

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**D.O. VOLLENWEIDER**

**J.W. ROLPH**

**E.E. GEISER**

**UNITED STATES**

**v.**

**Joseph P. SCHWEITZER  
Captain (O-3), U.S. Marine Corps**

NMCCA 200000755

Decided 10 May 2007

Sentence adjudged 2 April 1999. Military Judge: A.W. Keller.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commanding General, U.S Marine Forces, Atlantic, Camp  
Lejeune, NC.

MARY T. HALL, Civilian Appellate Defense Counsel  
Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel  
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Maj KEVIN HARRIS, USMC, Appellate Government Counsel  
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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

ROLPH, Senior Judge:

**Background**

On the 3rd of February 1998, one of the most tragic incidents in military aviation history occurred when a Marine Corps EA-6B "Prowler" aircraft, manned by four Marine Corps officers and flying at exceptionally low levels through the Italian Alps, impacted and severed two weight-bearing suspension cables of the Alpe Cermis cable car system located at varying heights approximately 365 to 450 feet above ground level near the town of Cavalese, Italy. The mishap caused a descending gondola and all of its passengers to plummet approximately 365 feet to the earth below. Twenty civilians from numerous nations riding in the gondola were killed, and substantial property damage (in the millions of dollars) was suffered by both the aircraft and the cable car system. Despite serious damage to their aircraft, the EA-6B crew was able to return to the North Atlantic Treaty

Organization (NATO) air base in Aviano, Italy, where they conducted a successful emergency landing.

On the date of this tragedy, the appellant was a naval flight officer and one of three electronic counter measures officers (ECMO's) onboard the mishap aircraft, which was piloted by Captain (Capt) Richard J. Ashby, USMC.<sup>1</sup> The mishap crew's squadron, Marine Tactical Electronics Warfare Squadron TWO (VMAQ-2), based in Cherry Point, N.C., had been deployed in Aviano, Italy, since August 1997 in support of NATO operations.<sup>2</sup>

Ultimately, the appellant was charged at a general court-martial and, on 3 August 1998, arraigned upon multiple alleged offenses arising out of this incident, including: two specifications of dereliction of duty; negligently suffering military property to be damaged; recklessly damaging non-military property; twenty specifications of involuntary manslaughter; conduct unbecoming an officer by conspiring to obstruct justice; conduct unbecoming an officer by obstructing justice; and twenty specifications of negligent homicide in violation of Articles 92, 108, 109, 119, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 808, 809, 919, 933, and 934. The general court-martial was convened by the Commanding General, U.S. Marine Forces, Atlantic, and ultimately assembled at Camp Lejeune, North Carolina. The appellant's co-accused, Capt Ashby, was likewise charged by the same convening authority at his first general court-martial with twenty specifications of involuntary manslaughter; twenty specifications of negligent homicide; two specifications of dereliction of duty; negligently suffering military property to be damaged; and recklessly damaging non-military property. He was ultimately acquitted of all of these offenses by officer members. Because Capt Ashby had earlier refused to consent to the joinder after arraignment of additional charges alleging conduct unbecoming an officer by conspiring to obstruct justice and obstructing justice in violation of Article 133, UCMJ, these offenses were later referred to a second general court-martial. Officer members convicted Capt Ashby of these two offenses and sentenced him to six months confinement, total forfeitures, and a dismissal.

The majority of the charges against the appellant -- including all involuntary manslaughter and negligent homicide specifications -- were withdrawn and dismissed after Capt Ashby

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<sup>1</sup> There are three ECMO positions in the EA-6B Prowler, which has a four-seat cockpit. The appellant was "ECMO 1" during the mishap flight, which placed him in the right front seat next to Capt Ashby. This ECMO position is generally responsible for navigation, communications, and defensive electronic countermeasures. "ECMO 2" was Capt William L. Raney, II, USMC, and "ECMO 3" was Capt Chandler P. Seagraves, USMC, both of whom were located in the aircraft's aft cockpit.

<sup>2</sup> Captain Seagraves was not assigned to VMAQ-2, but was present within that squadron as an advance party member from VMAQ-4. He was invited to participate as a member of the mishap crew for low level mission familiarization.

was acquitted of the same charges at his first court-martial. The appellant ultimately entered voluntary and unconditional pleas of guilty pursuant to a pretrial agreement to conduct unbecoming an officer by conspiring with Capt Ashby to obstruct justice (endeavoring to impede a criminal investigation by Italian authorities) by secreting a videotape removed from the cockpit by the appellant and Capt Ashby, and ultimately destroying it; and actual obstruction of justice based upon these same actions, both offenses in violation of Article 133, UCMJ. On 2 April 1999, the appellant was sentenced by officer members to a dismissal. On 8 May 2000, the convening authority approved both the findings and the adjudged sentence.

### **Assignments of Error**

The appellant has raised 10 separate assignments of error for this Court's consideration.<sup>3</sup> We additionally and *sua sponte* raise and address the issue of excessive post-trial delay which has plagued this case from the date sentence was announced -- much of which is the direct responsibility of this court. Most helpful in our thorough review of all issues assigned were the excellent briefs of appellate counsel, as well as the superb oral

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<sup>3</sup> We summarize the assignments of error as follows:

- I. The military judge erred in failing to dismiss the charges and specifications as the convening authority was both a "type two" and "type three" accuser.
- II. The convening authority abused his discretion in failing to withdraw the Article 133 offenses (conduct unbecoming an officer by conspiring to obstruct justice and actual obstruction of justice) after Capt Ashby was acquitted.
- III. Even if the convening authority was not an accuser, he was nevertheless disqualified from taking post-trial action in appellant's case where post-trial submissions by defense counsel raised issues concerning his personal credibility.
- IV. The military judge erred in failing to dismiss the charges because of unlawful command influence.
- V. The convening authority's staff judge advocate was disqualified from providing post-trial recommendations to the convening authority because he and his staff functioned as *de facto* prosecutors during the trial, and their conduct during the trial presented a factual dispute in the post-trial matters submitted by the defense.
- VI. The military judge erred in accepting the appellant's plea of guilty to conspiracy to obstruct justice because a foreign (i.e., Italian) investigation is not a qualifying "criminal proceeding."
- VII. The military judge erred in allowing family members of the victims of the gondola crash to testify on sentencing.
- VIII. The military judge erred when he denied the appellant's motion for a mistrial based on trial counsel's references during cross-examination of a defense character witness to the Commandant of the Marine Corps' "zero tolerance" policy for defects.
- IX. The military judge erred when he denied the appellant's request for a mistrial based on trial counsel's repeated questions to character witnesses referencing the appellant's invocation of his right to remain silent (under both Article 31, UCMJ, and the 5th Amendment) and his right to counsel.
- X. The appellant's sentence to an approved dismissal is inappropriately severe.

arguments by counsel for both the appellant and the Government presented before this court on 23 August 2006. After having carefully considered all of the appellant's assignments of error,<sup>4</sup> the issue we have raised *sua sponte*, along with the evidence of record and the military judge's extensive findings of fact and conclusions of law, we believe additional fact-finding is required to properly resolve the appellant's fifth assignment of error. We shall order such action in our decretal paragraph. See Arts. 59(a) and 66(c), UCMJ.

### **I. The "Accuser" Issues**

In his first assignment of error, the appellant asserts that the military judge erred when he refused to grant a defense motion to dismiss all charges and specifications based upon the claim that the convening authority was both a "type two" and "type three" accuser under Article 1(9), UCMJ, and was therefore disqualified under Articles 22(b) and 23(b), UCMJ, from convening the court-martial, or taking post-trial action in this case upon its conclusion.

The convening authority for this trial was then-Lieutenant General (LtGen) Peter Pace, USMC,<sup>5</sup> who at the time was serving in the dual capacity as Commander, U.S. Marine Forces Atlantic, and Commander, U.S. Marine Forces Europe. General (Gen) Pace convened the initial "Command Investigation Board" ("CIB") that investigated the gondola tragedy immediately after it occurred. Upon the CIB's conclusion, Gen Pace directed that an Article 32, UCMJ, investigation be conducted to examine formal charges that had been preferred against the four aircrew members, and he ultimately convened the general courts-martial that tried the appellant and Capt Ashby.

### **Discussion**

Every individual accused of an offense under the UCMJ is entitled to have his or her case handled by an unbiased and impartial convening authority. Accordingly, the convening authority must assume a neutral role and his motives should not be prosecutorial in nature. "An accuser may not convene a general or special court-martial for the trial of the person accused." RULE FOR COURTS-MARTIAL 504(c)(1), MANUAL FOR COURTS-MARTIAL,

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<sup>4</sup> We have given thorough and careful consideration to assignments of error VIII (The military judge erred when he denied the appellant's motion for a mistrial based on trial counsel's references during cross-examination of a defense character witness to the Commandant of the Marine Corps' "zero tolerance" policy for defects) and IX (The military judge erred when he denied the appellant's request for a mistrial based on trial counsel's repeated questions to character witnesses referencing the appellant's invocation of his right to remain silent [under both Article 31, UCMJ, and the 5th Amendment] and his right to counsel) and have determined each to be without merit. They will not be discussed further in this opinion.

<sup>5</sup> Gen Pace received his fourth star in September 2000, and is currently serving as the sixteenth Chairman of the Joint Chiefs of Staff.

UNITED STATES (1998 ed.). See R.C.M. 601(c). Article 1(9) of the UCMJ defines an "accuser" as: "a person who signs and swears to charges" ["type one" accuser]; "any person who directs that charges nominally be signed and sworn to by another" ["type two" accuser]; "and any other person who has an interest other than an official interest in the prosecution of the accused" ["type three" accuser]. *United States v. Jeter*, 35 M.J. 442, 445 (C.M.A. 1992). See also R.C.M. 601(c) and 201(b). Articles 22(b) and 23(b) of the UCMJ disenfranchise any statutorily defined "accuser" in Article 1(9) from convening a special or general court-martial, requiring instead that "the court shall be convened by superior competent authority." The question of whether a convening authority is an "accuser" under Article 1(9), UCMJ, is a question of law that we review *de novo*. *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979).

a. Waiver

We initially consider whether this "accuser" issue has been waived by the appellant's unconditional pleas of guilty to the sole remaining Charge and two specifications, alleging violations of Article 133, UCMJ [conduct unbecoming an officer by conspiring to obstruct justice (Specification 1), and the actual obstruction of justice by destroying a videotape taken from the cockpit of the mishap aircraft (Specification 2)]. After carefully reviewing the facts and procedural evolution of this case, we answer that question in the affirmative.

Generally, a plea of guilty waives all defects "which are neither jurisdictional nor a deprivation of due process of law." *United States v. Rehorn*, 26 C.M.R. 267, 268-69 (C.M.A. 1958); *United States v. Paige*, 23 M.J. 512, 513 (A.F.C.M.R. 1986). Our superior court has properly determined that violations of Articles 22(b) and 23(b) of the UCMJ are not jurisdictional errors. *Jeter*, 35 M.J. at 446; *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994); *United States v. Ridley*, 22 M.J. 43 (C.M.A. 1987). Additionally, we find no evidence of a deprivation of the appellant's due process rights in this case that would persuade us not to apply waiver in regard to this issue. The military judge expressly advised the appellant that his voluntary and unconditional pleas of guilty would waive all litigated motions that were non-jurisdictional in nature. Record at 2724.<sup>6</sup> Nothing in the appellant's pleas of guilty or pretrial agreement preserved the right to raise this "accuser" matter on appeal. See Appellate Exhibits CCVI and CCVII. Accordingly, this issue has been waived. Assuming, however, that this issue

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<sup>6</sup> The military judge stated, "Captain Schweitzer, by your pleas of guilty, you also give up your right to appeal the decisions, not only that I made, but the decisions that were made by Colonel [N] during the joint motion session of this trial. By your plea of guilty, you waive all motions with the exception of . . . motions involving jurisdictional issues . . . . All other motions are waived." Record at 2724.

was somehow preserved for appellate review, we will address the appellant's contentions.

b. "Type Two" Accuser Issue

The appellant claims that Gen Pace improperly convened his general court-martial when he was disqualified from doing so because he "directed that charges nominally be signed and sworn to by another," making him a "type two" accuser under Article 1(9), UCMJ. As previously mentioned, if Gen Pace was in fact a "type two" accuser, he was obligated under Article 22(b), UCMJ, to forward the case for disposition by a "superior competent authority." Implicit in this specific statutory disqualification is the notion that improper personal interest in a case may not be "cleansed" simply by "directing another to formalize the pleadings" against an accused. *United States v. Shelton*, 26 M.J. 787, 791 (A.F.C.M.R. 1988)(quoting *United States v. Smith*, 23 C.M.R. 402 (C.M.A. 1957)). In assessing this issue, our essential goal is "determining whether the convening authority . . . directed a subordinate to act as his *alter ego* in preferring charges." *United States v. Allen*, 31 M.J. 572, 585 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). After careful review of the record of trial, we answer this question in the negative.

In support of his assertion, the appellant claims that Gen Pace was a "type-two" accuser because

he was intricately involved in directing that charges nominally be signed and sworn by another. In essence, he engineered the preferral process through his influence on the CIB and in forwarding the case to the LSSS [Legal Services Support Section, Camp Lejeune, N.C.] for preferral of charges which he himself had actively been involved in identifying.

Appellant's Brief and Assignment of Errors of 18 Oct 2002 at 37. The appellant views as particularly troubling the fact that, on 28 March 1998, within two weeks of the CIB's Report and first endorsement being issued, Gunnery Sergeant Ciarlo, USMC, of the Camp Lejeune LSSS preferred the same charges against the appellant that Gen Pace's 11 March 1998 first endorsement of the CIB report had recommended be considered. Specifically, Gen Pace's endorsement on the CIB report contained the following comments upon the report's recommendation that "appropriate disciplinary and administrative action be taken against the mishap aircrew."<sup>7</sup>

I am providing a copy of this investigation to the legal office that supports my command for their review and the drafting of appropriate charges. I intend to commence a pretrial investigation under Article 32 of

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<sup>7</sup> See recommendation 1, CIB Report (page 69), AE LXXIII at 35.

the Uniform Code of Military Justice (UCMJ) to consider whether charges such as *involuntary manslaughter or negligent homicide, damage to private and government property, and dereliction of duty*, should be referred to a general court-martial if the United States retains jurisdiction.

AE LXXIV at 3 (italics and bolding added). The appellant additionally directs us to previous draft copies of Gen Pace's endorsement that were even more specific as to what charges were recommended against the appellant. A proposed "9th draft" of the endorsement contained lined out language that contemplated charges having already been drafted and preferred, and makes the specific statement that:

"The charges preferred against each member of the aircrew are:

- (1) 20 specifications of involuntary manslaughter under Article 119 of the UCMJ;
- (2) 20 specifications of negligent homicide under Article 134;
- (3) A charge of damage to private property under Article 108;
- (4) A charge of damage to government property under Article 109; and
- (5) A charge of dereliction of duty under Article 92."

See AE LXXXI at 1. Gen Pace's overall active interest and involvement in the CIB's progress and final report, combined with the coincidence of the actual preferred charges mirroring those recommended in his first endorsement, suggests to the appellant that subordinate personnel were simply serving as Gen Pace's "*alter ego*" in preferring charges he "directed." We disagree.

In his essential findings of fact on this matter, the military judge concluded that Gen Pace was not a "type-two" accuser because he "never directed the preferral of any particular charges against either Captains Ashby or Schweitzer, though he did forward the CIB report to the LSSS, at Camp Lejeune, for the drafting of appropriate charges." AE XCVIII at 27. According to the military judge, the fact that the charges ultimately preferred against the appellant mirrored those reflected in Gen Pace's draft and final endorsements was simply a by-product of lawyers for both Gen Pace and the CIB working carefully and continuously together throughout the CIB to hone proposed charges to what the evidence actually supported. *Id.* These findings of fact are supported by the evidence of record, are not clearly erroneous, and we adopt them for purposes of resolving this assignment of error. See *United States v. Ureta*, 44 M.J. 290, 297 (C.A.A.F. 1996).

Under Article 6(b), UCMJ, convening authorities are expressly admonished to:

. . . at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

We find nothing improper in Gen Pace consulting with his various legal advisors and commenting in his endorsement to the CIB (a strictly administrative investigation) upon criminal charges that might logically flow from this catastrophic mishap. See *Conn*, 6 M.J. at 354 (convening authority is not acting as an "accuser" when he performs command functions embraced or reasonably anticipated under the UCMJ). It is axiomatic that a convening authority must make certain preliminary "probable cause" determinations before determining whether criminal charges under the UCMJ should be forthcoming in any case, and what their ultimate disposition should be. See *Allen*, 31 M.J. at 584-85; *United States v. Wojciechowski*, 19 M.J. 577, 579 (N.M.C.M.R. 1984); R.C.M. 306 and 405(c). Complete and absolute "neutrality" by a convening authority is neither realistic, nor required under the UCMJ. *Allen*, 31 M.J. at 584-85; *Wojciechowski*, 19 M.J. at 579. There is no credible evidence to suggest that Gen Pace's actions, words, or official correspondence "directed" that charges of any nature be specifically preferred against the appellant. Gen Pace testified clearly at trial that he never dictated or directed that charges be preferred against any of the mishap crewmembers. Record at 1000. This testimony was substantiated by both Gen DeLong, the CIB President (*Id.* at 1081, 1096, 1098-99, 1122) and Colonel Carver, the legal advisor to the CIB (*Id.* at 1144-45, 1155, 1203). Indeed, Gen Pace's action of forwarding the CIB report and endorsement to the LSSS at Camp Lejeune "for their review and drafting of appropriate charges" belies any intent on his part to manipulate the process towards a specific set of charges. We find absolutely no evidence in the record that supports the appellant's allegation that Gen Pace was a "type-two" accuser. Accordingly, we find this assignment of error to be without merit.

b. "Type Three" Accuser Issue

The appellant also claims that Gen Pace was disqualified to serve as convening authority for this case because he was a "type three" accuser in that he had an "other than official interest in the prosecution of the [appellant]." The test for determining whether a convening authority is a "type three" accuser is whether he is "so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter." *United States v. Dinges*, 55 M.J. 308, 312 (C.A.A.F. 2001)(quoting *Allen*, 31 M.J. at 585); *United States v.*

*Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999)(citing *United States v. Jackson*, 3 M.J. 153, 154 (C.M.A. 1977)); *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.* We must determine under the unique and particular facts and circumstances of this case whether a reasonable person would impute to General Pace a disqualifying personal feeling or interest in the outcome of this case. *Conn*, 6 M.J. at 354.

In support of this allegation, the appellant requests us to carefully scrutinize Gen Pace's personal role at every stage of this very complex and undeniably high-visibility administrative CIB investigation, subsequent Article 32 investigation, and ultimate general court-martial. The appellant asserts that the "unprecedented" extent to which Gen Pace injected himself into the CIB proceedings and ultimate report, combined with his first endorsement thereon that effectively "directed" that specific charges be preferred, evidenced his pre-determination of the appellant's guilt and a disqualifying, non-official interest in the outcome of the appellant's military justice proceedings. Specifically, the appellant directs us to evidence of multiple daily telephone calls between Gen Pace and Major General (MajGen) DeLong, the President of the CIB, during the weeks that the CIB was being conducted that allegedly directed both the course and content of the investigation; evidence of extensive personal editing of the CIB report by Gen Pace; evidence of multiple facsimile copies of draft CIB reports being sent to Gen Pace and a number of his superiors; and the extensive involvement of Gen Pace's personal staff judge advocates in the CIB proceedings, the drafting of charges, and monitoring the ultimate conduct of the trial. Because the gondola tragedy "occurred on his watch," ostensibly "reflected poorly" upon Marine Corps aviation assets under his command, generated intense "political heat" he had to deal with, and resulted in him expressing his opinion "quite literally . . . to the world of the appellant's guilt before charges were preferred," the appellant asserts that Gen Pace could not properly convene this general court-martial, or take post-trial action on the case after the appellant's conviction. Appellant's Brief at 44-45. We have carefully examined each of the appellant's allegations in this regard, studied the record of trial in great detail, and carefully scrutinized the military judge's essential findings of fact on this matter. We find the allegations to be without merit. Our conclusion is that Gen Pace's actions were completely consistent with those of any military commander and convening authority who might be called upon to handle an incident involving such abject human tragedy, having such far-ranging and potentially serious national and international ramifications, and generating such potentially dire military justice consequences.

There is no doubt that Gen Pace was intensely interested in the proceedings of the CIB, as were the majority of the Marine Corps' senior leadership. As theatre commander for a multinational area of responsibility, Gen Pace had an obvious interest in insuring that the gondola tragedy was thoroughly and thoughtfully investigated, and that all recommendations flowing from the investigation were carefully addressed. International attention upon, and careful scrutiny of, the CIB's ultimate report was inevitable.

It is important to understand that the CIB was an administrative, fact-finding investigation, not a proceeding conducted under the UCMJ. Gen Pace, situated in Norfolk, Virginia, was frequently in touch with Gen DeLong, his Deputy Commander and the CIB President, based in Aviano, Italy, seeking updates on what the investigation was revealing about the mishap. This information exchange from Italy to Norfolk, Virginia allowed Gen Pace to stay abreast of this high-visibility international incident as its extremely somber details came to light and to brief others who had a need to know about the incident. In his sworn testimony, Gen Pace made it clear that the numerous telephone calls he made to Gen DeLong were all related to receiving update briefs concerning the course and findings of the mishap investigation, and/or ensuring with prodigious scrutiny that every word in the CIB report was clear, understandable to the lay reader, and devoid of confusing aviation terms, acronyms and military jargon.

Significantly, Gen Pace played no role in the appointment of the CIB members, other than naming Gen DeLong as the CIB's President, and he had no input upon who would be voting members of the CIB. Record at 954. Gen Pace also did not discuss the nature, content, or preferral of charges with Gen DeLong. *Id.* We find no evidence to substantiate the appellant's claim that Gen Pace expressed any opinion of the mishap crew's guilt or innocence. He did not know the appellant or any of the mishap crewmembers, and there was no evidence to suggest he harbored any animus against any of them. Our review of the record of trial supports the military judge's findings of fact, which concluded that Gen Pace had only an "'official' interest in the disposition of the allegations and preferred charges against the mishap crew, and did not abandon his neutral role and become an 'accuser'." AE XCVIII at 27. We can find no fault in Gen Pace's desire to ensure that the CIB report was thorough, clear, concise, and devoid of content unintelligible to the wide and general audience that would no doubt be reviewing it with great scrutiny. Gen Pace made it clear to Gen DeLong on many occasions that the CIB findings and recommendations must be those of the CIB members, based on the evidence before them. He was adamant in his sworn testimony that he never directed any member of the CIB to arrive at specific conclusions, nor did he direct that any finding of fact, opinion, or recommendation be included, changed or deleted. Record at 1000.

The unrebutted evidence clearly supports Gen Pace's repeated assertions that his many conversations with Gen DeLong during the CIB were simply aimed at ensuring the absolute clarity and conciseness of all terms utilized by the Board members. *Id.* Gen DeLong also made it clear in his sworn testimony that Gen Pace only reviewed the CIB report with him for clarity and not for substance. *Id.* at 1102-03, 1119-20. We find that Gen Pace's interest in the CIB report and his subsequent endorsement thereon was official in nature. Though the level of his personal interest in this incident and its investigation was indisputably high, there is no evidence to substantiate the appellant's claim that Gen Pace's involvement in this case at any level ever transformed into anything "other than official." *Id.* at 1122, 1125. Compare *United States v. Tittel*, 53 M.J. 313, 314 (C.A.A.F. 2000) (holding that a willful violation by an accused of a convening authority's personal order did not render the convening authority an "accuser"); *Vorhees*, 50 M.J. at 498-99 (convening authority did not become an "accuser" when he threatened to "burn" the accused if he did not enter into a pretrial agreement); *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (convening authority not an "accuser" despite his "misguided zeal" in discouraging testimony on behalf of accused service members); *Conn*, 6 M.J. at 6 (holding that the convening authority was not disqualified by performing command functions such as being briefed on the investigation, reading witness statements, conferencing with the SJA and trial counsel, and directing the accused's arrest). *United States v. King*, 4 M.J. 785, 787-88 (N.M.C.M.R. 1977) (convening authority does not become an "accuser" simply by endorsing an administrative "line of duty/misconduct" investigation which expresses various opinions on the matter contained therein), *aff'd*, 7 M.J. 207 (C.M.A. 1979). We find the appellant's contentions in this regard without merit.

c. Absence of Prejudice

The appellant has also failed to demonstrate any prejudice suffered by him in relation to the "accuser" issues in this case, as all original offenses potentially impacted were withdrawn and dismissed after the appellant's co-accused, Capt Ashby, was acquitted of similar charges at his first general court-martial. The offenses to which the appellant entered unconditional pleas of guilty were not even contemplated at the time that the CIB was conducted, nor are they mentioned in the endorsement to the CIB. The Article 133, UCMJ, offenses to which the appellant ultimately pled guilty were preferred on 28 August 1998, five months after the preferral of the original charges. They were also preferred well after the conclusion of the CIB; the Article 32, UCMJ, investigation; the referral of the original charges; and the appellant's original arraignment. On 10 September 1998, the appellant waived his right to have the additional offenses investigated at an Article 32, UCMJ, investigation. The additional offenses were referred to general court-martial and joined with the original charges on 21 September 1998 with the

consent of the appellant. On 02 October 1998, the appellant was arraigned a second time on these additional offenses.

The appellant has presented absolutely no evidence demonstrating how he was prejudiced in any respect regarding the decision to refer these additional charges to trial - which were the product of an investigation completely independent from the CIB. Even if Gen Pace was disqualified as an "accuser" on the original charges, we can fathom no reason why he should be similarly disqualified in regard to the additional offenses (the only offenses before this court) to which the appellant ultimately pled guilty. See *Allen*, 31 M.J. at 572 (a violation of the "accuser" concept is a purely statutory violation to be tested for prejudice).

## **II. Failure to Withdraw the Article 133, UCMJ, Offenses**

In his second assignment of error, the appellant claims that the convening authority "abused his discretion" in failing to withdraw the Article 133, UCMJ, charge and both specifications from a general court-martial once the appellant's co-accused, Capt Ashby, was acquitted at his general court-martial on all offenses originally referred to trial, and the appellant's original charges were subsequently withdrawn and dismissed.<sup>8</sup> Appellant's Brief at 46. In the eyes of the appellant, the Article 133 offenses standing alone were only worthy of a lesser forum "such as Article 15." *Id.* Relying solely on the general admonition contained in R.C.M. 306(b) suggesting that "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition . . . .", and vaguely asserting bad faith on the part of Gen Pace in the light of "international pressure being exerted on the United States," the appellant urges us to dismiss the findings and sentence. *Id.* at 46-47. We decline to do so.

We interpret the appellant's assignment of error as similar in nature to a claim of selective or vindictive prosecution. The burden of persuasion on a claim of selective or vindictive prosecution is on the moving party. *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997); see R.C.M. 905(c)(2)(A). To support such a claim, an appellant has a "heavy burden" of showing that "others similarly situated" have not been charged, that "he has been singled out for prosecution," and that his "selection . . . for prosecution" was "invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *United States v. Hagen*, 25 M.J. 78, 83 (C.M.A. 1987) (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985)). Prosecutorial authorities and convening authorities are

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<sup>8</sup> The withdrawn and dismissed offenses included twenty specifications of involuntary manslaughter; twenty specifications of negligent homicide; two specifications of dereliction of duty; negligently suffering military property to be damaged; and recklessly damaging non-military property.

presumed to act without bias. *United States v. Brown*, 40 M.J. 625, 629 (N.M.C.M.R. 1994). The appellant has the burden of rebutting that presumption. *Argo* 46 M.J. at 463; *Hagan*, 25 M.J. at 84. He has failed to do so.

Every convening authority is "vested with considerable discretion in determining whether to refer charges and what to refer, so long as his selection is not deliberately based upon unjustifiable standards." *United States v. Blanchette*, 17 M.J. 512, 515 (A.F.C.M.R. 1983). See *Brown*, 40 M.J. at 629; *United States v. Bledsoe*, 39 M.J. 691 (N.M.C.M.R. 1993), *aff'd* 40 M.J. 292 (C.M.A. 1994); R.C.M. 407(a). In both *Bledsoe*, 39 M.J. at 697, and *Brown*, 40 M.J. at 629, we clearly articulated the principles upon which we evaluate claims of this nature. They are as follows:

1. The exercise of the convening authority's discretion in the referral of charges will enjoy a presumption of regularity;
2. The referral decision is only reviewable for an abuse of discretion;
3. An abuse of discretion may occur when the convening authority is an accuser, acts out of bad faith, improper motives or prosecutorial vindictiveness, or applies improper standards (e.g., referral on the basis of race, religion, or national origin);
4. A claim of an abuse of discretion in referral of charges to trial does not raise a claim of jurisdictional error;
5. When the facts that give rise to the claim are known at trial time, the issue must be raised at trial in order that the record may be fully developed, appropriate findings entered, and action taken; and
6. When the accused does not raise the issue at trial, he waives the issue on appeal.

It is quite apparent that the Government had adequate probable cause to believe that the appellant committed the Article 133 offenses that he ultimately pled guilty to. That being the case, the decision to prosecute these offenses, and the forum at which they should be handled, rested within the sound discretion of the convening authority. There is absolutely no evidence of bad faith or prosecutorial vindictiveness in this case as regards either the charges themselves or the forum at which they were handled. See *Garwood*, 20 M.J. at 152-54. The appellant agreed to enter voluntary and unconditional pleas of guilty to these offenses at a general court-martial, never challenging at trial the forum where those charges resided. Indeed, in his pretrial agreement with the convening authority,

he specifically agreed to withdraw all outstanding motions and further agreed to file no additional motions in his case, which clearly would include any motion challenging the forum selection made by the convening authority. See Appellate Exhibit CCVI, at ¶ 21. He has, therefore, affirmatively waived this issue.

Even if not waived, we are not persuaded by his unsubstantiated suggestion that improper motives or "international pressure" kept these very serious charges at a general court-martial. We find the selection of a general court-martial to be objectively reasonable for an officer who conspired to obstruct justice in an investigation of the seriousness and magnitude involved in this case, and who then actually executed that conspiracy, after time for thoughtful reflection, by participating in the destruction of potential evidence in such an investigation, and then lied to his commanding officer about it. As previously mentioned, there is no evidence that Gen Pace was an accuser, acted out of bad faith, improper motives or vindictiveness, or applied improper standards. It is well-settled that a disposition decision does not render the decision-maker an "accuser." *United States v. Grow*, 11 C.M.R. 77, 82 (C.M.A. 1953); *United States v. Jewson*, 5 C.M.R. 80, 85 (C.M.A. 1952). We find no abuse of discretion on the part of General Pace in electing to keep these charges at a general court-martial after withdrawing all of the original charges referred. This assignment of error is completely without merit.

### **III. Convening Authority Disqualification in Taking Post-Trial Action**

In a third and summary assignment of error, the appellant asserts that even if Gen Pace was not an "accuser" he was still disqualified from taking post-trial action in this case where the post-trial submissions of the defense team on behalf of the appellant raised issues concerning his "personal credibility." Appellant's Brief at 47. Specifically, the appellant believes that, because matter submitted to the convening authority post-trial under the provisions of R.C.M. 1105(a) and R.C.M. 1106(f) called into question the veracity of his testimony on various motions, Gen Pace could not thereafter act objectively upon the findings and sentence of his general court-martial. See Art. 60, UCMJ; R.C.M. 1107. He asks this court to order that a new action be prepared by a convening authority who can act impartially upon his case. Appellant's Brief at 47.

In the various and extensive post-trial submissions by the defense team to the convening authority, submitted pursuant to R.C.M. 1105(a) and 1106(f), the only document potentially calling into question Gen Pace's "personal credibility" was a written clemency request dated 20 January 2000, submitted by the appellant's civilian defense counsel, Mr. David L. Beck (Beck

Letter).<sup>9</sup> Mr. Beck's 31-page letter catalogued numerous alleged failings in the appellant's trial proceeding that ostensibly had the effect of transforming the UMCJ into an "Unequal Code of Military Justice." Beck Letter at 31. Among the issues of "credibility" raised in the Beck letter are the following:

1. The claim that Gen Pace was aware of "political pressure" being placed upon CIB members during the course of the mishap investigation, despite his testimony to the contrary. Beck letter at 5, ¶5;
2. The assertion that complaints from various CIB members expressing their personal concerns regarding "unlawful command influence" flowing from the multiple telephone calls taking place between Gen Pace and Gen DeLong throughout the Board's proceedings belied Gen Pace's testimony that his calls related solely to the "clarity" of the CIB report. *Id.* at 22, ¶¶24 and 25.
3. The claim that an email "update" from Gen DeLong to the Commandant of the Marine Corps regarding the Aviano cases, released by the Commandant late in the discovery process, revealed that Gen Pace was aware that many of Gen DeLong's assertions were "intentionally misleading," and that Gen Pace was also aware of political pressures "being brought directly to bear on the Board." *Id.* at 26-28, ¶¶30 and 31; and
4. Raising the clear innuendo that Gen Pace and Gen DeLong had discussions with the Commandant of the Marine Corps during the course of the CIB regarding "substantive issues" in the appellant's case, and the ultimate dispositions for each of the Aviano cases. *Id.* at 39-30, ¶¶33 and 34.

Article 60, UCMJ, clearly contemplates that the convening authority will be fully capable of thoughtfully considering, and acting upon, the competing interests of the Government and the accused during the post-trial process. *See United States v. Fisher*, 45 M.J. 159, 162 (C.A.A.F. 1996). However, the simple fact that a convening authority testifies at trial in regard to one or more matters and/or motions raised is not *per se* disqualifying in regard to his subsequent ability to take action on the case under R.C.M. 1107. *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002)(citing *United States v. McClenny*,

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<sup>9</sup> While the appellant's detailed defense counsel, Lieutenant (LT) Kathryn L. Clune, JAGC, USN, also submitted extensive matters in writing to Gen Pace on 15 February 2000 (pursuant to R.C.M. 1105 and R.C.M. 1106) calling into question his ability to act upon this case, nothing in that submission directly or indirectly called into question Gen Pace's personal credibility. LT Clune objected to Gen Pace taking action upon the case where allegations of unlawful command influence by him and others working with him, along with the allegation that he was an "accuser" under Article 1(9), UCMJ, had been raised by the defense team.

18 C.M.R. 131, 136-37 (C.M.A. 1955)); *United States v. Ward*, 1 M.J. 18, 19 (C.M.A. 1975)(citing *United States v. Choice*, 49 C.M.R. 663 (C.M.A. 1975)). There is a clear distinction between matters involving "official action" and those impacting upon "personal interest." *McClenny*, 18 C.M.R. at 137. When the convening authority's testimony "is of an official or disinterested nature only," he will not be subsequently precluded from acting on the same case. *Id.* The test to be applied in making this determination is one of "objective reasonableness" - that is:

[i]f from his testimony it appears that [the convening authority] has a personal connection with the case, he may not act as reviewing authority. On the other hand, if his testimony is of an official or disinterested nature only, he may properly review the record. Here, as in the accuser situation, there may be cases in which the facts incontrovertibly place the reviewing authority at one or the other of the extremes. In other cases, however, the facts may not so clearly define his position. A case in the twilight zone will not be easy to decide.

*Id.* Disqualification from taking action in a case should only occur in those situations where a convening authority "is put in the position of weighing his testimony against or in light of other evidence which conflicts with or modifies his own." *Choice*, 49 C.M.R. at 665 (staff judge advocate not disqualified to prepare post-trial review after testifying as a defense witness on uncontested matter relating to procedures in his office, and no evidence of an other than official interest existed); *United States v. Cansdale*, 7 M.J. 143 (C.M.A. 1979)(convening authority not disqualified after testifying regarding his authorization to search); *Conn*, 6 M.J. at 354-55 (C.M.A. 1979)(convening authority not disqualified from acting after testifying on "accuser" motion where no "other than official interest" was established). Compare *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976)(convening authority disqualified when his testimony on a speedy trial motion made it necessary for him to review his own diligence in regard to the handling of the case); *McClenny*, 18 C.M.R. at 131 (convening authority's trial testimony used to authenticate an official document disqualified him from taking action in the case when he would have been required on review to determine the factual accuracy of that same document).

As previously stated in this opinion, convening authorities are presumed to act without bias. *Brown*, 40 M.J. at 629; *Kelly*, 40 M.J. at 570. The appellant has the burden of rebutting this presumption. *Argo*, 46 M.J. at 463; *Hagan*, 25 M.J. at 84. After reviewing the entire record of trial, all post-trial submissions by the parties, and the findings of the military judge, we do not believe Gen Pace was disqualified from taking action in this case. The military judge found no merit in the appellant's various claims that Gen Pace was an "accuser" or had committed unlawful

command influence, personally or by proxy. Gen Pace's compelling testimony at trial, tested by vigorous and thorough cross-examination, failed to substantiate any of Mr. Beck's post-trial claims about the General's "personal credibility." The credible and uncontroverted evidence at trial clearly established that all of Gen Pace's actions in relation to this case were official in nature, despite all claims to the contrary. We find *Conn*, 6 M.J. at 354-55, particularly persuasive on this issue. In *Conn*, the appellant sought to disqualify a convening authority who testified on an "accuser" motion, claiming that his "other than official" interest in the offenses, as well as his testimony on the "accuser" motion, prevented him from acting impartially on his case. Our superior court found no personal interest on the part of the convening authority where his testimony was objective in nature and unrebutted by the evidence presented on the motion. *Conn*, 6 M.J. at 355. "[N]o clear predisposition by the convening authority as to the salient issue" could be found in the record. *Id.* at 354-55. That is also the case here. Gen Pace's testimony evidenced a high degree of personal sensitivity regarding the adversarial process, and the importance of adversarial integrity in ensuring that ultimate justice is achieved. Record at 950-1016. He was particularly astute in his knowledge of, and sensitivity towards, the negative impact and consequences of actual or apparent unlawful command influence. *Id.* at 988.

The complete absence of evidence to support this assignment of error endorses the summary manner in which it was raised. There is no evidence whatsoever that demonstrates Gen Pace was unable, unwilling, or failed to conduct a thorough and unbiased review of the legal and factual issues raised by the appellant, or was incapable of properly considering the clemency submissions. Additionally, we can discern no possible prejudice to the appellant in regard to the charges to which he ultimately entered unconditional pleas of guilty, as they were never mentioned in the CIB report or its endorsement, or investigated at an Article 32, UCMJ, proceeding.<sup>10</sup> Absolutely no connection (real or hypothetical) has been established between the alleged conduct of Gen Pace and the offenses to which the appellant pled guilty. This assignment of error is without merit.

#### **IV. Unlawful Command Influence**

##### **a. Facts**

In his fourth assignment of error, the appellant claims that the military judge erred in not dismissing all charges and specifications due to alleged unlawful command influence (UCI). The appellant complains specifically about Gen Pace's involvement in, and alleged UCI over, the CIB investigative and evidence gathering process, ultimate report, and first endorsement.

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<sup>10</sup> On 10 September 1998, the appellant waived his right to have the Article 133, UCMJ, charge and specifications investigated by a Pretrial Investigation Officer under the provisions of Article 32, UCMJ.

Appellant's Brief at 50-52. He also asserts that UCI was exerted over potential witnesses for the appellant by the actions of numerous individuals during the course of the CIB's investigation, including MajGen Ryan (Commander, 2nd Marine Aircraft Wing (MAW), Cherry Point, N.C.), Brigadier General (BGen) Bowden (Assistant Wing Comander, 2nd MAW, Cherry Point, N.C.), MajGen DeLong (President, CIB), and Lieutenant Colonel (LtCol) Sullivan (Commanding Officer, VMAQ-4). *Id.* at 52-61.

The appellant alleges that Gen Pace committed UCI during the period that the CIB was being conducted and thereafter through his active and "improper" participation in the CIB's investigative process and his subsequent endorsement upon the CIB's final report. Specifically, he asserts that Gen Pace exerted UCI by actively directing the course of -- and evidence collection effort throughout -- the CIB; by communicating daily with the CIB President concerning the course and content of the investigation; by actively engaging in the drafting and editing of the CIB report; by "directing" the charges that would ultimately be brought against the accused; and by essentially orchestrating the entire prosecutorial effort against the accused when he knew he would be serving as the convening authority.

Additionally, the appellant complains of the comments and actions of a number of senior leaders associated with the CIB specifically, or the gondola tragedy generally, claiming their actions and/or remarks individually and/or collectively constituted a "public condemnation" of the mishap crew; discouraged defense witnesses from stepping forward to assist the appellant; inflicted retribution on individuals who challenged the CIB's investigative "methodology;" and generally created a "chilling environment" in regard to assuring fundamental fairness and due process for the appellant and Capt Ashby. Particularly condemned by the appellant are the following actions:

- (1) The comments of MajGen Michael D. Ryan, USMC, then Commanding General, 2nd MAW, made at squadron "all officers" meetings involving aviators assigned to the Marine Tactical Electronics Warfare (VMAQ) squadrons at Cherry Point, North Carolina, on or about 05 February 1998. Over four days (05 to 09 February 1998), similar meetings were repeated for all the aircrews of the 29 flying squadrons in the 2nd MAW. During these meetings, Gen Ryan allegedly read inflammatory news articles concerning the gondola tragedy and suggested that aircrew mistakes caused it; insinuated that VMAQ flight crews were routinely "breaking the rules" relating to low-level training flights by flying below minimum flight levels (i.e., "flathatting"); speculated that he might personally serve as the convening authority for any judicial proceedings arising out of the tragedy; and stated that anyone intentionally disregarding established Marine Corps flight safety rules would be punished.

(2) A collateral investigation (conducted simultaneously with the CIB investigation) by BGen William G. Bowden, USMC, Assistant Wing Commander, 2nd MAW, USMC, which sought to determine whether there was a systemic problem with flight rule violations during previous VMAQ deployments to Aviano, Italy. During this investigation, Gen Bowden questioned every officer in the EA-6B "Prowler" community at Cherry Point. Before doing so, he administered Article 31b, UCMJ, warnings to each aviator advising them that they were suspected of possible "dereliction of duty" for failing to follow established protocol for low-level flying missions conducted in Italy. Some perceived retribution against those who were unwilling to cooperate with Gen Bowden.

(3) A meeting between the Commandant of the Marine Corps, Gen Charles C. Krulak, USMC, and Capt Howard Marroto, USMC (aviator assigned to VMAQ-3, Cherry Point), in Washington, D.C., on 21 April 1998. Capt Marroto had earlier sent Gen Krulak two email messages expressing the squadron's concern and dismay at the relief of LtCol S.L. "Muddy" Watters, USMC, the Commanding Officer at VMAQ-3, MCAS, Cherry Point. LtCol Watters was relieved of command after a preliminary investigation substantiated that he had been personally involved in violating low-level flying restrictions (approximately 10 months prior to the mishap flight). Additionally, LtCol Watters advised his squadron officers during the course of the Aviano mishap investigation to "make disappear" any homemade videotape of low-level flying events in which they may have participated. LtCol Watters received nonjudicial punishment from Gen Pace for these two incidents. Gen Krulak responded to the emails by inviting Capt Marroto to visit with him personally to discuss this matter if he was ever in Washington, D.C. They eventually did meet approximately one month later in Washington, D.C. During their encounter, Gen Krulak ostensibly declared that "he loved the mishap crew members and would fight to get them home (to the United States); that he would not bow to political pressure in regard to how the crew was dealt with; but that did not mean they would not be disciplined," or words to that effect.

(4) MajGen DeLong's "inaccurate and biased" press conference of 12 March 1998, during which he mistakenly declared that the gondola cable system was marked as an aerial cableway on the charts available to the mishap crew. Gen DeLong also stated the CIB's conclusion that "the cause of this mishap was aircrew error." At a subsequent "all officers meeting" that same day with VMAQ-4 personnel, Gen DeLong expressed his opinion that

the mishap crew was "flathatting" and that the mission data supported such a conclusion.

(5) The email communication made by LtCol Sullivan, USMC, Commanding Officer of VMAQ-4, Cherry Point, N.C., to the mishap crew and their counsel asking them to "conform to common military courtesies and use the chain of command" when submitting discovery requests, rather than contacting squadron personnel directly. Colonel Craig Carver, USMC, legal advisor to the CIB, responded to this email (which was forwarded to him) by advising all squadron leadership to:

Please advise all of your officers (and the other Q squadrons as well) to decline . . . attorneys [sic]. All of [the defendants'] requests for assistance should come from their defense counsel to the trial counsels who will discuss with the appropriate command regarding how and whether to comply with the request. Further, for legal reasons, all such discovery requests must be documented by the trial counsels for court reasons.

According to the appellant, all of these actions and statements enveloped and steered the ultimate "prosecutorial process," negatively impacting upon his right to due process, and thus constituting UCI. Appellant's Brief at 52.

#### b. Law

UCI has often and properly 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 *Thomas*, 22 M.J. at 393). Even the mere appearance of UCI has the potential to 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)(citing *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)). Any brand of UCI insidiously erodes the very foundations of fundamental fairness, due process, and true justice. Article 37(a), UCMJ, firmly prohibits UCI as follows:

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. . . .

Though we often recognize the military trial judge as the "'last sentinel' to protect the court-martial from unlawful command influence," *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998), the judges of the service courts of criminal appeals and the Court of Appeals for the Armed Forces have clearly demonstrated that they will actively serve as "force multipliers" in this regard. *Gore*, 60 M.J. at 186; *United States v. Biagase*, 50 M.J. 143, 152 (C.A.A.F. 1999); *Kelly*, 40 M.J. at 558; *United States v. Francis*, 54 M.J. 636, 637 (Army Ct.Crim.App. 2000). The undeniable validity of this service-wide "general quarters" approach to judicial prevention of UCI is buttressed by our superior court's observation that "a prime motivation for establishing a civilian [Court of Appeals for the Armed Forces] was to erect a further bulwark against impermissible command influence." *Thomas*, 22 M.J. at 393. See *Gore*, 60 M.J. at 185.

The law is crystal clear in condemning any UCI directed against prospective witnesses at a court-martial. *Gore*, 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; *United States v. Rosser*, 6 M.J. 267, 271-272 (C.M.A. 1979). 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.

### c. Burdens

While similar in nature, there are important distinctions in the burdens of production and persuasion concerning UCI claims as asserted at the trial level and on appeal. At trial, the defense must meet an initial burden to bring forth "some evidence" that raises UCI which could potentially cause the proceedings to be unfair. *Biagase*, 50 M.J. at 150 (citing *United States v. Ayala*, 43 M.J. 296, 300 (C.M.A. 1995)). See *United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000). Though this threshold is low, the evidence required to meet it must be more than mere allegation or speculation. *United States v. Stonemen*, 57 M.J. 35, 41 (C.A.A.F. 2002)(citing *Biagase*, 50 M.J. at 150); *Francis*, 54 M.J. at 637 (citing *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994)). "At trial, the accused must show facts which, if true, constitute [UCI], and that the alleged [UCI] has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Biagase*, 50 M.J. at 150.

During appellate consideration of UCI claims, the factors are framed for consideration in light of a completed trial. 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); *Francis*, 54 M.J. at 637. While the

trial judge most often will be evaluating UCI **prospectively**, anticipating its impact upon the pending trial proceedings, the appellate courts will generally be viewing alleged UCI **retrospectively**, thoughtfully evaluating the actual impact it had upon the completed trial. 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." *Biagase*, 50 M.J. at 150 (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 at trial or on appeal, the burden then shifts to the Government to convince the court beyond a reasonable doubt that there was no UCI, or that the UCI will not (at trial) or did not (on appeal) 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.

#### d. Discussion

We have thoroughly reviewed the military judge's extensive findings of fact and conclusions of law. We are confident that his 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 there was no 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 they had absolutely no impact upon the findings and sentence of this general court-martial.

The military judge initially concluded that the CIB was "an administrative fact-finding body, and not a prosecutorial or judicial entity." AE XCVIII at 2. As such, the CIB "was neither a part of the accusatorial or the adjudicative stages of [a

court-martial proceeding], nor a part of the legal process required under the UCMJ as a condition precedent to the preferral or referral of charges to trial [by court-martial]." *Id.* at 29. The CIB's purpose was to determine the facts surrounding and causing the gondola tragedy, "not to perfect or adjudicate criminal charges against [the mishap crew members]." *Id.* Accordingly, the military judge ruled that Article 37, UCMJ, and the legal principles generally surrounding UCI, did not apply to the CIB. There is strong merit in this position. *See United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995); *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994); *Thomas*, 22 M.J. at 388.

Our superior court has noted that "the term 'unlawful command influence' has been used broadly in our jurisprudence to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ." *Hamilton*, 41 M.J. at 36. However, by its clear and unambiguous statutory language, Article 37, UCMJ, applies solely to courts-martial and military tribunals. *See also* R.C.M. 306(a)(disposition decisions in regard to criminal charges must be free of UCI), and Article 98, UCMJ (UCI may result in criminal punishment under the UCMJ). Article 37, UCMJ, appears to have been purposefully entitled, "Unlawfully Influencing Action of Court." While we certainly do not encourage or condone any action intended to subvert or improperly influence administrative fact-finding that might ultimately result in criminal charges within our court-martial system, we can find no authority for extending the legal prohibitions surrounding UCI to the investigative and pre-preferral process. Fortunately, in this case we need not formally decide this issue as we are convinced beyond a reasonable doubt that no UCI occurred at any stage of this case.

We have carefully reviewed all the evidence and testimony of record in regard to Gen Pace's conduct of, and participation in, the CIB process, including the preparation of the CIB report and first endorsement. We have particularly scrutinized Gen Pace's personal testimony on these matters and found it to be compelling and credible. Having previously addressed Gen Pace's actions extensively in the context of other assignments of error raised, we do not feel the need to elaborate much beyond what we have previously stated, other than to note the complete absence of evidence of any intent or motive on his part to influence the CIB members or their ultimate report, the Article 32 investigation, or the ultimate court-martial proceedings in this case. In particular, we are satisfied that Gen Pace did not "direct" that specific charges be brought against the appellant. We are convinced beyond a reasonable doubt that Gen Pace's actions throughout the appellant's investigation and court-martial case did not constitute UCI (actual or apparent).

Likewise, we are convinced beyond a reasonable doubt that there was no improper conduct or UCI flowing from the various actions of MaGen Ryan, BGen Bowden, MajGen DeLong, Gen Krulak, or

LtCol Sullivan, as discussed above. See *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003). Foremost, none of the sundry statements, meetings, collateral investigations or actions sought to condemn or attribute wrongdoing or guilt to any of the mishap crewmembers. Nor did they attempt to impede or obstruct the appellant's access to evidence or witnesses favorable to his case. To the extent that the various "all officer meetings" generally addressed perceived systemic deficiencies within the 2nd MAW community, we can only observe that senior leadership was doing what they believed was necessary to prevent similar tragedies from taking place. None of the statements or actions complained of has been shown to have a direct or negative impact upon the appellant's court-martial process. The excellent reasoning of the Army Court of Criminal Appeals in *United States v. Simpson*, 55 M.J. 674 (Army Ct.Crim.App. 2001) applies forcefully to this case. "While [the appellant] identifies certain actions by DOD and DA officials as evidence of [UCI], he does not tie those actions to specific events, outcomes, or results at trial, alleging instead that the atmosphere was so poisoned that a fair result was unobtainable." *Id.* at 686. Similarly, in this case, there is no evidence that the actions taken by various senior members of the Marine Corps in response to the gondola tragedy - including statements to the media and measures taken to prevent future mishaps - were intended to in any way influence the appellant's court-martial, or that they had such an effect.

Even if we were to conclude that one or more of the complained of actions constituted UCI, we would still not grant relief as we are convinced beyond a reasonable doubt that such actions did not effect the findings and sentence of the appellant's court-martial. *Biagase*, 50 M.J. at 151. As we noted previously, the appellant has failed to demonstrate any prejudice in relation to the alleged UCI issues in this case, as all original offenses potentially impacted thereby were withdrawn after the appellant's co-accused, Capt Ashby, was acquitted by members at his general court-martial of his original charges. The offenses to which the appellant entered unconditional pleas of guilty were not even contemplated at the time that the CIB was conducted, nor are they even mentioned in the endorsement to the CIB. The Article 133, UCMJ, offenses to which the appellant ultimately pled guilty were preferred on 28 August 1998, five months after the preferral of the original charges. Again, it is important to note that they were also preferred well after the conclusion of the CIB; the Article 32, UCMJ, investigation; the referral of the original charges; and the appellant's original arraignment. The subject matter of those additional charges is distinct and separate from the original charges. On 10 September 1998, the appellant waived his right to have the additional charges investigated at an Article 32, UCMJ, investigation. The additional charges were referred to general court-martial and joined with the original charges on 21 September 1998 with the consent of the appellant. On 02 October 1998, the appellant was arraigned a second time on these additional charges.

The appellant has presented absolutely no evidence demonstrating prejudice in any respect regarding the decision to refer these additional charges to trial. He does not suggest that his pleas of guilty were coerced as a result of UCI, and we find no evidence to suggest that was the case. Indeed, the appellant voluntarily entered into a pretrial agreement attesting to the fact that his pleas of guilty were being made freely and "that no person or persons whomsoever have made any attempt to force or coerce me into making this offer or pleading guilty." AE CCVI at 1. See *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986). The appellant also does not complain that any defense witnesses testified falsely, were dissuaded from testifying, or somehow "curbed" their testimony based upon any of the above-discussed actions. Appellate counsel acknowledges that there was a "compelling character case" offered on his client's behalf at the Article 32, UCMJ, pretrial investigation. Appellant's Brief at 32. We also note the extensive and compelling testimony (7 live witnesses) and evidence (including over 20 affidavits and letters from character witnesses) submitted by the appellant at trial in extenuation and mitigation of the offenses to which he pled guilty. See *Thomas*, 22 M.J. at 396 (presentation of extensive favorable character evidence at trial can rebut assertion that UCI prevented accused from securing favorable evidence). Finally, there is absolutely no evidence suggesting that the members who sentenced the appellant were in any way impacted by the alleged UCI. We are personally confident from our review of the record that none of the complained of actions or statements had any impact whatsoever on the findings or sentence of the appellant's court-martial.

We hold that the appellant has failed to establish a *prima facie* case of UCI. To whatever extent he may have met the first prong of the *Stombaugh-Biagase* test for raising UCI, he has failed to demonstrate any nexus between the acts complained of and any unfairness in his general court-martial -- prongs two and three of *Stombaugh*, 40 M.J. at 213. Assuming, arguendo, that the appellant has cognizably raised the issue of UCI, we find beyond a reasonable doubt that the allegations made do not constitute UCI and that the findings and sentence were unaffected by any of the actions of which he complains. See *Biagase*, 50 M.J. at 150. We are satisfied that the appellant's trial was in fact fair, and that the record completely dispels any perception of unfairness stemming from the pretrial activities the appellant complains of. This assignment of error is without merit.

#### **V. Disqualification of the Staff Judge Advocate in Providing Post-Trial Recommendations**

In his fifth assignment of error, the appellant alleges that the staff judge advocate to the convening authority, Colonel [C], USMC [hereinafter SJA], and the deputy staff judge advocate, LtCol [C], USMC [hereinafter DSJA], were both disqualified from providing post-trial advice and recommendations (SJAR) to Gen Pace, the convening authority, due to their pervasive involvement

in the prosecutorial effort, which effectively rendered them *de facto* "members of the Aviano prosecution team." Appellant's Brief at 62. In support of this assignment of error, the appellant requests us to closely scrutinize the actions of the SJA and DSJA during their attendance at multiple sessions of the Aviano courts-martial. Among the allegations raised in the appellant's post-trial submissions to this court are the following:

- 1) That, although assigned to Gen Pace's staff in Norfolk, VA., the SJA and DSJA (either individually or together) were present at Camp Lejeune, N.C., for virtually all sessions of Capt Ashby's and the appellant's general courts-martial.
- 2) That while attending these courts-martial sessions, the SJA and/or DSJA usually monitored the court proceedings on a closed circuit television located in the LSSS office of LtCol [G], USMC, leader of the Aviano prosecution team. A desk was apparently added to LtCol [G's] office to accommodate the SJA and/or DSJA.
- 3) The SJA and/or DSJA were frequently seen having discussions with members of the prosecution team in LtCol [G's] office.
- 4) The SJA and/or DSJA were viewed participating in a courtroom meeting with members of the prosecution team and Government experts on a weekend day.
- 5) On a break prior to closing arguments being presented in the Ashby trial, the DSJA was viewed "literally jogging" toward the courtroom from the prosecution wing of the LSSS building to give trial counsel "final instructions" on his closing argument. "Numerous individuals" in the courtroom during closing arguments in the Ashby case saw the DSJA handing his written notes to, and discussing strategy with, the trial counsel presenting the closing argument.
- 6) That ". . . it seemed or was known . . . that [the SJA and DSJA] were assisting the trial counsel in ways that would show favoritism for the government."

One individual stated, ". . . the mere presence of the SJAs throughout the proceedings was highly unusual, created an appearance that the SJA had a personal interest in the cases and that trial counsel were responding to direct supervision or guidance from the SJA or his staff." Letter of Major (Maj) Jon W. Shelburne, USMC, dtd 18 April 2000. These allegations were specifically raised by the defense in their post-trial submissions to the convening authority, which requested that both the SJA and DSJA be disqualified from providing any post-trial

recommendations or advice in the appellant's case. See Letter of LT Katherine L. Clune, JAGC, USN, of 15 Feb 2000, with attachments (submitting matters pursuant to R.C.M. 1105 and 1106); Letter of Maj E.M. Veit, USMC, dtd 19 Apr 2000, with enclosures (submitting R.C.M. 1106 matters on behalf of the appellant in light of addendum to SJAR dtd 20 Mar 2000); and Letter of Mr. David L. Beck, of 20 Jan 2000, with enclosures (requesting clemency and seeking disqualification of SJA and DSJA). Ultimately, the SJA prepared the SJAR in this case, as well as multiple addendums thereto. Addressing the allegations made above, the SJA summarily dismissed them without discussion as being "without merit," specifically stating that the allegation concerning his DSJA giving hand-written notes and advice to the trial counsel before closing argument was "totally false." Addendum to SJAR of 20 Mar 2000.

Article 60(d), UCMJ, states that the staff judge advocate or legal officer shall review certain cases and provide a written recommendation to the convening authority concerning disposition. See R.C.M. 1106(a). Congress has made it clear that any such individual providing the post-trial recommendation must not be disqualified by prior participation in the case. Article 6(c), UCMJ, states, "No person who has acted as a member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case." See also Article 64(a), UCMJ; R.C.M. 1106(b). Our superior court has strictly applied this statute in light of its clear purpose "to assure the accused a thoroughly fair and impartial review." *United States v. Coulter*, 14 C.M.R. 75, 77 (C.M.A. 1954). See *United States v. Edwards*, 45 M.J. 114, 115 (C.A.A.F. 1996) (citing *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994) and *United States v. Crunk*, 15 C.M.R. 290, 293 (C.M.A. 1954)). See also *Jeter*, 35 M.J. at 442. The discussion following R.C.M. 1106(b) states that a staff judge advocate may also be disqualified if he or she has served as defense counsel in a companion case, testified as to a contested matter (unless the testimony is clearly uncontroverted), or has other than an official interest in the case. The language "other than an official interest" has been interpreted to mean a personal interest or feeling in the outcome of a particular case. *United States v. Sorrell*, 47 M.J. 432, 433 (C.A.A.F. 1998); *United States v. Rice*, 33 M.J. 451, 453 (C.M.A. 1991); *Choice*, 49 C.M.R. at 663. A legal officer has been declared disqualified from preparing a post-trial recommendation when he had preferred charges, interrogated the accused, and acted as evidence custodian. *Edwards*, 45 M.J. at 116. Our superior court has also held that the phrase applies to "[o]ther conduct by a staff judge advocate [that] may be so antithetical to the integrity of the military justice system as to disqualify him from participation" in the post-trial [recommendation]. *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976). Where a legitimate factual controversy exists between the staff judge advocate and the defense counsel, the staff judge advocate must disqualify himself

or herself from participating in the post-trial recommendation. *Lynch*, 39 M.J. at 228 (citing *United States v. Caritativo*, 37 MJ 175, 183 (C.M.A. 1993)).

This particular issue is troubling in light of the serious allegations raised in the R.C.M. 1105 and 1006 submissions by LT Clune, JAGC, USN, detailed defense counsel; Maj Veit, USMC, detailed defense counsel; Mr. David L. Beck, civilian defense counsel; and supported by five separate and distinct additional statements. See Major Veit ltr dtd 19 Apr 2000 (with enclosures). The submissions and statements clearly place in dispute the SJA's ability to render a fair and impartial review in the appellant's case in light of his alleged active participation in the prosecutorial effort. At a minimum, they raise a legitimate factual dispute between the defense team and the SJA which may have signaled the need for an independent review by an SJA whose actions were not being called into question. *Lynch*, 39 M.J. at 227-28. Instead, the allegations raised by no less than seven separate individuals were summarily dismissed by the SJA (the person whose actions were complained of) as "without merit." See Addendum to SJAR dtd 20 Mar 2000 at 1; Addendum to SJAR dtd 03 May 2000 at 1-2. The facts before us are sufficient to raise a colorable claim that the SJA who prepared the SJAR and addenda thereto became "embedded" with the prosecutorial effort in this case to an extent that it may have transformed his interest in the outcome to a personal one. Certainly, the numerous testimonials submitted in support of this assignment have given rise to a clear **appearance** that the SJA became an advocate for the prosecution. In order to determine whether the SJA should have disqualified himself from preparing the SJAR and the addenda thereto, we believe that further impartial fact-finding on this matter is required. We will order such action in our decretal paragraph, see *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), as well as suggest an alternative thereto.

## **VI. Improvident Pleas of Guilty**

In his sixth assignment of error, the appellant urges us to set aside the findings and sentence in this case based upon the claim that his pleas of guilty to both offenses alleged under Article 133, UCMJ (conduct unbecoming an officer by engaging in a conspiracy to obstruct justice and actual obstruction of justice) were improvident. He specifically asserts that the appellant's guilty pleas could not be provident to either offense because a foreign (i.e., Italian) criminal investigation is not a qualifying "criminal proceeding" under our obstruction of justice statute. See M.C.M. (1998 ed.), Part IV, ¶96c. This is the first time our court has considered the issue of whether a foreign criminal investigation can satisfy the "criminal proceeding" requirement under our obstruction of justice statute. We answer that question now in the affirmative.

During the providence inquiry into his pleas of guilty, the appellant admitted that -- following the cable strike, and after executing an emergency landing in the mishap aircraft at the NATO Air Base in Aviano, Italy, on 3 February 1998 -- he and Capt Ashby made a conscious decision to remove a videotape from a hand-held video recorder used during the flight to record portions of the mishap event. The appellant believed the tape contained footage of a low-level "flaperon roll"<sup>11</sup> during a ridgeline crossing executed by Capt Ashby on the first leg of the flight, along with a shot of the appellant smiling into the camera, all of which he believed would be viewed negatively by investigators of the mishap. Record at 2751-52; 2753. He told the military judge that the tape depicted three segments of the mishap flight occurring at approximately 35 minutes, 30 minutes, and 10 minutes before the cable strike occurred. *Id.* at 2770. After suggesting to Capt Ashby, "Let's take the tape," the appellant and Capt Ashby removed the recorded tape from the camera and substituted a new, unrecorded tape in its place, thereafter leaving the camera and unused tape in the cockpit. *Id.* at 2743-44. They took this action knowing the contents of the mishap aircraft would be immediately inventoried pursuant to standard post-mishap investigation procedures.

Capt Ashby secreted the recorded tape from the plane in his flight suit. The following day (4 February 1998), the mishap crew was advised that the mishap flight had caused the death of 20 civilians; that there was an Italian criminal investigation underway regarding the flight; and that they would each be asked to make statements to an Italian magistrate who was investigating possible "manslaughter" or "murder" charges. *Id.* 2744-45; 2758. Italian defense counsel were hired by the United States to represent the crewmembers in their dealings with the Italian magistrate's office, and military counsel were also detailed. Italian authorities then interviewed each crewmember. A few days later, around the 6th of February 1998, the appellant, Capt Ashby, and Capt Seagraves met and discussed what should be done with the tape they had removed from the aircraft. After the appellant explained the contents of the tape to Capt Ashby, and opined that "the Italians will eat you alive [if they find out about the tape]," Capt Ashby gave the tape to the appellant. Capt Seagraves suggested to both the appellant and Capt Ashby that they should get rid of the tape. *Id.* at 2752. The appellant ultimately destroyed the videotape by throwing it into a bonfire. *Id.* at 2753. The appellant was aware at the time that Italian criminal investigators would clearly be interested in viewing as potential evidence any videotape depicting footage of the mishap flight. *Id.* at 2770. He also admitted destroying the tape because the Italians might view the scenes recorded on the tape as indicative of carelessness or negligence, and also did so knowing his actions would impede the investigation, were contrary to good order and discipline, would bring discredit upon

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<sup>11</sup> A flaperon roll is a 360-degree twisting maneuver about the long axis of the aircraft.

the armed forces, and were unbecoming an officer. Id. at 2777-80.

The elements of obstruction of justice, when alleged under Article 133, UCMJ, are as follows:

1. That the accused wrongfully did a certain act;
2. That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;
3. That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice;
4. That, under the circumstances, the conduct of the accused 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; and
5. That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

The elements of conspiracy, when alleged under Article 133, UCMJ, are as follows:

1. That the accused entered into an agreement with one or more persons to commit an offense under the code;
2. That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.
3. That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

See M.C.M. (1998 ed.), Part IV, ¶96b (obstruction of justice), ¶5 (conspiracy), and ¶59c(2) (conduct unbecoming an officer and gentleman).

Though there was initially much controversy in this case regarding the exact "investigation" the Government was alleging had been obstructed in these two specifications, see Record at 2625-86, the appellant ultimately entered unconditional pleas of guilty by exceptions and substitutions clarifying the conduct in both the conspiracy specification and obstruction of justice specification to which he was pleading guilty. Specifically, he pled guilty to both specifications based upon the following actions making up the core object and conduct of both offenses:

. . . between on or about 3 February 1998 and on or about 14 March 1998, at NATO Air Base Aviano, Italy, wrongfully obstruct justice by endeavoring to impede a ***criminal investigation by Italian authorities*** by the secreting and destruction of evidence. The said

Captain SCHWEITZER and Captain Richard J. ASHBY, U.S. Marine Corps Reserve, removed a videotape from the cockpit of the aircraft that struck cable car cables on or about 3 February 1998 and secreted said videotape from the investigators and destroyed the said videotape . . . .

See AE CCIX (cleansed charge sheet reflecting pleas by exceptions and substitutions)(emphasis and italics added). It is important to note that the appellant specifically excepted out language from the original charge sheet alleging the appellant's intent to impede "an investigation," and substituted therefore the more specific phrase, "a criminal investigation by Italian authorities." See AE CCVI at 4-6; Record at 2720-21.

To set aside a guilty plea as improvident, the record must demonstrate a substantial basis in law and fact to question the validity of the appellant's plea. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999). See R.C.M. 910(e). Further, where a guilty plea is first attacked on appeal, we must construe the evidence in a light most favorable to the Government. *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989)(Cox, C.J., concurring). Article 45(a), UCMJ, provides:

If an accused . . . after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

R.C.M. 910(c) requires the military judge to inform the accused of the nature of the offense to which the guilty plea is offered. This rule implements *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), requiring the military judge to question an accused "about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense . . . to which he is pleading guilty." See *United States v. Faircloth*, 45 M.J. 172, 174 (C.M.A. 1996). R.C.M. 910(e) requires the military judge to make "such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." This rule implements *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980), requiring that "the factual circumstances as revealed by the accused himself objectively support that plea [of guilty.]" It is not enough to elicit legal conclusions. The military judge must elicit facts from which the military judge

can determine the factual basis for the plea. See *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). On appeal, a guilty plea should be overturned only if the record fails to objectively support the plea or there is "evidence in substantial conflict with the pleas of guilty." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994)(quoting *United States v. Herbert*, 1 M.J. 84, 86 (C.M.A. 1975)(internal quotations omitted).

After carefully reviewing the record of trial, including the military judge's ruling on this matter and his extensive providence inquiry into the appellant's pleas of guilty, we are confident that the pleas are provident in every respect. After thoughtfully considering the case law cited on this matter by the litigants, the military judge ruled as follows:

I also agree that the existing case law establishes that a service member can obstruct justice by interfering with a criminal investigation regardless of whether the investigation was conducted by State, Federal, military or foreign authorities.

Misconduct which tends to obstruct a foreign criminal investigation, though more remote from a military investigation, can also affect the military justice system. Accordingly . . . the term "criminal proceedings" [as used in the MCM section addressing obstruction of justice] includes a foreign criminal investigation or proceeding if the foreign criminal investigation or proceedings involves alleged misconduct that also violates the Uniform Code of Military Justice and U.S. military authorities are made aware of the foreign criminal investigation or proceedings.

Record at 2685. See Record at 2736. This ruling is consistent with the limited body of case law in the military addressing this issue. See *United States v. Smith*, 34 M.J. 319 (C.M.A. 1992)(obstruction of justice offense can arise from interference with a state criminal proceeding when the "impact of the charged conduct on the later, but nonetheless probable, military investigation brought it within the intended scope of [the Article.]" ; *United States v. Simpkins*, 22 M.J. 924, 924-927 (N.M.C.M.R. 1986), *aff'd*, 24 M.J. 49 (C.M.A. 1987)(summary disposition)(a literal reading of the elements of obstruction of justice justifies a broad interpretation to include all instances of corrupt conduct intended unlawfully to influence, impede, or otherwise obstruct the due administration of justice, which is consistent with the historical genesis of the offense in 18 U.S.C. §1503); *United States v. Johnson*, 39 M.J. 1033, 1038 (A.C.M.R. 1994)(stating in dicta that interference with a criminal investigation constitutes obstruction of justice under the Code regardless of whether the investigation was conducted by military, state, or foreign authorities); *United States v. Kirks*, 34 M.J. 646, 650-51 (A.C.M.R. 1992)(holding that a specification alleging

wrongfully endeavoring to impede an investigation by German Criminal Police was sufficient to allege the offense of obstruction of justice); *United States v. Bailey*, 28 M.J. 1004 (A.C.M.R. 1990)(elements of obstruction of justice justify a broad interpretation to include all instances of corrupt conduct intended to obstruct the due administration of justice). We are satisfied based upon our review of the UCMJ and the case law interpreting the offense of obstruction of justice, that if the charged obstructive actions take place in the context of a military, state, or foreign criminal investigation, an Article 15 proceeding, an Article 32 investigation, a summary, special, or general court-martial, or a state or foreign criminal proceeding, the "criminal proceeding" element of this offense is met.

We find nothing in the UCMJ or the M.C.M. that suggests the words "criminal proceedings" as used in the elements of our obstruction of justice offense were intended to be limited strictly to military criminal proceedings under the UCMJ.<sup>12</sup> Such a narrow view would be contrary to the predisposition running through military case law to apply a broad interpretation to the elements of this offense. *See Bailey*, 28 M.J. at 1006. *See also United States v. Guerrero*, 28 M.J. 223, 226-27 (C.M.A. 1989); *Simpkins*, 22 M.J. at 924-27. While our statute's overarching purpose is the protection of "the administration of justice in the military system," *see Guerrero*, 28 M.J. at 227, there is no suggestion that the offense cannot occur when a military member endeavors to impede a foreign criminal investigation, especially when the results of that investigation will inevitably become known to, shared with, or acted upon by United States military authorities.<sup>13</sup> The offense still requires that the accused's

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<sup>12</sup> The Military Judges' Benchbook definition of "Criminal proceedings" reads as follows: "'Criminal proceedings' includes (lawful searches) (criminal investigations conducted by police or command authorities) (Article 15 nonjudicial punishment proceedings)(Article 32 investigations)(courts-martial) (state and federal criminal trials)(\_\_\_\_\_)." This "laundry-list" definition, as indicated by the open bracket at the end, is clearly not intended to be exhaustive. Military Judges' Benchbook, Dept of the Army, Pamphlet 29-9 at 686 (15 Sep 2002).

<sup>13</sup> We note in this case that Italy is a signatory, along with the United States, to the North Atlantic Treaty Organization Status of Forces Agreement. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.C. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (NATO SOFA). The NATO SOFA expressly contemplates that its signatories ". . . shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense." *Id.* at Art. VII, ¶6(A). *See Bailey*, 28 M.J. at 1006-07 (Korean police acting as a conduit for United States military officials under terms of SOFA between United States and Republic of Korea). Also, Italy and the United States have concurrent jurisdiction over criminal offenses by U.S. service members serving in Italy. *Id.* at Art. VII ¶1(b). After *Solorio v. United States*, 483 U.S. 435 (1987), it would appear especially illogical to conclude that our obstruction of justice statute reaches military, state, and federal investigations and prosecutions, but somehow does not apply to the many foreign criminal investigations and prosecutions that frequently impact our military mission, and the lives of

conduct be to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces. See *United States v. Jones*, 20 M.J. 38 (C.M.A. 1985)(service member's intentional destruction of discoverable evidence which could have been used by military authorities in instigating a military prosecution or investigation constituted a service disorder). The appellant was explicit in his admission of this element, and that: 1) he knew 20 citizens from multiple nations had perished and that there was an ongoing Italian criminal investigation into the gondola tragedy when he elected to destroy the in-flight videotape; 2) he knew he was being investigated for "manslaughter" and possibly "murder" by Italian authorities; 3) he knew United States authorities were cognizant of this fact and were monitoring the Italian investigation; 4) he was aware United States authorities would ultimately be made aware of the results and recommendations of the Italian criminal investigation under the terms of the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA);<sup>14</sup> 5) he knew the CIB investigation would have been interested in viewing the destroyed videotape, and could be recommending criminal action against him; 6) his actions impeding the Italian criminal investigation necessarily would impede any follow-on criminal investigation, including any conducted by the United States; and 7) his actions had an adverse effect on the United States military justice system. Prosecution Exhibit 22; Record at 2731-80; 3526-34. See *Smith* 34 M.J. at 322 (" . . . the impact of the charged conduct on a later, but nonetheless probable, military investigation brought it within the intended scope of Article 134 [obstruction of justice offense]). Under these facts and circumstances, we find no substantial basis in law or fact to question the providence of the appellant's pleas of guilty to either offense.

#### **VII. Admission of Sentencing "Impact" Testimony from Family Members of Victims of the Gondola Mishap**

In his seventh assignment of error, the appellant asks us to conclude that the military judge erred in admitting into evidence during sentencing the testimony of three family members of individuals who died in the gondola car. He contends that this testimony was not admissible because: 1) it was not relevant in that it was not directly related to or resulting from the offenses of which the appellant was convicted, and 2) even if it

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United States military personnel worldwide. See *United States v. Smith*, 34 M.J. 319, 324 (C.M.A. 1992)(Cox, J. concurring)("In light of [*Solorio*], there can be no distinction between obstructing federal or military prosecutions on the one hand and obstructing state prosecutions on the other hand, and there are no "strictures" in the Manual for Courts-Martial that purport to so limit the scope of the offense.").

<sup>14</sup> Our superior court has held that obstructing justice can occur where the appellant "believed that some law enforcement official of the military . . . would be investigating his actions." *United States v. Finsel*, 36 M.J. 441, 444 (C.M.A. 1993)(internal quotations omitted).

was relevant, the admission of this testimony violated MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), because its prejudicial impact far outweighed the "minimal probative value" of the evidence. Appellant's Brief at 75-76. We disagree with both assertions.

The three witnesses in question (Mr. Bert Berger of the Netherlands; Ms. Margo Anthonissen of Lille, Belgium; and Ms. Vera Eyskens, also of Belgium) each lost a daughter as a result of the mishap tragedy. The Government called them as witnesses in sentencing for the sole and limited purpose of testifying in regard to how the destruction of the cockpit videotape by the appellant impacted them personally. Each testified that the missing videotape left substantial and lingering questions in their minds regarding what was actually depicted on the tape, and what truly transpired during the mishap flight. Each stated also that the families were first told that a blank videotape was found in the video-recorder. Later, they learned that the original videotape had been switched out for a blank tape, and that the appellant had destroyed this recorded videotape taken from the aircraft by burning it. Mr. Bergen's testimony was typical of that adduced from all three witnesses when he asserted that the appellant's destruction of the cockpit videotape left the victims' families with "a puzzle lacking pieces." Record at 3176-78. He asserted that "closure" was difficult for his family members to achieve when the content of the videotape could never be conclusively determined. *Id.*

We review a military judge's decision to admit sentencing evidence in aggravation under an abuse of discretion standard. *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997). The military judge is given broad discretion to determine whether to admit evidence under R.C.M. 1001(b)(4) as aggravation evidence. *Id.*; *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). "Whether a circumstance is 'directly related to or results from the offenses' calls for considered judgment by the military judge, and we will not overturn that judgment lightly." *Wilson*, 47 M.J. at 155 (citing *United States v. Jones*, 44 M.J. 103, 104-05 (C.A.A.F. 1996)). R.C.M. 1001(b)(4) clearly defines the type of evidence that is permissible evidence of aggravation in sentencing:

- (1) Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.

The Discussion under the 1998 version of R.C.M. 1001(b)(4) states that: "Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused' offense."

Evidence qualifying for admission under R.C.M. 1001(b)(4) must also survive the test imposed by MIL. R. EVID. 403, which requires a thoughtful and careful balancing of the probative value of the evidence against its likely prejudicial impact. *United States v. Hardison*, 64 M.J. 279 (C.A.A.F. 2007); *United States v. Wilson*, 35 M.J. 473, 476 n.5 (C.M.A. 1992). The military judge, in carefully ruling upon this matter *in limine*, made both the scope and the nature of the permissible testimony clear:

I find the proffered testimony of Mr. Berger, Mrs. Eyskens and Mrs. Athonissen, regarding their lingering question as to what was on the video tape, to be relevant.

I also find a reasonable link exists between such testimony and the offenses before the court.

I find the probative value of such testimony substantially outweigh (sic) the danger of unfair prejudice, confusion, or delay.

The testimony will be limited, however. The witness may identify himself or herself as a father, mother, sister, et cetera, of a person who died when the aircraft struck the cable car cables on 3 February 1998, that the impact of never knowing what was actually on the video tape has caused lingering questions regarding the loss of the witness' loved one. They will not be able to, or permitted to, testify in any other areas.

Record at 2710-11. Before the testimony in question was presented, the military judge provided the following limiting instruction for the members to follow:

Mr. President, members of the court, as you are aware, Captain Schweitzer has pled guilty to conduct unbecoming an officer and a gentleman by conspiring to obstruct justice, and by obstruction of justice. I remind you that Captain Schweitzer is not charged with any offense alleging that he is criminally responsible for the tragic incident, and you may not hold Captain Schweitzer responsible for the death of the people involved in that gondola incident. Even though the next three witnesses are related to people who died during this gondola-aircraft incident, the fact that people died during this incident must play no part in your determination as to an appropriate sentence for Captain Schweitzer. These three witnesses will testify that destruction of the video tape has created lingering questions in their own mind as to what may or may not have been on the video tape . . . . Does everyone understand that the Captain is not being

sentenced for the death of the 20 individuals who lost their lives on the 3d of February? I'm getting an affirmative response from everyone.

*Id.* at 3175. We are satisfied that the military judge did not abuse his discretion in admitting the testimony of each of these three witnesses. We also conclude that the testimony's probative value was not substantially outweighed by the danger of unfair prejudice or confusion of the members, that the evidence was not cumulative, and that the military judge's limiting instruction clearly advised the members of the proper contours for their consideration of the testimony. We are particularly satisfied that the "lingering questions" created in the minds of these three family members was relevant and probative evidence in aggravation. Such "lingering questions" flowed directly, logically and foreseeably from the appellant's intentional destruction of the cockpit videotape containing actual footage of the mishap flight, which the appellant admitted had evidentiary value to understanding what took place that day in the Italian Alps.

Courts-martial, in their quest to fashion an appropriate sentence that addresses proper sentencing considerations, must, as part of that function, consider the full impact of crimes upon victims and their family members. *United States v. Fontenot*, 29 M.J. 244, 251-52 (C.M.A. 1989); *United States v. Pearson*, 17 M.J. 149, 152-53 (C.M.A. 1984). The appellant's crime of obstructing justice by burning the videotape victimized, at a minimum, all family members of the 20 victims of the gondola tragedy who sought to learn all the facts and circumstances surrounding how and why their loved ones died in the terrible manner they did. The record does not reflect any untoward emotional displays or comments by the three family members who testified, and their testimony was carefully limited by the judge so as to avoid unfair prejudice to the appellant. Their comments articulated the common sense and reasonably foreseeable impact from the intentional destruction of probative evidence in an ongoing criminal proceeding. This was proper evidence in aggravation to the offense of obstruction of justice, which the members were entitled to hear to properly fulfill their sentencing duties.

In light of the entire sentencing case and the lenient sentence awarded by the members, we are confident that, even if the admission of this testimony was error, the error was harmless.

## **VII. Sentence Appropriateness**

In his tenth assignment of error, the appellant asserts that his sentence to a dismissal from the naval service was inappropriately severe. He directs us specifically to the extensive evidence in the record of trial attesting to the appellant's outstanding military character, superior skills and expertise as an ECMO, numerous personal awards and decorations,

and genuine agony and remorse in regard to the gondola mishap. The appellant suggests "this is one of those extremely rare cases where the stigma of the conviction alone, with no punishment, is appropriate." Appellant's Brief at 82.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Courts of Criminal Appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395. A sentence should not be disturbed on appeal, "unless the harshness of the sentence is so disproportionate as to cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.C.M.R. 1980).

The authorized maximum sentence for the offenses to which the appellant pled guilty included a dismissal, confinement for 10 years, and total forfeitures. The members ultimately elected to award the appellant only a dismissal. We cannot say that an approved sentence to a dismissal is inappropriately severe for these offenses or for this particular appellant. This Marine Corps captain conspired with a fellow officer to obstruct justice in the midst of the investigation of one of the most highly visible and tragic incidents in naval aviation history. After time for considerable reflection concerning the object of his conspiratorial agreement with Capt Ashby, the appellant nevertheless chose to obstruct justice by intentionally removing, secreting, and destroying the videotape recording portions of the mishap flight. The destruction of the tape took place after the appellant was fully aware that 20 human beings had perished in the gondola mishap. Thereafter, he intentionally lied to his commanding officer and another squadron senior officer in regard to his use of the video camera during the mishap flight. PE 22 at 7.

After reviewing the entire record, and taking into consideration the appellant's excellent military service, we find that the adjudged sentence is appropriate for this offender and his offenses. See *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395; *Snelling*, 14 M.J. at 268.

#### **VIII. Post-Trial Delay**

Though not raised as an assignment of error by the appellant, we *sua sponte* raise and address the issue of excessive post-trial delay in this case. The following chronology of significant case

milestones illustrates the troublesome delay throughout the post-trial process in this case:

<u>Date</u>	<u>Event</u>
02 Apr 1999	Appellant sentenced by officer members.
08 May 2000	Convening Authority's Action.
24 May 2000	Case received by Navy-Marine Corps Appellate Review Activity (NAMARA).
14 Jun 2000	Case docketed with the NMCCA.
18 Oct 2002	After 21 enlargements of time, Appellant files 82-page brief raising 10 assignments error.
26 Jun 2003	Government files 60-page answer.
10 Jul 2003	Case to NMCCA panel for decision.
23 Aug 2006	Oral argument heard at NMCCA.
10 May 2007	NMCCA issues opinion.

Despite the appellant's ultimate pleas of guilty, this was nevertheless a lengthy and complex general court-martial involving multiple motions and legal rulings that were not waived on appeal by the pleas. The appellant's record of trial is 3,543 pages in length and contains hundreds of exhibits and attachments. The complete record of trial spans 51 volumes. The lengthy appellate briefs from both the appellant and the Government attest to the complexity of the issues presented in this case. The basic chronology above demonstrates that the appellant did not receive his first level appeal of right for more than seven years after he was sentenced. It also showcases the fact that more than six years have passed since NAMARA received this case.

A convicted service member has a constitutional due process right to a timely review and appeal of his court-martial conviction. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34, 37-38 (C.A.A.F. 2003). In thoughtfully evaluating whether post-trial delay has violated the due process rights of an appellant, we first ask whether the delay in question is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). If we answer that question in the affirmative, we must then apply, examine, and balance the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), which are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. See *Moreno*, 63 M.J. at 135-36; *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United*

*States*, 60 M.J. 100, 102 (C.A.A.F. 2004) ("*Toohey I*"). As our superior court noted in *Moreno*, "no single factor [is] required to find that post-trial delay constitutes a due process violation." *Moreno*, 63 M.J. at 136 (citing *Barker*, 407 U.S. at 533). We look at "the totality of the circumstances in a particular case" in deciding whether relief is warranted. *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006). If we ultimately conclude that the appellant's due process right to speedy post-trial review and appeal has been violated, we will generally grant relief unless we are convinced beyond a reasonable doubt that the constitutional error is harmless. *Id.* at 370. We may also initially assume a constitutional due process violation, yet deny relief after concluding that the error was harmless beyond a reasonable doubt. *Id.*

We have carefully and thoughtfully evaluated each individual segment of post-trial delay in this case. Especially disturbing is the length of time our own court has taken to issue this opinion after briefing of the case was completed -- a period of over three and a half years. This was due in large part to the retirement of the originally assigned lead judge before that individual could author an opinion, necessitating Article 66, UCMJ, review *ab initio* by a newly assigned lead judge. It was also the result of this court failing to exercise diligent oversight of individual case processing timelines during much of the period of our handling of this appeal. Delay of this nature is simply inexcusable and represents an abject failure in the performance of our critical duty to provide every appellant "even greater diligence and timeliness than is found in the civilian system" as regards their appeal of right. *Toohey I*, 60 M.J. at 102. Though our superior court has generally applied a "more flexible" review of delay occasioned by the Courts of Criminal Appeals in the exercise of their judicial decision-making authority, *see Moreno*, 63 M.J. at 137 (citing *Diaz*, 59 M.J. at 39-40) and *United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006)), the gross negligence and lack of institutional vigilance we today acknowledge warrants only harsh condemnation.

Initially, we conclude that the post-trial delay in this case has been facially unreasonable. Applying the four *Barker v. Wingo* factors, and carefully examining the totality of the circumstances in this case, we also find that the length of time consumed in completing the appellant's appeal denied him his due process right to speedy review and appeal. Though we can discern no particular *Barker* prejudice in this case, we find a due process violation resulting from our balancing of the other three factors, as the delay in this case "is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) ("*Toohey II*").

However, after considering the record as a whole and the totality of the circumstances relating to the delay in this case,

we are fully confident that this constitutional error was harmless beyond a reasonable doubt, and that no relief is warranted at this time. *Id.* at 363. See *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)(citing *Chapman v. California*, 386 U.S. 18, 24, (1967)). See also *Allison*, 63 M.J. at 370. The appellant entered voluntary pleas of guilty at his general court-martial, and was sentenced only to a dismissal. No other punishment was adjudged. No claim of denial of speedy review and appeal has ever been asserted in this case. See *Allison*, 63 M.J. at 371. We have determined that the appellant's assignments of error on appeal lack merit, albeit we have ordered additional fact-finding in regard to the pending issue of whether the SJA should have been disqualified from authoring the SJAR. We will reconsider the issue of harm to the appellant anew upon return and subsequent review of the appellant's record to this court in light of the outcome of the *DuBay* hearing we order in the following paragraph, or upon the completion of a new SJAR and CA's action. See *Dearing*, 63 M.J. at 488 ("Consistent with *Moreno*, Appellant may in any later proceeding demonstrate prejudice arising from post-trial delay."). We will also, at that time, consider whether it is appropriate in this case to grant the appellant discretionary relief under our Article 66(c), UCMJ, authority. *Toohey I*, 60 M.J. at 102; *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

### Conclusion

Based upon our resolution of assignment of error V (alleged disqualification of SJA and DSJA), the record of trial is returned to the Judge Advocate General of the Navy so that he may remand the record to an appropriate convening authority who shall order a fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). At the ordered hearing a qualified and properly detailed military judge shall inquire into, and render findings of fact concerning, the following issues:

- 1) The full extent and nature of the SJA's and DSJA's participation in the prosecutorial effort in both the appellant's and Captain Ashby's general courts-martial, to include: all meetings and conversations with prosecutors and/or witnesses; all written communications with/to the prosecution team; all recommendations/suggestions made in relation to the prosecutorial effort in the Aviano cases; and any other pertinent information.
- 2) The legitimacy, veracity and scope of the allegations made against the SJA and/or DSJA, as particularly stated in Part V of this opinion.
- 3) Whether there is any additional evidence of actions by the SJA and/or DSJA that would negatively impact

upon their ability "to assure the accused a thoroughly fair and impartial review."

4) Any other evidence which may be reasonably and logically linked to the above matters.

In the alternative, a new SJAR by a different, non-disqualified staff judge advocate, and a new convening authority's action may be ordered. Following completion of either of these alternative actions, the record shall be returned to this court for completion of appellate review. *Boudreaux v. U.S. Navy-Marine Corps C.M.R.*, 28 M.J. 181, 182 (C.M.A. 1989).

Senior Judge VOLLENWEIDER and Senior Judge GEISER concur.

For the Court

R.H. TROIDL  
Clerk of Court