

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
D.O. VOLLENWEIDER, J.E. STOLASZ, C.P. NICHOLS
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**HECTOR GOMEZ
BOATSWAIN'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200500794
GENERAL COURT-MARTIAL**

Sentence Adjudged: 6 October 2004.

Military Judge: CAPT Ronald Leo, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA .

Staff Judge Advocate's Recommendation: CAPT R.I. Clove, JAGC, USN.

For Appellant: LCDR Evelio Rubiella, JAGC, USN; LT A.M. Souders, JAGC, USN.

For Appellee: LtCol J.F. Kennedy, USMCR; Maj Kevin Harris, USMC.

11 September 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of wrongful use of methamphetamine and wrongful distribution of methamphetamine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. He was found not guilty of wrongful distribution of marijuana. The appellant was sentenced to confinement for seven months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

Upon consideration of the record of trial, which was submitted without assignment of error, the court directed counsel to brief a specified issue concerning whether the evidence is factually sufficient to sustain the findings of guilty. Having carefully considered the record of trial, the briefs of the parties to the specified issue, we conclude that the findings and sentence are correct in law and fact and that there was no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

In April 2004, following a random urinalysis, several Sailors stationed onboard the USS THATCH tested positive for illegal substances including methamphetamine and marijuana. Thereafter, the Naval Criminal Investigative Service (NCIS) investigated the source of the drugs and other possible users. During the investigation, the appellant was implicated as a drug user and drug distributor by five different crewmembers. At trial, the Government presented six witnesses who testified as to their knowledge of the appellant's use of methamphetamine during the period August 2003 and March 2004, and his distribution of methamphetamine in November 2003.

Testimony of the Witnesses

Quartermaster Seaman (QMSN) Austin B. Richmond tested positive for methamphetamine during the April 2004 command urinalysis. He was interviewed by NCIS on 29 April 2004 and admitted to using methamphetamine on two occasions. Prior to testifying, he received nonjudicial punishment for his use of methamphetamine. He testified under a grant of testimonial immunity which required him to provide truthful testimony or face a court-martial. QMSN Richmond testified that he observed the appellant use methamphetamines a little more than ten times from January 2004 until March 2004. QMSN Richmond testified he saw the appellant use methamphetamine at two different house parties, in QMSN Richmond's car, and also around the appellant's family and friends during the aforementioned time frame.

Seaman Apprentice (SA) John L. Dees also tested positive during the command urinalysis, in his case for marijuana and methamphetamine. His case was disposed of at nonjudicial punishment after he agreed to testify against

the appellant pursuant to a grant of testimonial immunity. He estimated that he witnessed the appellant using methamphetamine on eight occasions between November 2003 and April 2004. More particularly, SA Dees testified that he saw the appellant use methamphetamine three times at Boatswain's Mate Second Class (BM2) Davis' house in Lemon Grove, California; twice while he was a passenger in SA Dees car, between January and April 2004; and once with SA Dees in the boatswain's locker under the forecastle while on watch between January and April 2004. SA Dees also testified that the appellant distributed methamphetamine to him on three occasions at his home in San Diego between November 2003 and 1 January 2004. On two of the occasions when the appellant distributed methamphetamine to SA Dees, the appellant also used methamphetamine. SA Dees also testified that the appellant admitted he was coming off of a high on four or five occasions before Christmas 2003.

SA Dustin T. Kindle was identified as a possible drug user during the NCIS investigation spawned by the April 2004 urinalysis conducted by the USS THATCH. He was interviewed by NCIS on 29 April 2004 and admitted his involvement with illegal drugs. The charges against SA Kindle were disposed of at nonjudicial punishment and he was granted testimonial immunity. SA Kindle testified the he went to a couple of bars in Port Hueneme with the appellant sometime between 29 October 2003 and 7 November 2003. He testified that at one of the bars the appellant motioned for SA Kindle to follow him to the restroom. While inside the restroom, the appellant displayed a bag with white powder which he then spread into two lines. SA Kindle snorted one of the lines through a rolled up dollar bill, and testified that his nose hurt, his eyes were watery and his "heart was really pounding." Record at 110. He indicated that he gave the dollar bill to the appellant to snort the other line. Although he did not see the appellant snort the line, he noticed the appellant was rubbing his eyes. When asked by the military judge if he could positively state that he used methamphetamine that the appellant had provided to him, SA Kindle answered affirmatively. *Id.* at 125.

Michael Dancause, a crewmember on the USS THATCH during the investigation who had transitioned to civilian life by the time of the trial, was also identified as a possible drug abuser during the NCIS investigation. He received nonjudicial punishment for his use of

methamphetamine prior to the end of his obligated service. Mr. Dancause testified voluntarily for the Government and admitted to using methamphetamine once a week starting in October of 2003 and that he used methamphetamine more than 20 times. He testified that he saw the appellant at the house he shared with Fire Controlman Second Class (FC2) Chalmers and Fire Controlman Seaman (FCSN) Kenny D. Dunn. He testified that while the appellant was at the house people were smoking methamphetamine. He further testified that he did not see the appellant use drugs.

Fire Controlman Seaman Recruit (FCSR) Kevin P. Smith was interviewed by NCIS on 19 May 2004 after he was apprehended while on unauthorized absence. FCSR Smith went to a special court-martial and pled guilty to use of marijuana and methamphetamines as well as unauthorized absence and missing movement. In return for his guilty pleas and testimony against the appellant, the confinement portion of his sentence was capped at 90 days. FCSR Smith testified that he smoked methamphetamine with the appellant in January 2004 while at FC2 Chalmers' apartment in Claremont, California. He also testified that while onboard the USS THATCH in a stern equipment room the appellant held up a bag with a white substance in it and offered him some "shit." He assumed the appellant was using street language for methamphetamines.

FCSN Kenny D. Dunn tested positive for methamphetamines and marijuana after a urinalysis on 24 May 2004. He pled guilty at a general court-martial to use of methamphetamines, use of marijuana, distribution of methamphetamines, unauthorized absence and missing movement. In return for his guilty pleas and testimony against the appellant, his confinement was capped at 19 months. He testified that he used methamphetamine with the appellant and BM2 Davis at BM2 Davis' house in August or September 2003, and in December 2003.

Legal and Factual Sufficiency

To convict the appellant of the specifications for use and distribution, the Government must prove that the appellant: 1. either used, or distributed a controlled substance; and, 2. that his possession, use or distribution was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV ¶ 37(b)(2)-(3). The test for legal sufficiency is whether, considering the evidence in the

light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 7 (C.A.A.F. 2000); see also Art. 66(c), UCMJ.

The test for factual sufficiency is whether after weighing the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art 66(c), UCMJ. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562. Furthermore, this court, in its fact-finding role, "may believe one part of a witness' testimony and disbelieve another." *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999)(quoting *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979)).

Accomplice Testimony

The appellant asserts that a conviction based solely on accomplice testimony is not factually sufficient if, as here, the testimony of the accomplices is "self contradictory, uncertain or improbable." Appellant's Brief of 15 Jun 2006 at 6. Since each of the witnesses who testified against the appellant was himself a user or distributor of drugs, and since their respective testimony was inconsistent, uncorroborated and untruthful, the appellant asserts that the evidence was not factually sufficient as to either charge. *Id.* 6, 7. However, the appellant is legally incorrect in assuming that every witness that testified against him is an accomplice. The test for determining whether a witness is an accomplice is whether the witness himself could be convicted for the same crime for which the defendant is being prosecuted. *United States v. Gibson*, 58 M.J. 1, 6-7 (C.A.A.F.2003)(citing *United States v. McKinnie*, 32 M.J. 141, 143 (C.M.A. 1991)).

Analysis

QMSN Richmond testified he directly observed the appellant smoke or snort methamphetamines on numerous occasions between January 2004 and March 2004. He also

testified that he only used methamphetamine in the presence of the appellant on one occasion, but did not recall if the appellant was using at the time. QMSN Richmond was not an accomplice on these occasions; he was a witness to the events that were taking place. He would only be an accomplice if he were using at the same time as the appellant. His testimony indicates that he did not use methamphetamine at the same time as appellant, except for possibly one occasion. We are convinced beyond a reasonable doubt, from our review of the record, that the testimony of QMSN Richmond is factually sufficient to support a guilty finding as to Specification 1 of Charge I, wrongful use of methamphetamine on divers occasions, between August 2003 and March 2004.¹ *Turner*, 25 M.J. at 325. In doing so, we have also considered QMSN Richmond's testimonial inconsistencies, his grant of immunity, and the fact that he himself was a drug user. We have also considered that we neither saw nor heard his testimony, but find neither of these factors dissuades us from our determination of factual sufficiency as to the appellant's use of methamphetamines on divers occasions.

We also find that SA Kindle was not an accomplice with the appellant on the occasion when the appellant distributed methamphetamine to him. SA Kindle could not have been convicted for the same crime for which the appellant was prosecuted, in this instance, distribution of methamphetamine. *McKinnie*, 23 M.J. at 143. The only crime SA Kindle could be prosecuted for was use of the drug. The testimony of SA Kindle clearly establishes that the appellant distributed an amount of methamphetamine to him while he was in the restroom of the bar in Port Hueneme, California. Even if we were to assume that SA Kindle was an accomplice with the appellant, we still find that his testimony is factually sufficient to find beyond a reasonable doubt that the appellant distributed methamphetamine to him in the restroom at the bar at or near Port Hueneme, California on or about November 2004. We have carefully reviewed SA Kindle's testimony and determined it was neither self contradictory, uncertain nor improbable, and conclude that it was not facially unreliable. *United States v. Williams*, 52 M.J. 218, 222 (C.A.A.F. 2000). We have also factored into our decision

¹ We also find QMSN Richmond's direct observations support the legal sufficiency of the military judge's findings of guilty to Specification 1 of Charge I.

the grant of testimonial immunity as well as testimonial inconsistencies, to the extent they exist, but note that neither of these factors stamp an accomplice's testimony as unbelievable as a matter of law. *Id.* We also recognize that the appellant put forth a strong good character defense, but also recognize that the character witnesses were testifying to their observations of the appellant while the ship was underway and not time spent with the appellant in their off duty hours. Record at 329, 347, 361. We are convinced beyond a reasonable doubt of the appellant's guilt to the charged offense of distribution of methamphetamine to SA Kindle.²

Since we find the evidence, based on the testimony of QMSN Richmond and SA Kindle, factually sufficient to support the findings of guilty against the appellant, as to Specifications 1 and 2 of Charge I, we will not address the appellant's contentions regarding the requirements for accomplice testimony as they pertain to other witnesses, specifically FCSN Dunn, SA Dees and FCSR Smith. However, assuming *arguendo*, that those witnesses were accomplices to the appellant, we do not find their testimony to be self contradictory, uncertain or improbable. *Williams* 52 M.J. at 222.

Conclusion

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

Senior Judge VOLLENWEIDER concurs.

NICHOLS, Judge (dissenting):

My brothers affirm the findings and sentence and I respectfully dissent.

The Court of Criminal Appeals is in the unique position among appellate courts to conduct a *de novo* review over the factual findings of a court-martial. "Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c),

² We also find SA Kindle's direct observations support the legal sufficiency of the military judge's findings of guilty to Specification 2 of Charge I.

UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The key factual question is whether the Government has met its burden of proof of guilt beyond a reasonable doubt.

The majority opinion accurately states the law regarding accomplice testimony and I agree with my brothers' conclusions about the instances in which Quartermaster Seaman (QMSN) Richmond and Seaman Apprentice (SA) Kindle were and were not the appellants' accomplices. Where my brothers and I part ways is in our conclusions as to the factual sufficiency to support appellant's convictions.

I have carefully considered the record of trial and the responses of the parties to our specified issue. I find the evidence factually insufficient to support the findings of guilt. Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

I. Facts

In April 2004, following a command urinalysis, several Sailors on the USS THACH tested positive for illegal substances including methamphetamine and marijuana. The positive tests sparked a Navy Criminal Investigative Service (NCIS) investigation into the sources of the drugs and other possible users. During the investigation, the appellant was implicated by other crewmembers.

At trial, the Government presented five witnesses – QMSN Austin B. Richmond, SA Dustin T. Kindle, Fire Controlman Seaman (FCSN) Kenny D. Dunn, Seaman Apprentice (SA) John L. Dees, and Fire Controlman Seaman Recruit (FCSR) Kevin P. Smith – who testified that they had seen the appellant use methamphetamine. According to the combined testimony, the witnesses saw the appellant use methamphetamine on at least 22 occasions – 19 between January and April 2004. Another witness, Michael Dancause, placed the appellant in a house where methamphetamine was used, but did not see the appellant use methamphetamine. SA Kindle testified regarding the single distribution of methamphetamine specification. Some of the other witnesses also testified that the appellant distributed methamphetamine and used and distributed marijuana. A civilian NCIS agent, Special Agent Joel Gossett, testified

about how methamphetamine and marijuana can be used, the physical symptoms of such use, and the value of different quantities of methamphetamine and marijuana.

I will discuss only the testimony that implicates the specifications for which the appellant was found guilty. Where relevant, I will describe the testimony in more detail. For the witnesses who testified that they saw the appellant use methamphetamine, the Government elicited testimony describing the substance taken, how it was used, the effects the witness observed on the appellant, and if the witness also used, the effects on the witness. These effects included being hyper, talkative, and carefree.

QMSN Richmond tested positive for methamphetamines. Record at 41. On April 28, 2004, he was the first of the Government's witnesses to be interviewed by NCIS. In the interview, he implicated the appellant for methamphetamine use and marijuana distribution. *Id.* at 87. He pled guilty to using methamphetamine, received nonjudicial punishment (NJP), and testified with immunity. At trial, he testified that he observed the appellant use methamphetamine "a little more than ten" times from late January to March 2004. Record at 51, 57-60. QMSN Richmond saw the appellant use methamphetamine at Boatswain's Mate Second Class (BM2 Davis') house in Lemon Grove, California, at Fire Controlman Second Class (FC2) Chalmers' house, in QMSN Richmond's car, and around the appellant's family and friends in the El Centro, Calexico area of California. He said the appellant admitted to using before he joined the Navy and to weekend use between January and March 2004. *Id.* at 61. He never used methamphetamine at the same time as the appellant. *Id.* at 102.

SA Dees also tested positive after the April urinalysis. *Id.* at 243. NCIS interviewed him the same day as QMSN Richmond. *Id.* SA Dees implicated the appellant for use of methamphetamine and distribution of marijuana and methamphetamine. He said that in exchange for his testimony against the appellant, the Navy would "drop all my charges and not send me to court-martial, but to captain's mast." *Id.*

At trial, SA Dees testified that he had seen the appellant use methamphetamine on eight occasions between November 2003 and April 2004. He said that on three occasions between November 2003 and New Years, the

appellant had distributed methamphetamine to him and his wife at their home in San Diego. On two of these occasions, the appellant used methamphetamine. *Id.* at 248-52. Between January and April 2004, he saw the appellant use methamphetamines three times at BM2 Davis' house in Lemon Grove, California and two times in his car. *Id.* at 247-48, 260-61. Furthermore, he testified that while on watch one night between January and April 2004, he smoked methamphetamine with the appellant in the boatswain's locker underneath the forecastle. *Id.* at 262-64. Finally, four or five times before Christmas 2003, while at work, the appellant admitted that he was coming off a high. *Id.* at 267.

NCIS interviewed SA Kindle on 29 April 2004. *Id.* at 115. After the NCIS agents told him they had statements about SA Kindle and the appellant using methamphetamine, he told the agents about distribution and use of methamphetamine. *Id.* at 120. Like QMSN Richmond and SA Dees, SA Kindle received NJP in exchange for pleading guilty to use of methamphetamine and testifying against the appellant.

At trial, SA Kindle testified that sometime between 29 October 2003 and 7 November 2003, he and the appellant went to bars in Port Hueneme. *Id.* at 160. While he could not remember how he and the appellant came to be together or the names of the bars they visited, he did remember they had a driver, Seaman (SN) Gonzalez Sanchez, who did not go into the bars. *Id.* at 107. He said that while in one of the bars, the appellant motioned for him to go into the restroom, showed him a bag with a white powder in it, and made two lines of the powder. *Id.* at 108-09. SA Kindle snorted one of the lines using a rolled-up dollar bill. His nose hurt, his eyes were watery and his "heart was really pounding." *Id.* at 110. After snorting the powder, SA Kindle handed the rolled-up bill to the appellant "so that he would do the other one." *Id.* He did not see the appellant do the other line, but when he stopped rubbing his eyes, the appellant was also rubbing his eyes. *Id.* After returning to the ship, SA Kindle "stayed up all night, racing." *Id.* Other than rubbing his eyes and snorting, SA Kindle did not see any change in the appellant's behavior. *Id.* at 110-11. The military judge asked SA Kindle if he could positively state that he used methamphetamine and that the appellant gave him the

methamphetamine. SA Kindle answered affirmatively. *Id.* at 125.

Later in the afternoon, after SA Kindle's interview, NCIS agents interviewed Mr. Dancause. *Id.* at 187. At the time of the investigation, he was attached to the USS THACH and roommates with another suspected drug user, FC2 Chalmers. *Id.* at 176. Mr. Dancause was not asked about the appellant and did not bring him up because he had no reason to believe that he was using drugs. *Id.* at 188. Mr. Dancause, a civilian at the time of the appellant's trial, testified voluntarily for the Government. *Id.* at 176. On August 19th or 20th, 2004, he received nonjudicial punishment for using drugs and left the Navy on August 21st, when his enlistment expired. *Id.* at 189.

At trial, Mr. Dancause testified that he saw the appellant at FC2 Chalmers' house on two occasions around February or March of 2004, but did not observe the appellant using drugs. He said the appellant was in FC2 Chalmers' room and there were methamphetamine pipes laying around and methamphetamine on the table "lined up to use." *Id.* at 179. Upon questioning from the Government, he said he would observe people smoking and using methamphetamine in FC2 Chalmers' room.

On 19 May 2004, the NCIS interviewed FCSR Smith after he was apprehended while on unauthorized absence. *Id.* at 143. In the interview, he named FC2 Chalmers and FCSN Dunn as drug dealers on USS THACH. *Id.* at 161-62. Pursuant to a pretrial agreement (PTA) in his special court-martial, FCSR Smith pled guilty to use of methamphetamine and marijuana, distribution of methamphetamine, unauthorized absence, and missing movement. In return for the guilty pleas and his testimony against the appellant, FCSR Smith received a 90-day cap on his confinement, which shaved five months off of his adjudged confinement of eight months.

FCSR Smith testified that in January 2004, he and the appellant smoked methamphetamine from a pipe in FC2 Chalmers' old apartment in Clairemont, California. *Id.* at 142-43. He also said the appellant had offered him marijuana on three different occasions at FC2 Chalmers' house. *Id.* at 135-39. Responding to questions from the military judge, FCSR Smith said that in January or February 2004, in a stern equipment room on the USS THACH, the appellant held up a baggy filled with a white substance and

offered him some "shit". Based on the street language, he assumed it was methamphetamine. *Id.* at 171-72.

FCSR Smith lived with Mr. Dancause and FC2 Chalmers for a month. *Id.* at 148-49. Between December and May 2004, FCSR Smith said he used methamphetamine heavily for four or five weeks. Both FC2 Chalmers and FCSN Dunn gave him methamphetamine and he also purchased \$200-\$250 worth of methamphetamine. *Id.* at 150-52.

FCSN Dunn tested positive for methamphetamine and marijuana from a urinalysis on 24 May, 2004. *Id.* at 239. He pled guilty at a general court-martial to use of methamphetamine, use of marijuana, distribution of methamphetamine, unauthorized absence and missing movement. Specifically, he admitted that he had used methamphetamine and marijuana every day from September 2003 to May 2004. *Id.* at 231. He testified in the appellant's case pursuant to a PTA under which the convening authority capped his confinement at 19 months. He faced a potential sentence in excess of 20 years. *Id.* at 215.

From 24 May to mid-August 2004, Dunn was confined with FC2 Chalmers and FCSR Smith. He testified that while in confinement, he and FC2 Chalmers and FC2 Smith, would discuss their cases and sentencing daily. *Id.* at 225. On 21 August, 2004, FCSN Dunn was moved into special quarters. *Id.* at 238. FCSN Dunn told the military judge that he did not talk about the appellant while in pretrial confinement with FC2 Chalmers and FCSR Smith. *Id.* at 240.

At trial, FCSN Dunn testified that he and BM2 Davis snorted methamphetamine with the appellant twice at BM2 Davis' house – the first time, in August or September of 2003, and the last time in December 2003.

II. Sufficiency of the Evidence

At trial, the defense attacked the credibility and motives of the Government's witnesses. On appeal, the appellant couches the same arguments in terms of the former rule regarding uncorroborated accomplice testimony that is self-contradictory, uncertain, or improbable. In each instance, the adverse information was countered by trial counsel's examination of the witnesses. Ultimately, proving the appellant was guilty beyond a reasonable doubt came down to credibility. Recognizing that the military

judge saw and heard the witnesses, I am not convinced of the appellant's guilt beyond a reasonable doubt.

A. Distribution of Methamphetamine

The appellant's conviction for Specification 2 rests solely on the uncorroborated testimony of SA Kindle. The appellant argues that SA Kindle's testimony is uncertain, improbable, and uncorroborated. I agree that the testimony regarding the appellant's distribution of methamphetamine in Port Hueneme is uncorroborated.

At trial, SA Kindle was uncertain of most details except those necessary to convict the appellant. He said he was drunk. He could not recall how he and the appellant came to go out together or what bars they visited. The only fact about which he was positive was that the appellant had provided him methamphetamine. On direct examination by the military judge, he said:

Q. . . . [D]o you have any clear recollection of what occurred that--that evening or that night?

A. Yes, sir.

Q. I mean, can you state positively that you--that you used methamphetamine

A. Yes, sir.

Q. And can you state positively that you believe that it was with--that it was the accused who gave you this methamphetamine?

A. Yes, sir.

Q. Did you--did you submit to a urinalysis test following that use--your use?

. . . .

A. I did not take a urinalysis right after the use of--of drugs that night, sir.

Q. Okay. So you were never tested?

A. No sir.

Record at 125-26. Facially, this testimony addresses the elements necessary to convict for distribution. Indeed, it must have satisfied the military judge of the appellant's

guilt beyond a reasonable doubt. Recognizing that the military judge saw and heard the testimony of SA Kindle, I am not, however, convinced beyond a reasonable doubt that the appellant is guilty of distribution of methamphetamine.

In examining SA Kindle's testimony, I am deeply troubled by the lack of testimony from SN Sanchez, the driver on the trip to Port Hueneme. It seems highly unusual that he would stay in the car all night as SA Kindle testified. In his absence, I am left to wonder: Would he have denied that he drove SA Kindle and the appellant to Port Hueneme? Would he have contradicted SA Kindle's testimony regarding the distribution of methamphetamine? Since the burden is on the Government to establish guilt, the Government's case bears any adverse inferences from the failure to produce evidence to answer these questions. Based on SA Kindle's uncorroborated testimony, I am not convinced beyond a reasonable doubt that the appellant distributed methamphetamine.

B. Use of Methamphetamine

At trial, the defense vigorously attacked the motives, credibility, and reliability of the Government's primary witnesses. Five of the Government's witnesses testified pursuant to pretrial agreements for which they received mitigation in their own sentences. Also, even though the Government presented six witnesses who alleged multiple uses of methamphetamine, none of these testified about the same instance of the appellant's alleged use of methamphetamine. Additionally, superiors from the USS THACH testified that some witnesses had poor reputations for truthfulness. Moreover, there were inconsistencies of varying degrees between the testimony at the Article 32 investigation and that at trial. These are all issues I considered in assessing the credibility of the witnesses as part of my Article 66(c), UCMJ, duty.

"[N]either grant of immunity nor testimonial inconsistencies stamp an accomplice's testimony as unbelievable as a matter of law." *United States v. Williams*, 52 M.J. 218, 222 (C.A.A.F. 2000). Similarly, testimony procured through pretrial agreements is not rendered *de facto* unbelievable. I do, however, find the agreements noteworthy. SA Dees testified that he agreed to testify because the Government would drop all his charges. Both FCSN Dunn and SA Dees received a significant sentence

limitation. Even Mr. Dancause, who testified "voluntarily", gives me some pause. He says he used methamphetamine more than 20 times, yet he received nonjudicial punishment and was allowed to leave at his enlistment's natural expiration.

Character evidence may itself generate reasonable doubt in the fact-finder's mind. *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985); *United States v. Kahakauwila*, 19 M.J. 60 (C.M.A. 1984). A person of good military character is less likely to commit offenses, which strike at the heart of military discipline and readiness. *Vandelinier*, 20 M.J. 45. The appellant's character witnesses established his reputation for good military character, outstanding performance, and dependability. I am mindful that the appellant's character witnesses did not spend time with him after hours. On balance with the Government's witnesses, and recognizing that the military judge observed the witnesses, I remain unconvinced that the appellant is guilty beyond a reasonable doubt

I find it significant that despite the appellant's abundant alleged drug use, no two witnesses were present at the same time that the appellant allegedly used methamphetamine. Similarly, while Richmond and Dees said the appellant arrived at work coming off methamphetamine, the appellant's superiors attested to his outstanding performance and military bearing. This evaluation is in stark contrast to the characterization of the admitted methamphetamine users, QMSN Richmond, SA Dees, and SA Dunn. I have a reasonable doubt that the appellant's performance would not suffer if he truly was coming down off a high when he arrived at work as alleged.

Only one specific use of methamphetamine was allegedly corroborated. That being SA Dees' account that he and the appellant smoked methamphetamine under the forecastle. SA Kindle testified that one morning the appellant had admitted to using methamphetamine under the forecastle with SA Dees. At trial, SA Kindle could not say, without prompting, what time of year the appellant made this admission. He was able to say, "Yes, ma'am" to trial counsel's questions until the dates were resolved. At his NCIS interview, SA Kindle was asked if the incident on the forecastle could have been as far back as 2002 and answered, "Yes, ma'am, possibly." *Id.* at 129. He explained that at the time he was "a little nervous and

[he] wasn't thinking straight." *Id.* Combined with his answers to the military judge regarding the distribution specification, SA Kindle's testimony seems reflective of a pattern of deference to questions from law enforcement. Noting that NCIS interviewed SA Dees the day before SA Kindle and that SA Kindle did not mention the appellant until prompted, I am not convinced that the forecastle incident was not just another question to which SA Kindle said, "Yes."

As a result of the apparent drug problem on the USS THACH, NCIS conducted a highly motivated investigation. One of the defense's principal arguments is that the appellant was swept up in the tide. QMSN Richmond and SA Dees implicated the appellant on the first day of the investigation. Both failed their drug tests. The defense raised the motivation that QMSN Richmond was mad at the appellant. SA Dees admitted that he lied to the NCIS investigators about some of the drug buyers he named. At trial, he denied that naming SA Kindle had been a lie, but I have no doubt that after interviewing QMSN Richmond and SA Dees, the appellant and SA Kindle were targets of the NCIS investigation. Furthermore, the appellant's character witnesses impeached QMSN Richmond's and SA Dees' reputation for truthfulness.

FCSN Dunn's uncorroborated testimony has little credibility. Facing a possible 20-year sentence, he had one of the strongest motives to strike a deal. Furthermore, FCSN Dunn had the opportunity to discuss the case while in confinement with FCSR Smith and FC2 Chalmers, further undermining his credibility.

Ultimately, the lack of any physical evidence and untainted witness testimony leaves me with a lingering, reasonable doubt. The testimony of the Government's case relied on the testimony of six witnesses testifying in exchange for some form of leniency. In contrast, the character witnesses for the appellant established his reputation for good military character and outstanding performance and dependability. I recognize that the military judge heard all of these arguments and personally observed the witnesses, however, I am not convinced of the accused's guilt beyond a reasonable doubt.

Conclusion

Based on the entire record, recognizing that the trial court saw and heard the witnesses, I am not convinced that the Government has sustained its burden of proof in this case. I would set aside the findings of guilty and the sentence and would dismiss the charge and specifications. I would restore all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence.

While I respect my brothers' decision, I do not believe this conviction would stand in any other court in this country. We owe more, not less, to those who wear the uniform - even those accused of bringing dishonor to it. Our historic role of oversight in this system of military justice demands no less.

For the Court

R.H. TROIDL
Clerk of Court

Judge NICHOLS participated in this decision prior to detaching from the court.