on operations in mid-2011 and placed the boxed Glock in a cupboard and the ammunition was placed under your bed. We consider that during this move you would have clearly recalled both the pistol and ammunition but no doubt placed it very low on your list of things to sort out due to being so busy.

F Now I do not need to tell you that military weapons particularly when combined with suitable ammunition and kept in insecure accommodation has the potential to cause very great harm should they fall into criminal hands.

G We have considered the matter of dangerousness under section 219 of The Armed Forces Act 2006 but do not consider you come within this category. However, parliament has decreed that in relation to Charge 1, that a minimum period of 5 years imprisonment is mandatory unless there are exceptional circumstances. In this regard I can tell you that we accept that you received the pistol legitimately and originally planned to deactivate it but never got around to so doing. With regard to the ammunition, we are concerned that a Senior Non-Commissioned Officer of your experience, being a Range and Training Officer thought it right to effectively hoard ammunition. You would have known the rules and there is a clear obligation on those who come into possession of prohibited firearms and ammunition to comply with the law. Indeed we consider you knew full well from both your experience and Standing Orders that such items were never to be held insecurely at your home but rather securely in a lock-up cage at work.

H

A In considering this matter we are assisted by the case of *R v. Reeman* and *R v. Wood* [2006] 1 Cr.App.R. as to whether there are exceptional circumstances in your case. We find:

1. That whilst you did not plead guilty at the first opportunity, we accept that your medical condition allows us to give you more than the usual credit for a plea at the court door.
2. You are a man of exemplary character.
- B 3. You were entirely cooperative and genuinely remorseful.
4. You are a highly valued soldier of great practical experience.
5. The gun was not fired.
6. We recognise that but for your particular work you would not be in contact with such weapons and ammunition.

C Further, that the familiarity with them had made you lose sight of the essential requirement for their safekeeping. Finally, that but for your work, you would not find yourself in such a position. All these matters allow us to find exceptional circumstances in your case.

D Nevertheless, the court would not be doing its duty in relation to protection of the public at large if it did not bear in mind the potential grave consequences of your behaviour. You must understand that these are extremely serious offences that require a custodial sentence of considerable length. We consider that if you had contested this matter you could likely have received a custodial sentence in excess of 3½ years imprisonment. However, in view of your guilty plea, your exemplary character, the circumstances of the offence and all other matters which we take into account, we consider that we can deal with you more leniently. However, these offences are far too serious for a suspended sentence to be appropriate.

E We have not dismissed you or reduced you in rank as on the information before us we consider that you may still, with your specialist experience, be of use to the army in the future. We would invite those who will have to consider your future in the army in due course to bear these sentencing remarks in mind.

I now invite the president to formally read out the court sentence.

(SENTENCE)

F PRESIDENT OF THE BOARD: 24951951 Sergeant Nightingale, The Duke of Lancaster's Regiment, in relation to Charge 1 the court sentences you to 18 months detention. In relation to Charge 2 the court sentences you to 6 months detention; these sentences to run concurrently.

Court Usher, carry on.

G **The Trial is concluded.**

(POST-TRIAL MATTERS)

JUDGE ADVOCATE: Yes, well thank you very much Colonel for your assistance and thank you Mr Winter for your assistance. Are there any other matters?

H COL BARNETT: Just two matters, your honour. Firstly there is the Diary of Events.

A JUDGE ADVOCATE: Yes and then there must be perhaps an order with regard to the Glock?

COL BARNETT: Yes indeed your honour.

JUDGE ADVOCATE: Now does the army require another Glock?

B COL BARNETT: You may well recall your honour that we left it in abeyance as to whether you would make an order at all in relation to the previous Glock and in relation to the ammunition. I have taken some instructions. The ammunition if it is felt would be appropriate if you did make an order for its destruction because these things go out of date.

JUDGE ADVOCATE: So be it.

C COL BARNETT: Thank you, your honour. In relation to the Glock, the Service Police tell me that the easiest way to deal with those is for an order to be made for them to be transferred or a suggested order to the National Ballistics Centre, where apparently they have an interest in obtaining weaponry of this sort for evidential purposes I have explained.

JUDGE ADVOCATE: I so make that order.

D COL BARNETT: I am grateful your honour.

JUDGE ADVOCATE: Thank you very much indeed.

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CERTIFICATE

In the matter of:

Regina v Harold Nightingale

I, *David Allen CERQUA*, of Merrill Corporation, 8th Floor, 165 Fleet Street, London, EC4A 2DY, hereby certify that:

The proceedings of the above Court Martial have been produced to the best of my skill and ability.

Signed: *David A. Cerqua*

Date: *13th day of November 2012*