

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

**Before
J. FELTHAM, J.W. ROLPH, F.D. MITCHELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW W. MAGALHAES
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200602480
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 March 2006.

Military Judge: LtCol P. Ware, USMC.

Convening Authority: Commanding Officer, Marine Wing
Support Squadron 371, Marine Wing Support Group 37, 3d
Marine Wing, MCAS Yuma, AZ.

Staff Judge Advocate's Recommendation: Col V.A. Ary, USMC

For Appellant: LT Darrin W.S. MacKinnon, JAGC, USN

For Appellee: LT Derrek D. Butler, JAGC, USN

21 February 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

ROLPH, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of two specifications of making a false official statement; wrongful possession of Chlordiazepoxide, a Schedule IV controlled substance; and obstruction of justice by wrongfully endeavoring to impede an investigation, in violation of Articles 107, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 912a, and 934. The appellant was found not guilty of a charge

and single specification alleging wrongful distribution of Oxycodone on divers occasions in violation of Article 112a, UCMJ.

After carefully considering the record of trial, the appellant's ten assignments of error,¹ and the various briefs submitted by counsel for the appellant and the Government, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

In November 2005, the appellant was an active-duty Marine suspected of wrongful distribution of Oxycodone to a fellow Marine, Private First Class (PFC) [M]. PFC [M] informed Marine Corps Criminal Investigation Division (CID) investigators that

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- ¹ I. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO CONVICT APPELLANT OF FALSE OFFICIAL STATEMENTS AND ATTEMPTING (SIC) TO IMPEDE AN INVESTIGATION.
- II. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO DISMISS ALL CHARGES BASED ON UNLAWFUL COMMAND INFLUENCE.
- III. APPELLANT'S RIGHT TO DUE PROCESS IN HIS APPEAL HAS BEEN UNDERMINED BECAUSE THERE ARE SUBSTANTIAL AND MATERIAL ITEMS MISSING FROM HIS COURT-MARTIAL RECORD OF TRIAL.
- IV. APPELLANT DID NOT VIOLATE ARTICLE 107, UCMJ, WHEN HE STATED THAT HE "HAD TO S--- [DEFECATE]" BECAUSE SUCH A STATEMENT WAS NOT OFFICIAL.
- V. THE SPECIFICATION ALLEGING THAT APPELLANT'S STATEMENT THAT HE "HAD TO S--- [DEFECATE]" SHOULD BE SET-ASIDE PURSUANT TO THIS COURT'S ARTICLE 66 SENTENCE APPROPRIATENESS AUTHORITY UNDER THE DOCTRINE OF *DE MINIMIS NON CURAT LEX*.
- VI. THE CONVENING AUTHORITY AND THE SJA SHOULD HAVE DISQUALIFIED THEMSELVES FROM APPELLANT'S CASE BECAUSE THEY EFFECTIVELY EXTENDED PROMISES OF IMMUNITY OR CLEMENCY TO PRIVATE MCGUFFIN, A PROSECUTION WITNESS, REDUCING HIS CASE FROM A SPECIAL COURT-MARTIAL TO A SUMMARY COURT-MARTIAL, IN EXCHANGE FOR HIS TESTIMONY AGAINST APPELLANT.
- VII. APPELLANT CUT OFF CONSENT TO THE SEARCH OF HIS BARRACKS ROOM BY HIS ACT OF SLAMMING THE BATHROOM DOOR ON THE GOVERNMENT AGENT.
- VIII. INVESTIGATORS ILLEGALLY CUT OFF THE FUNDAMENTAL RIGHTS OF APPELLANT'S CO-OCCUPANTS TO OBJECT TO THE CONSENT SEARCH.
- VIII.
- IX. APPELLANT'S CONVICTION FOR HIS STATEMENT THAT HE "HAD TO S--- [DEFECATE]" VIOLATED HIS VITAL INTEREST IN LIBERTY AND PRIVACY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.
- X. APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POSTTRIAL [sic] REVIEW WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN THE POSTTRIAL [sic] PROCESSING.

the appellant was his source for Oxycodone after he tested positive for such on a randomly administered urinalysis. The appellant, when approached by CID investigators concerning the allegation, voluntarily consented to a permissive search of his barracks room. Two CID investigators, Agents Mock and Goforth, escorted the appellant to his barracks to execute the consent search. While Agent Mock was checking in with the barracks duty noncommissioned officer to inform that individual of the pending room search, the appellant clandestinely left the presence of both agents and headed rapidly up the stairs towards his room. One of the investigators, Agent Goforth, eventually spotted the appellant "running" towards his room. Just as the CID agents caught up to the appellant, he entered his room and slammed the door shut behind him. Because the door was locked, the CID agents banged on it demanding to be let in. After approximately 30 seconds, the door was finally opened by the appellant, who, according to both agents, appeared extremely "nervous and fidgety."

Shortly after the agents entered the room, the appellant unlocked his locker and secretary desk for them in a nervous manner, and then announced, "I have to s--- [defecate]." He then ran into the bathroom, slamming and locking the stall door behind him. Agent Mock immediately pursued the appellant into the head, pounded on the stall door, and instructed him to "come out of there." The appellant did not come out, but remained in the stall 20 to 30 seconds, flushed the toilet once, and then exited the stall. Agent Mock was highly suspicious of the appellant's claim of having to defecate. Though a flatulent sound came from the stall while occupied by the appellant, Agent Mock smelled no odor, heard no "splash," and did not hear the appellant unroll the toilet paper. Also, when the appellant emerged from the stall, he was not adjusting his pants in any way and did not wash his hands.

Agent Mock subsequently noticed a lone pill sitting in the bottom of the toilet. An empty pill bottle was also found on the bathroom counter. By the time the agents were able to acquire the materials necessary to seize the pill, it had dissolved. Water samples taken for analysis eventually tested "inconclusive" for the presence of controlled substances. The appellant claimed that the pill was left over from "old heartburn medications that I tried to flush down the toilet days ago." Record at 91. Three other individuals shared this bathroom and toilet with the appellant. Ultimately, a number of prescription medication bottles were seized from the medicine cabinet in the appellant's head, along with a bottle of "Tylenol

P.M." pills which also contained a lone, "odd-ball" pill of Chlordiazepoxide, a Schedule IV controlled substance, which formed the basis for the Additional Charge alleging wrongful possession.

The false official statement specifications the appellant was convicted of represent the two separate statements made by him to the CID agents while in his barracks room. They include the statement, "I have to s--- [defecate]" or words to that effect (Charge I, Specification 1), and "The pills in the toilet were old heartburn medication that I tried to flush down the toilet the other day" or words to that effect (Charge I, Specification 2). The obstruction of justice conviction (Charge III, Specification) flows from the appellant's act of flushing evidence (pill(s)) down the toilet during the course of the permissive search.

Legal and Factual Sufficiency of the Evidence

In his first assignment of error (AOE), the appellant asserts that the evidence presented at his court-martial was both legally and factually insufficient to convict him of making false official statements in violation of Article 107, UCMJ; of obstruction of justice by wrongfully endeavoring to impede an investigation by destroying evidence in violation of Article 134, UCMJ; and of wrongful possession of Chlordiazepoxide in violation of Article 112a, UCMJ. We disagree.

This court has a duty under Article 66(c), UCMJ, to affirm only those findings of guilty that we find to be correct in both law and fact. The long established test for assessing the legal sufficiency of the evidence is whether, considering all the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. The test for assessing the factual sufficiency of the evidence is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the military judge as fact finder, this court is nevertheless convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Our reasonable doubt standard does not require that the evidence presented be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may properly believe one part of a witness' testimony while disbelieving other aspects of the testimony, or may chose to believe one witness' testimony over

that of another. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

To convict the appellant for making false official statements as alleged under Article 107, UCMJ, the Government had to prove the following elements beyond a reasonable doubt:

1. That the appellant made a certain official statement;
2. That the statement was false;
3. That the appellant knew it to be false at the time he made the statement; and
4. That the statement was made with the intent to deceive.

To convict the appellant of wrongful possession of a controlled substance (Chlordiazepoxide) as alleged under Article 112a, UCMJ, the Government had to prove the following elements beyond a reasonable doubt:

1. That the appellant possessed a certain amount of a controlled substance (Chlordiazepoxide); and
2. That the possession by the appellant was wrongful.

To convict the appellant for obstruction of justice (wrongfully endeavoring to impede an investigation) as alleged under Article 134, UCMJ, the Government had to prove the following elements beyond a reasonable doubt:

1. That the appellant wrongfully did a certain act;
2. That the appellant did so in the case of a certain person [himself] against whom he had reason to believe there were or would be criminal proceedings pending;
3. That the act was done with the intent to impede the due administration of justice; and
4. That, under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 31 (false official statement), ¶ 37 (wrongful use of controlled substance), and ¶ 96 (obstruction of justice).

Having weighed all the evidence in the record of trial and recognizing that we did not personally see or hear the witnesses,

as did the finder of fact, we are nevertheless convinced of the appellant's guilt of both specifications under Charge I, the sole Specification under Charge III, and the Additional Charge and Specification beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. In our opinion, the direct and circumstantial evidence of the appellant's guilt on all offenses was compelling and highly persuasive.

We are similarly convinced that the military judge, considering all the evidence in a light most favorable to the Government, could have found the elements of each offense beyond a reasonable doubt, and, therefore, that the evidence of the appellant's guilt is legally sufficient.

The appellant's two separate false official statements were obviously made to facilitate his wrongful destruction of potentially incriminating evidence by flushing it down the toilet in his barracks room in the midst of an ongoing consent search, then covering up the true nature of his action. The direct and circumstantial evidence of record clearly established that the appellant had something to hide, and was adamant about doing so despite his seemingly compliant nature in originally consenting to the search. We are specifically satisfied that both false statements were "official" in nature.² *See United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003); *United States v. Caballero*, 37 M.J. 422 (C.M.A. 1993).

Official statements "include all . . . statements made in the line of duty." MCM, Part IV, ¶ 31c(1). Military courts have routinely cited the Federal civilian counterpart statute, 18 U.S.C. § 1001, in determining the scope of Article 107, UCMJ. The scope of Article 107, however, is more expansive than its civilian counterpart "because '[t]he primary purpose of military criminal law -- to maintain morale, good order, and discipline -- has no parallel in civilian criminal law.'" *Teffeau*, 58 M.J. at 68-69 (citing *United States v. Solis*, 46 M.J. 31, 34 (C.A.A.F. 1997)). Even with this more expansive definition and purpose, not every false statement by a servicemember rises to the level of a false official statement, as the circumstances surrounding the making of such statement assist in determining whether the servicemember was in the line of duty while making the statement. *Compare Teffeau*, 58 M.J. at 62 with *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994). "Where a statement is made to a military person, the official capacity of the person receiving the statement is likely to be conclusive on the issue of whether the statement is official. In such a case, the line-of-duty question likely need not be raised." *United States v. Caballero*, 65 M.J. 674, 676 (C.G.Ct.Crim.App. 2007).

² Our ruling on this issue also resolves AOE IV.

Here, the appellant made his two false statements to military investigators on a military base, while in a military barracks room in uniform, and in the midst of the execution of a military consent search. The first false statement was made in an effort to mask the appellant's "escape" to the bathroom in order to obstruct the investigation by disposing of potential evidence down the toilet. We are not dissuaded from our viewpoint in this regard by the fact that this first statement was spontaneous, and not made in response to official questioning. The appellant's second statement concerning the nature of the pill found in the toilet was clearly intended to deceive the investigators regarding the action he had just accomplished, as well as the nature of the substance(s) involved. Under the circumstances in which both statements were rendered, we find them to be "official" in all respects, and rendered specifically to deceive the investigators and facilitate the appellant's scheme for impeding the investigation.

We are similarly disposed in regard to the legal and factual sufficiency of the obstruction of justice charge. The UCMJ's prohibition against obstruction of justice has as its overriding concern the protection and sanctity of the administration of justice within our military system. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989). The term "criminal proceeding" as used in defining this offense has been interpreted broadly, and includes lawful searches³ and criminal investigations conducted by police or command authorities.⁴ See Military Judges' Benchbook, Dept of the Army Pamphlet 27-9 at 686 (15 Sep 2002).

When an accused acts to destroy evidence in the case of a person (including himself) against whom he has reason to believe there is or will be a criminal investigation or proceeding, having the subjective intent to impede such, he has obstructed justice. *United States v. Lennette*, 41 M.J. 488, 490-91 (C.A.A.F. 1995); *United States v. Jones*, 20 M.J. 38, 40 (C.M.A. 1985); accord *United States v. Gravely*, 840 F.2d 1156, 1160-61 (4th Cir. 1988). As a general rule, property owners are free to dispose of their property in whatever manner they wish. *United States v. Richards*, 63 M.J. 622, 630 (Army Ct.Crim.App. 2006); *United States v. Davis*, 62 M.J. 691, 694-95 (Army Ct.Crim.App. 2006), *set aside and remanded on other grounds*, 64 M.J. 173 (C.A.A.F. 2006)(summary disposition). However, as our Army brethren

³ See *United States v. Turner*, 33 M.J. 40, 42 (C.M.A. 1991)("When a servicemember obstructs a search, one can clearly state that a criminal investigation is being impeded.").

⁴ See *United States v. Athey*, 34 M.J. 44 (C.M.A. 1992); *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989); *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990).

observed in *Davis*, an otherwise lawful act may become wrongful and constitute obstruction of justice if it is performed for an improper purpose. 62 M.J. at 694. When a normally lawful disposal of property is accomplished primarily because it is evidence of wrongdoing, the act "negatively affects society and crosses the line from legal to wrongful activity." *Id.* at 695 (citing *United States v. Reeves*, 61 M.J. 108 (C.A.A.F. 2005)).

Having carefully reviewed the evidence concerning the appellant's destruction of potentially incriminating evidence (pill(s)) during the course of the CID agents' search of his barracks room, we are convinced that the military judge, considering all the evidence in a light most favorable to the Government, could have found the elements of this offense beyond a reasonable doubt, and, therefore, that the evidence of the appellant's guilt is legally sufficient. We are ourselves convinced of the appellant's guilt beyond a reasonable doubt. This issue is without merit.

Unlawful Command Influence and "Accuser" Issues

In his second AOE, the appellant alleges that the military judge abused his discretion when he failed to dismiss all charges based on the convening authority becoming an "accuser," and exercising unlawful command influence (UCI) over the appellant's case. We disagree.

The convening authority in this case, Lieutenant Colonel (LtCol) P.W. Woody, USMC, conducted a number of "command visitations" with the appellant during the period that the appellant was in pretrial confinement at the Marine Corps Air Station, Yuma, AZ., awaiting trial. The appellant belonged to LtCol Woody's unit, and LtCol Woody had a policy of trying to personally visit any command member placed into pretrial confinement.

LtCol Woody testified that his visitations with the appellant generally related to providing assistance for medical and dental problems, obtaining uniform items, procuring a new military identification card, and dealing with various personal problems (e.g., a stolen wallet, and arranging communications with family members). However, on more than one occasion, LtCol Woody engaged in conversations with the appellant that related to his pending court-martial and the nature of the evidence against him. The appellant generally initiated the conversations that related to his pending court-martial. On one occasion, he asked LtCol Woody why his accuser's (PFC M's) version of the facts was being viewed as more credible than his own, despite the fact that PFC M was an admitted drug user and

pending disciplinary action himself. LtCol Woody responded by stating that he could not discern any motive on the part of PFC M to fabricate his version of the facts, and, when combined with the testimony of the CID agents concerning the appellant's actions during the consent search, the evidence against him "looked bad." In an unusual analogy to the "Pythagorean Theorem,"⁵ LtCol Woody told the appellant, "a-squared plus b-squared is not equaling c-squared" or words to that effect. LtCol Woody also spoke directly with the appellant's mother concerning several aspects of the appellant's pending trial, including the limited experience of his detailed defense counsel. The military judge entered numerous findings of fact in regard to the defense motion to dismiss all charges based on UCI, including the following:

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8. During several of the command visits by [LtCol] Woody, the merits of the case were discussed with PFC Magalhaes without counsel present or reading him his rights under Article 31(b), UCMJ.
9. On each occasion when the merits were discussed, it was always initiated by the accused, who repeatedly asked why his accuser's story, [PFC] [M], was more credible than his.
10. On one such occasion, the accused produced documentary evidence in his possession and LtCol Woody told him he needed to provide it to his counsel.
11. LtCol Woody told the accused that his story, when compared to [PFC] [M]'s and CID's was analogous to the pathagorium theory (sic) and drew a diagram of it on the back of a command visit record form during a visit on 25 Jan 06.
12. LtCol Woody made arrangements at the accused's request with the accused's family to notify the accused's mom [of the accused's legal problems] through contact with

⁵ In Euclidian geometry, the Pythagorean Theorem is a relation among the three sides of a right triangle. The theorem states that, in any right triangle, the area of the square whose side is the hypotenuse (the side opposite the right angle) is equal to the sum of the areas of the squares whose sides are the two legs (the two sides that meet at a right angle). This is usually summarized as: *The square of the hypotenuse is equal to the sum of the squares on the other two sides.* Thus, if c is the length of the hypotenuse and a and b are the lengths of the other two sides, the theorem is often expressed as the equation $a^2+b^2=c^2$. See http://en.wikipedia.org/wiki/Pythagorean_theorem

- his dad, who would relay to his sister, and then to his mother.
13. [LtCol] Woody told PFC Magalhaes that he was hurting his mother's feelings by not being "up front" with her about his past drug use that resulted in him being convicted at SCM and confined in the brig at Camp Pendleton and being administratively processed for separation with an OTH.
 14. [LtCol] Woody discussed witnesses with PFC Magalhaes and made the only three Marines requested, Spaulding,⁶ Leett (sic),⁷ and Pujowski (sic),⁸ available to defense counsel and to testify at trial.
 15. LtCol Woody discussed a number of different issues with the accused during his visits to include medical and dental appointments needed, arrangements to get (sic) to the bank to resolve lost credit card issues, and brig visits by other unit personnel requested by the accused.
 16. [LtCol] Woody did not speak with anyone in the accused's chain of command about their willingness or ability to testify on behalf of the accused.
 17. The accused has not requested an individual military counsel.
 18. The accused has not sought civilian counsel.
 19. The accused's mother, Ms. Magalhaes, initiated contact with LtCol Woody, who passed her phone number to the accused.
 20. Ms. Magalhaes seemed distraught about the accused's situation and thought the charges were "trumped up" against him.
 21. The accused's mother was under the impression that [detailed] defense counsel was inexperienced and would not do a good job representing the accused.
 22. Ms. Magalhaes has never expressed any reservations or concerns to [detailed] defense counsel concerning representation of the accused.
 23. The accused's mother has not hired civilian counsel for the accused, though she was willing to mortgage her home if necessary to pay the counsel.
 24. The accused is satisfied with his [detailed] defense counsel, Capt [S].
 25. LtCol Woody never gave the accused any advice concerning his counsel.

⁶ Corporal (Cpl) Ryan M. Spaulding, USMC.

⁷ Cpl Christopher Leet, USMC.

⁸ Cpl Christopher Kujawaski, USMC.

26. The accused has not entered [into] nor is he seeking a PTA [pretrial agreement].
27. LtCol Woody never brought up the possibility of entering [into] a PTA in discussions with the accused.
28. LtCol Woody has never expressed any animosity towards the accused and is willing to accept him back into the command should he be acquitted.
29. LtCol Woody is also willing to objectively consider any clemency request that may be submitted on behalf of the accused should he be found guilty.
30. LtCol Woody is willing to make any other witnesses in the accused's chain of command available to testify should they be requested by [the] defense.

Appellate Exhibit VIII at 2-4.

The military judge concluded that LtCol Woody neither had a personal interest in the appellant's case that would render him an "accuser," nor had he attempted to unlawfully influence either the appellant or his court-martial by speaking with the appellant about his case. AE VIII at 4. The military judge went on to rule that "[t]he evidence in this case supports BARD [beyond a reasonable doubt] that LtCol Woody has not committed [UCI] in this case." *Id.* However, the military judge did determine that an "appearance" of UCI had been created by LtCol Woody's actions which would cause a reasonable member of the public to harbor "substantial doubt as to the legality, fairness, and impartiality of the proceedings." *Id.* Though he denied the appellant's motion to dismiss all charges and specifications on the basis of UCI, the military judge did disqualify LtCol Woody, from the date of his ruling forward, from serving as the convening authority in the appellant's case, and directed that competent superior authority in Woody's chain-of-command assume convening authority responsibilities. *Id.* at 5.

Discussion

UCI has often been referred to as "the mortal enemy of military justice." *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004)(quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). UCI has the potential to insidiously erode the very foundations of fundamental fairness, due process, and true justice. Article 37(a), UCMJ, firmly prohibits UCI:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or,

by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case. . . .

Even the mere appearance of UCI may be "'as devastating to the military justice system as the actual manipulation of any given trial.'" *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000)(quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)). Apparent UCI occurs when "a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." *United States v. Allen*, 31 M.J. 572 , 590 (N.M.C.M.R. 1990)(citing *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979), *aff'd*, 33 M.J. 209 (C.M.A. 1991)). The law is also crystal clear in condemning any UCI directed against prospective witnesses at a court-martial. *Gore*, 60 M.J. at 185; *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996); *United States v. Gleason*, 43 M.J. 69, 75 (C.A.A.F. 1995); *United States v. Stombaugh*, 40 M.J. 208, 212 (C.M.A. 1994); *United States v. Levite*, 25 M.J. 334, 340 (C.M.A. 1987); *Thomas*, 22 M.J. at 393; *Rosser*, 6 M.J. at 271-72. In *Thomas*, 22 M.J. at 393, our superior court noted that when UCI is directed against prospective defense witnesses, it "transgresses the accused's right to have access to favorable evidence," thus depriving the servicemember of a valuable constitutional right.

During appellate consideration of UCI claims, the appellant bears the burden on appeal to: (1) show facts which, if true, constitute UCI; (2) show that the proceedings at trial were unfair; and (3) show that the UCI was the cause of the unfairness. *Id*; *Stombaugh*, 40 M.J. at 213; *see United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994); *United States v. Francis*, 54 M.J. 636, 637 (Army Ct.Crim.App. 2000). On appeal, prejudice will not be presumed until such time as the defense can meet its burden to show "proximate causation between the acts constituting [UCI] and the outcome of the court-martial." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(citing *Reynolds*, 40 M.J. at 202); *United States v. Singleton*, 41 M.J. 200, 202 (C.M.A. 1994).

Once the defense meets its initial burden of production, the burden then shifts to the Government to convince the court beyond a reasonable doubt that there was no UCI, or that the UCI did not affect the findings and sentence. *Stombaugh*, 40 M.J. at 214. The Government can meet this burden by:

1. disproving beyond a reasonable doubt the predicate facts on which the allegation of UCI is based;
2. persuading the court beyond a reasonable doubt that the facts established do not constitute UCI; or
3. convincing the court beyond a reasonable doubt that the UCI will not prejudice the proceedings (trial) or

did not affect the findings and sentence of the court-martial (appeal).

Biagase, 50 M.J. at 151 (citing *United States v. Gerlich*, 45 M.J. 309, 310 (C.A.A.F. 1996)). We review the military judge's findings of fact under a clearly erroneous standard, and the question of UCI flowing from those facts as a matter of law we consider *de novo*. *Ayers*, 54 M.J. at 95; *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994); *Francis*, 54 M.J. at 637-38.

We have carefully reviewed each of the military judge's findings of fact and conclusions of law. Record at 50-53; see also AE VIII at 1-5. We are confident that the military judge's findings of fact are supported by the evidence of record, are not clearly erroneous, and we adopt them as our own. We are also fully satisfied beyond a reasonable doubt that LTCol Woody was not an "accuser,"⁹ and that there was no actual UCI at any stage of the court-martial proceedings in this case. Even if the actions the appellant complained of could somehow be characterized as UCI, we are convinced beyond a reasonable doubt that the Government met their burden to show they had absolutely no impact upon the findings and sentence of this special court-martial.

Though LtCol Woody's actions in personally discussing the appellant's case with him in the absence of detailed defense counsel -- and appropriate rights warnings under Article 31(b), UCMJ -- was clearly misguided, we are convinced that he never intended to, or actually did, exert unlawful influence over either the appellant or his court-martial process. None of the appellant's various statements to, or conversations with, LtCol Woody were offered or used against him at trial. Also, there was no evidence that LtCol Woody in any manner attempted to coerce the appellant in regard to any aspect of his court-martial process (e.g., pleas, forum selection, evidence presentation, witness selection, etc.). Nor did LtCol Woody attempt to influence the appellant's court-martial through his interactions with the appellant's mother. We conclude from the evidence of record that LtCol Woody had no personal interest in the

⁹ The test for determining whether a convening authority is a "type three" accuser is whether the evidence establishes that he is "so closely connected to the offense that a reasonable person would conclude that he has a personal interest in the matter." *United States v. Dinges*, 55 M.J. 308, 312 (C.A.A.F. 2001)(Baker, J., concurring)(quoting *Allen*, 31 M.J. at 585); *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999); *United States v. Nix*, 40 M.J. 6, 7 (C.M.A. 1994); see R.C.M. 601. Disqualifying personal interests include those matters that would directly affect the convening authority's ego, family, property, and similar personal interests. *Voorhees*, 50 M.J. at 499. Also, personal animosity towards an accused, as manifested in "dramatic outbursts of anger" or similar action, may render a convening authority an "accuser" under this concept. *Id.*; see also *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979)

appellant's court-martial or its outcome, and acted strictly in his official capacity at all times.

Appellate defense counsel has not claimed any specific prejudice in regard to the actions of LtCol Woody, and we cannot discern any from the record of trial. The appellant elected to plead not guilty before a military judge serving as the fact-finder, and he had full access to all the evidence and witnesses in his case. There is absolutely no evidence that would substantiate a claim that any witness was dissuaded from testifying or "curbed" their testimony in this case. In fact, LtCol Woody went out of his way to make all defense requested witnesses available to the appellant and his counsel. We are fully confident that there was no actual UCI in this case, and that, even if there was, it was harmless beyond a reasonable doubt.

As neither party challenged the military judge's ruling that LtCol Woody's actions created the "appearance" of UCI, we will treat it as "law of the case." See *United States v. Grooters*, 39 M.J. 269, 272-73 (C.M.A. 1994)(citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986))(holding unchallenged ruling "constitutes the law of the case and binds the parties" absent plain error); *Morris v. American National Can Corporation*, 988 F.2d 50, 52 (8th Cir. 1993)(law of the case applies as result of waiver when party fails to raise issue on appeal). In light of that ruling, we believe the judge's subsequent disqualification of LtCol Woody from serving as convening authority in any capacity was a more than sufficient remedial measure to address the "appearance" issue, especially when no specific prejudice was discernible. We find this issue to be without merit.

Post-Trial Delay

In his tenth AOE, the appellant asserts that he was denied speedy post-trial processing in his case. In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we will assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. Because we find, based on the totality of the circumstances, that the appellant has not suffered any specific prejudice flowing from this delay, we hold that any due process violation that may have occurred in processing this case was harmless beyond a reasonable doubt.

We have also examined the issue of post-trial delay in this case pursuant to the authority contained in Article 66(c), UCMJ, our superior court's guidance in *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); and the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*). Again, after examining the totality of the circumstances, we

conclude that the delay in this case has no affect upon the findings and sentence that should be approved.

Remaining AOE's

We have carefully considered all of the appellant's remaining AOE's and determined that they each lack merit. Accordingly, they will not be addressed further. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The findings of guilty and the approved sentence are affirmed.

Senior Judge FELTHAM and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court