

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

**GOVERNMENT BRIEF
ON SPECIFIED ISSUE**

v.

Case No. ARMY Misc. 20220001

Colonel (O-6)
PRITCHARD, CHARLES L.,
Military Judge,
Respondent

Lieutenant Colonel (O-5)
DIAL, ANDREW J.,
U.S. Army
Real Party in Interest

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

COMES NOW the United States, by and through undersigned appellate counsel, pursuant to the Joint Rules of Appellate Procedure for the Courts of Criminal Appeals [J.R.A.P. R.], (1 Jan. 2019) 17, and briefs this court as to the specified issue ordered on 23 February 2022. The government hereby incorporates the statement of jurisdiction, the facts, and the specific relief sought from its brief, filed on 24 January 2022, in support of the writ of prohibition pursuant to 28 U.S.C. § 1651, the All Writs Act.

Specified Issue

WHETHER CONVICTIONS OF SERVICEMEMBERS WITHOUT A UNANIMOUS VERDICT FOR OFFENSES UNDER CLAUSE THREE OF ARTICLE 134, UNIFORM CODE OF MILITARY JUSTICE IMPLICATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Standard of Review

The constitutionality of a statute is a question of law, reviewed de novo.

United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Argument

Nonunanimous verdicts for assimilated offenses under Clause 3 of the General Article 134, UCMJ [Clause 3], do not implicate due process or equal protection concerns. Simply put, as the challenged statute—Article 52, UCMJ—treats all servicemembers exactly the same, it does not trigger an equal protection analysis because that analysis has a threshold requirement for a statute to treat two groups differently. Article 52 treats a servicemember charged under an enumerated UCMJ offense exactly the same as a different servicemember charged under a Clause 3 assimilated offense: both sets of findings do not require unanimous verdicts. Further, civilians are prosecuted under a completely different jurisdictional and statutory scheme, defeating any notion that they are similarly situated to an accused servicemember. Even if this court finds that they are,

rational bases exist for treating servicemembers differently. Consequently, the amicus's arguments fail.

A. Because the Real Party in Interest is not charged with an assimilated offense under Clause 3 of Article 134, UCMJ, an opinion on this issue by this court would amount to an advisory opinion.

The Real Party in Interest [RPI] is not charged under Clause 3 of the General Article 134, UCMJ, but rather under Clause 2 where his conduct was “of a nature to bring discredit upon the armed forces.” (Gov’t App. Ex. 1). Therefore, the specified issue goes beyond the facts of this case and was not at issue before the military judge when he issued his ruling. Without a genuine controversy for this court to address, any opinion regarding Clause 3 of General Article 134, UCMJ, would be advisory. *United States v. Wall*, 79 M.J. 456, 461 (C.A.A.F. 2020) (quoting *United States v. Chisolm*, 59 M.J. 151, 152 (C.A.A.F. 2003) (noting Article I courts “generally adhere to the prohibition on advisory opinions as a prudential matter”). Consequently, petitioner respectfully requests that this court limit its holding in the forthcoming opinion to the narrow facts of the RPI’s case.

B. Nonunanimous guilty verdicts do not implicate a servicemember’s Fifth Amendment Due Process rights, regardless of the charged offense.

None of the arguments the amicus curiae makes in its brief undermine the immense deference to and authority of Congress to regulate the military. When a court faces a Fifth Amendment Due Process question as it relates to a facet of the military justice system, the question becomes “whether the factors militating in

favor” of the right “are so extraordinarily weighty as to overcome the balance struck by Congress.” *Weiss v. United States*, 510 U.S. 163, 178 (1994) (citing *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). The “tests and limitations [of due process] may differ because of the military context.” *Id.* at 177 (citing *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)). The difference arises “from the fact that the Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment.’” *Id.* (citing *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)).

The Supreme Court’s analysis in *Weiss v. United States* guides the way. 510 U.S. 163 (1994). In *Weiss*, the Court considered whether non-tenured military judges violated servicemembers’ Fifth Amendment Due Process rights and weighed factors akin to those present in this nonunanimous verdict scenario. *Id.* Just as the Court found no Fifth Amendment Due Process violation in *Weiss*, so too should this court find in the instant case. *Id.* at 181.

First, neither tenured judges nor unanimous verdicts have ever “been a part of the military justice tradition.” *Id.* at 178. Indeed, nonunanimous verdicts have been part of military justice ever since adoption of the Articles of War. *Supra*, p 4. Second, just as Congress had “numerous occasions during our history [to] revise[] the procedures governing courts-martial, it has never required” tenured judges, nor has it required unanimous verdicts. *Id.* at 178; Military Justice Act [MJA] 2016

(increasing the votes required in non-capital cases from two-thirds to three-fourths). These are significant in light of the “historical maintenance of the military justice system” because, as the Court cited in *Weiss*, this “suggests the absence of a fundamental fairness problem.” *Id.* at 179.

Perhaps most significant is that, while “Congress has taken affirmative steps to make the system of military justice more like . . . civilian justice, it has nonetheless chosen not to given tenure to military judges,” or require unanimous verdicts, for that matter. *Id.* at 179. Setting aside the fact that unanimous verdicts have never been required under the UCMJ—and Congress’s recent election to increase verdicts to only three-fourths concurrence—a simple review of the last decade shows congressional choice to leave nonunanimous verdicts intact. Since 2012 alone, there have been nine National Defense Authorization Acts that promulgated changes to the UCMJ.¹ The changes were so plentiful and substantive that it necessitated three new publications of the Manual for Courts-Martial. *Manual for Courts-Martial, United States* (2012 ed.) [*MCM*, 2012]; *MCM*, 2016; *MCM*, 2019. Throughout all of these changes, Congress had the opportunity to make all verdicts unanimous. It did not. This detail is critical in answering the “question under the Due Process Clause.” *Weiss*, 510 U.S. at 179. The “historical fact” that unanimous verdicts, like tenured military judges, have

¹ <https://jsc.defense.gov/Military-Law/Changes-Since-2012-MCM>.

never been required “is a factor that must be weighed in this calculation.” *Id.*

Thus, despite the many opportunities Congress had to change the statute, the longevity of the nonunanimous verdict in the military is telling.

Viewed under the lens of the “cardinal canon” of construction, it is clear the “legislature says in [the] statute what it means and means in a statute what it says.” *Connecticut Nat’l Bank v. Germaine*, 504 U.S. 249, 253–54 (1992). Moreover, as with an equal protection analysis, “particular deference to the determination of Congress” is owed to its decisions regulating “land and naval forces” in this regard. *Weiss*, 510 U.S. at 176–77 (citing U.S. Const., Art. I, § 8). Therefore, there can be no question that this is a continued statute of importance for the legislators and a balance Congress has continued to strike.

Factors militating in favor of a unanimous verdict do not overcome this long-standing balance.² Mostly, the amicus and RPI both demand procedures matching the civilian sector, essentially arguing that uniform treatment weighs in favor of a unanimous verdict. (Amicus Br. 6; RPI Br. 1–2). One reason their analysis is unpersuasive is because they only request partial uniformity, which in

² On 22 February 2022, the Air Force Appellate Defense Division filed an amicus curiae brief in support of the Real Party in Interest [RPI]. (Amicus Br. 1). The amicus focused on equal protection, “given the basis of the military judge’s ruling,” and did not propose factors that militate in favor of a unanimous guilty verdict under a strict Fifth Amendment Due Process analysis. (Amicus Br. 6). Such arguments are still discernable from the brief, as well as the RPI’s brief in opposition to the writ of prohibition, filed 19 February 2022. (RPI Br. 7–14).

reality means no uniformity after all; their request is only for unanimous *guilty* verdicts, not unanimous *acquittals*. (Amicus Br. 14) (“Consistent with this understanding, the right to a unanimous guilty verdict at courts-martial is incumbent.”); (RPI Br. 10) (“A guilty verdict would only be valid if issued by an impartial, thus unanimous finder-of-fact.”). The federal civilian sector requires all verdicts, guilty and not guilty, to be unanimous. Fed. R. Crim. P. 31(a). Thus, any factors favoring unanimous verdicts are not so extraordinarily weighty as to overcome the time-honored congressional legislation on Article 52(a)(3), UCMJ.

C. Nonunanimous verdicts do not implicate the equal protection guarantee in a servicemember’s Fifth Amendment Due Process rights, including when he is charged under Clause 3 of Article 134, UCMJ.

Prosecuting a servicemember under Clause 3 of the General Article 134, UCMJ [Clause 3] does not violate his implicit equal protection rights under the Fifth Amendment Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (holding that while “[t]he Fifth Amendment . . . does not contain an equal protection clause,” the “racial segregation in the public schools of the District of Columbia [wa]s a denial of the due process of law guaranteed by the Fifth Amendment”). That is because the threshold question for equal protection analysis—whether servicemembers and civilians are similarly situated—cuts off any equal protection claim at the outset. *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (calling “a credible showing of different treatment of similarly situated

persons” the “required threshold” to the Court’s equal protection analysis). For the reasons stated in the government’s petition for a writ of prohibition, servicemember accuseds are not similarly situated to civilian defendants in any relevant aspect. (Gov’t Pet. 11–17). Accordingly, as the amicus cannot make a threshold showing that a servicemember is similarly situated to civilian defendants, there is no viable equal protection claim.

As an initial matter, amicus’s hypothetical where two servicemembers are charged under different jurisdictional schemes for the same offense does not implicate equal protection concerns because the two servicemembers can be considered identical. (Amicus Br. 8) (comparing a “servicemember accused of violating this statute in federal district court” to “his fellow servicemember . . . tried before a court-martial”). “To be similarly situated, the groups that the Legislature treats differently need not—and, indeed, cannot—be ‘identical.’” *People v. Nolasco*, 67 Cal. App. 5th 209, 221 (2021) (quoting *People v. McKee*, 47 Cal. 4th 1172, 1202 (2010)). Thus, this hypothetical is not relevant to this court’s equal protection analysis.

Other arguments from amicus that point to Clause 3 are unavailing. (Amicus Br. 7–10). A servicemember accused is not similarly situated to a civilian defendant simply because they face the same charge. Such a conclusion would be circular logic because it skips the threshold analysis of whether the two groups are

similarly situated and misconstrues the relevance of the charged offense.

Illustrative of this error, amicus asserts that “there is no relevant distinction which distinguishes either *their status* or the conduct at issue,” (Amicus Br. 7) (emphasis added); however, their statuses are exactly what makes them dissimilar. The similarly situated analysis first requires consideration of the status of a servicemember—status which subjects the servicemember to a military tribunal, not a civilian proceeding.

As the Supreme Court stated in *United States v. Solorio*, Congress exercised its Article I authority when it “empowered courts-martial to try serviceme[m]bers for crimes proscribed by the [UCMJ].” 483 U.S. 435, 438–39 (1987). Specifically, personal jurisdiction exists over all persons subject to the UCMJ. Art. 2, UCMJ; 18 U.S.C. § 802; *see also* *MCM*, Part I, Preamble 2(b)(1) (“Courts-martial for the trial of offenses against military law, and in the case of general courts-martial, of persons who by the law of war are subject to trial by military tribunals.”). Additionally, “[e]ach armed force has court-martial jurisdiction over all persons” subject to the UCMJ. Art. 17, UCMJ; 18 U.S.C. § 817.³

³ One charging method of Clause 3 of the General Article 134, UCMJ, has additional jurisdictional limitations that assuage any constitutional concerns. Article 134, UCMJ, makes punishable acts in three categories—referred to as “clauses 1, 2, and 3”—of offenses not specifically covered in any other article of the UCMJ. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 91.c.(1). Clause 3 offenses involve “noncapital crimes or offenses which violate federal civilian law including law made applicable through the Federal

Once a servicemember is properly subject to court-martial jurisdiction, they are entitled to a criminal proceeding distinct from the civilian sector. They are no longer similarly situated to their civilian counterpart because they have inherited a whole swath of obligations and benefits not applicable to civilians, and the court-martial proceeding has required components also not applicable to civilian federal

Assimilative Crimes Act [ACA].” *MCM*, pt. IV, ¶ 91.c.(1). When the government charges a servicemember under the ACA, “exclusive or concurrent federal jurisdiction” over the offense is still required. *MCM*, pt. IV, ¶ 91.c.(4)(a)(1)(iii). The burden of proof on the government as it relates to the exclusive or concurrent federal jurisdiction demonstrates there are distinctions between what a military and civilian prosecutor must prove. In other words, even in the Clause 3 context where the specification may at first appear identical, there often remains relevant distinctions. For a servicemember to be charged with this offense, it must occur not only on a military installation, but also a location wherein the United States exercises either exclusive or concurrent jurisdiction. *MCM*, pt. IV, ¶ 91.c.(4)(a)(1)(iii). The ACA “cannot be invoked with respect to crimes committed in places which -- although they may be owned by the United States -- are not subject to its ‘exclusive or concurrent jurisdiction.’” *United States v. Irvin*, 21 M.J. 184, 186 (C.M.A. 1986) (quoting *United States v. Perry*, 12 M.J. 112 (C.M.A. 1981)). This is important because it necessarily obliges the prosecutor to show that the servicemember committed the offense in a location that has a strong connection or nexus to a military installation. *See United States v. Williams*, 17 M.J. 207, 211 (C.M.A. 1983) (noting “[a]lthough some may assume that a military installation automatically comes within Federal jurisdiction, that assumption is incorrect” and requiring additional evidence regarding the location on Fort Hood where the kidnapping took place); *see also United States v. Geary*, 30 M.J. 855, 857 (N.M.C.M.R. 1990) (per curiam) (“Federal applicability of the state statute (i.e., that the United States had exclusive or concurrent jurisdiction over the area in which the alleged offense occurred) must be established by the prosecution. This applicability can be established by testimonial or documentary evidence, judicial notice, or a stipulation of the parties.”). Consequently, because these parameters make the offense a servicemember faces distinct from the offense a civilian faces, Fifth Amendment Due Process is not implicated.

courts. Due to this military status, the unique procedural differences of the Article I military court-martial afforded to servicemembers do not run afoul of the Fifth Amendment Due Process Clause. That is because “[d]ue process is inherently flexible.” *Bensing v. United States*, 551 F.2d 262, 265 (10th Cir. 1977). “Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process.” *Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911). Even the amicus appears to agree with this notion, as it included similar operative qualifiers like servicemembers “on active duty status” throughout its brief. (Amicus Br. 7, 9, 11). blame

In other words, the jurisdictional hook of a military court-martial places a servicemember in a classification that receives differing due process rights than an ordinary civilian, regardless of the charges they face.⁴ This is lawful. The Due

⁴ The amicus imputes the Government at large for deciding which proceeding the servicemember receives. (Amicus Br. 9, 14) (noting “the *Government’s* ability to pick *which* servicemember will be entitled to a unanimous guilty verdict”) (emphasis in original). Really, the one who “made it that way,” (Amicus Br. 9), is the active duty servicemember who joined the military and subjected himself to the jurisdiction of a military tribunal. This is one of the sacrifices of those who swore to protect and defend the Constitution, and it is no different than any of the other modified constitutional guarantees for those on active duty. *See e.g., Brown v. Glines*, 444 U.S. 348, 354 (1980) (quoting *Parker v. Levy*, 417 U.S. at 758) (noting “while members of the military services are entitled to the protections of the First Amendment, ‘the different character of the military community and of the military mission requires a different application of those protections,’” and the “rights of military men must yield somewhat ‘to meet certain overriding demands of discipline and duty’”); *see also Marcum*, 60 M.J. at 208 (noting that even a servicemember’s right to engage in certain intimate, sexual conduct “must be

Process Clause “bars only patently arbitrary classifications utterly lacking in rational justification.” *Bensing v. United States*, 551 F.3d 262 (10th Cir. 1977) (citing *Flemming v. Nestor*, 363 U.S. 603 (1960)). “Legislative classifications will be upheld if they are reasonable, have a fair and substantial relation to the object of the legislation, and cause ‘all persons similarly circumstanced’ to be treated alike.” *Id.* (citing *Johnson v. Robison*, 415 U.S. 361 (1974)).

Courts-martial maintain separate procedures that civilian courts do not. For example, just as servicemembers are not entitled to a representative cross-section for juries like their civilian peers, neither are they entitled to the unanimous verdicts their civilian peers receive. *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986). This extends to the consequences of a military conviction, in that the punishments vary from a civilian sector. *See United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2001) (noting “[t]he military justice system also differs because sentencing includes consideration of morale, as well as good order and discipline, together with unique penalties, such as punitive separation, reduction in rank, and forfeiture of pay.”); *see also Kennedy v. Louisiana*, 554 U.S. 945, 948 (2008) (discussing how authorization of the death penalty “in the military sphere does not indicate that the penalty is constitutional in the civilian context,” and

tempered in a military setting based on the mission of the military” and “the need for obedience of orders”) (internal quotations omitted).

declining to factor in military cases when determining the application of the Eighth Amendment to civilian populations).

Additionally, in a military setting, “military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life,” where “national security and constitutional rights are both paramount interest[s].” *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004). Courts-martial must be portable, efficient, and capable of addressing crimes while meeting ongoing mission demands. Further, the “efficient operation of the military justice system is important for maintaining good order and discipline in the armed forces.” *United States v. Lane*, 64 M.J. 1, 12 (C.A.A.F. 2006); *Middendorf*, 425 U.S. at 45–46 (“Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.”). Therefore, it is the very combatant status of the military accused that subjects them to the unique procedures of the military. And because “dissimilar treatment of dissimilarly situated persons” does not violate equal protection, *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994), there is no implication of Fifth Amendment Due Process following a unanimous verdict.

The CAAF’s analysis in *United States v. Rice* cements this sentiment. 80 M.J. 36, 41 (C.A.A.F. 2020) (calling Article 134, UCMJ, an “expansive, flexible, and amorphous prosecutorial tool within the military justice system with no analog to Title 18”). This “General Article,” including Clause 3, is intended to “serve as a means for a military commander to meet and enforce the exigencies of military discipline.” *Id.* (quoting William Winthrop, *Military Law and Precedents* 720-26 (2d ed., Government Printing Office 1920) (1895)).

The congressional purpose of Clause 3 via the Assimilative Crimes Act (ACA) was not to make servicemembers equal with their civilian counterparts; rather, it was to fill in the gap such that any offense a servicemember committed could be properly addressed. *See Lewis v. United States*, 523 U.S. 155, 164 (1993) (noting the ACA’s “gap-filling purpose”); *United States v. Butler*, 541 F.2d 730, 733–34 (8th Cir. 1976) (“The legislative history of the ACA demonstrates that its purpose was not to equalize, but to fill the voids in the criminal law applicable to federal enclaves created by the failure of Congress to pass specific criminal statutes.”). Said differently, Congress has always aimed to ensure that locations under exclusive federal jurisdiction “shall not be freed from the restraints of law.” *Western Union Tel. Co. v. Chiles*, 214 U.S. 274, 278 (1909). This inclusivity disputes the amicus’s position that: “Whatever deference is generally owed to Congress’s determinations insofar as they regulate the Armed Forces does not

apply here precisely because Congress did not see fit to criminalize such conduct in the first place.” (Amicus Br. 13). The ACA shows that Congress did see fit to criminalize this conduct—such that the military could maintain jurisdiction over all offenses that servicemembers committed.

D. Even if this court finds a military accused charged under Clause 3 to be similarly situated to his civilian counterpart, the military’s interest in promoting good order and discipline in its ranks provides a rational basis for an accused to be prosecuted under the military justice system.

The amicus’s argument that Clause 3 is a way to try a servicemember “for the exact same civilian offense[],” (Amicus Br. 6, 9), overlooks the manner in which the “General Article can thus be used to vindicate particular military interests.” *Rice*, 80 M.J.at 41. Contrary to amicus’s contention that the lack of a need to prove the terminal element under Clause 3 “undermines any supposed [government] interest [to promote good order and discipline] in prosecuting servicemembers” under that clause, (Amicus Br. 7), the government prosecutes many UCMJ offenses without the terminal element for the purpose of promoting good order and discipline. For example, it is beyond cavil that the military prosecutes sexual assault to promote good order and discipline within its ranks—in fact, senior Army leaders continue to speak about the “impact that sexual assaults have on military readiness, morale, and discipline.” *United States v. Alton*, ARMY 20190199, 2021 CCA LEXIS 269, at *19 (Army Ct. Crim. App. 2 June 2021) (mem. op.). Just because sexual assault under Article 120, UCMJ, does not

contain an element requiring that the conduct is prejudicial to good order and discipline, it does not undermine the government's interest to prosecute that offense to promote good order and discipline.

A criminal case wherein a servicemember is charged with a “civilian offense” carries with it an entirely separate calculus of the military's interest in holding one of their own accountable. *See United States v. Owens*, No. NMCCA 200100297, 2005 CCA LEXIS 182, at *12 (N. M. Ct. Crim. App. 17 June 2005) (unpub.) (denying appellant's equal protection claim following civilian and military prosecutions because any disparity was “rationally related to the military's interest in maintaining good order and discipline among its service members—a consideration entirely absent from the case of a civilian”). In other words, a servicemember's misconduct may impact military discipline and effectiveness, and “the military interest in deterring the offense is distinct from and greater than that of civilian society.” *Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975). Therefore, even if the military member faces a charge under Clause 3 of Article 134, UCMJ, there is no equal protection violation given the distinct military interests that cannot be “vindicated adequately in civilian courts.” *Id.*

Conclusion

Based upon the servicemember's status as a member of the Armed Forces at the time of the offense charged, "the requirements of the Constitution are not violated" should the military proceed with prosecution of a civilian offense. *Solorio*, 483 U.S. at 450–51. Regardless of the charge against him, a servicemember's Fifth Amendment Due Process rights are not implicated by a nonunanimous verdict. WHEREFORE, the government respectfully requests this honorable court grant the petition for extraordinary relief in the form of a writ of prohibition in this case.



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APPENDIX



Caution

As of: February 3, 2022 12:11 AM Z

United States v. Alton

United States Army Court of Criminal Appeals

June 2, 2021, Decided

ARMY 20190199

Reporter

2021 CCA LEXIS 269 *; 2021 WL 2232100

UNITED STATES, Appellee v. Cadet LEVI M. ALTON,
United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by [United States v. Alton, 2021 CAAF LEXIS 704 \(C.A.A.F., July 28, 2021\)](#)

Petition for review filed by [United States v. Alton, 2021 CAAF LEXIS 703, 2021 WL 3371611 \(C.A.A.F., July 28, 2021\)](#)

Review denied by [United States v. Alton, 2021 CAAF LEXIS 914 \(C.A.A.F., Oct. 14, 2021\)](#)

Prior History: [*1] Headquarters, United States Military Academy. Teresa L. Raymond and Mark A. Bridges, Military Judges. Colonel Erik L. Christiansen, Staff Judge Advocate.

Core Terms

convening, court-martial, military, video, sexual, sexual assault, recommended, predator, offenses, charges, Staff, specifications, recording, indecent, corps of cadets, member of congress, disinterested, assault, leaders, beyond a reasonable doubt, hearing officer, harassment, testifying, threshold, addendum, audience, observer, referral

Case Summary

Overview

HOLDINGS: [1]-In a general court-martial against a cadet at the United States Military Academy at West Point for indecent broadcasting and indecent recording, appellant failed to meet the "some evidence" threshold related to unlawful command influence (UCI) by either the members of Congress or the Army Chief of Staff, as there was no evidence in the record that any of the members of Congress were on the military's retired roles and thus, they were not subject to the UCMJ and could not commit UCI; [2]-When the West Point Superintendent's speech was viewed as a whole it was apparent that this was a leader who identified a deficiency in his formation and was attempting to fix it by changing behavior moving forward, and the convening authority spoke in terms of the impact that sexual assaults had on military readiness, morale, and discipline and did not mention appellant's court-martial.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts
 Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial
 Review > Standards of Review

Military & Veterans Law > Military Justice > Judicial
 Review > Courts of Criminal Appeals

[HN1](#) **Courts Martial, Convening Authority**

The United States Army Court of Criminal Appeals reviews a claim of unlawful command influence de novo.

Constitutional Law > ... > Fundamental
 Rights > Procedural Due Process > Scope of
 Protection

Military & Veterans Law > Military
 Offenses > Obstruction of Justice

[HN2](#) **Procedural Due Process, Scope of Protection**

Actual unlawful influence occurs when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.

Military & Veterans Law > ... > Courts Martial > Trial
 Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Courts
 Martial > Convening Authority

Military & Veterans Law > Military
 Offenses > Obstruction of Justice

[HN3](#) **Trial Procedures, Burdens of Proof**

Even where there was no actual unlawful command influence (UCI), there may be an appearance of UCI. In

analyzing a case with allegations of apparent UCI, an accused bears the initial burden of presenting some evidence that unlawful command influence occurred. This burden on the defense is low, but the evidence presented must consist of more than mere allegation or speculation.

Military & Veterans Law > ... > Courts Martial > Trial
 Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Courts
 Martial > Convening Authority

[HN4](#) **Trial Procedures, Burdens of Proof**

If an accused meets the threshold of presenting some evidence of apparent unlawful command influence, the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the predicate facts proffered by the appellant do not exist, or (b) the facts as presented do not constitute unlawful command influence. If the government cannot succeed in demonstrating (a) or (b), its last line of defense is to prove beyond a reasonable doubt that the unlawful command influence did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

Military & Veterans Law > Military Justice > Courts
 Martial > Convening Authority

Military & Veterans Law > Military
 Offenses > Obstruction of Justice

[HN5](#) **Courts Martial, Convening Authority**

For purposes of a claim of unlawful command influence, the some evidence threshold is low.

Criminal Law & Procedure > ... > Sexual

Assault > Abuse of Adults > Penalties

Military & Veterans Law > Military Offenses > Rape
& Sexual Assault

[HN6](#) Abuse of Adults, Penalties

The term "predator" in relation to sexual assault prosecutions presupposes guilt, and is inadvisable in virtually every context save discussing those actually convicted of sex offenses.

Counsel: For Appellant: Captain Catherine E. Godfrey, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig J. Schapira, JA; Captain Karey B. Marren, JA (on brief).

Judges: Before ALDYKIEWICZ, EWING,¹ and WALKER, Appellate Military Judges. Senior Judge ALDYKIEWICZ and Judge WALKER concur.

Opinion by: EWING

Opinion

MEMORANDUM OPINION

EWING, Judge:

Appellant was a cadet at the United States Military Academy at West Point when he was tried and convicted at a general court-martial for indecent

broadcasting and indecent recording. Appellant contends that a speech by the convening authority—the West Point Superintendent—during the pendency of appellant's court-martial either *itself* constituted apparent unlawful command influence, or was evidence of such influence *upon* the convening authority by Army and Congressional leaders, or both. As a result, appellant requests that we set aside his findings and sentence. Because this issue warrants discussion but no relief, we affirm.²

I. BACKGROUND [*2]

The chronology of events in this case is critical to understanding and analyzing appellant's unlawful command influence (UCI) claim. As such, we provide: (1) the facts leading to the charges against appellant; (2) the processing timeline of appellant's court-martial; and (3) the convening authority's actions germane to appellant's UCI claim.

A. Events leading to the charges.

Appellant was a second-year cadet in the West Point class of 2020. In June 2017, while home in Washington state on summer leave, appellant hosted a party at his parent's residence. Several of appellant's hometown

²A military judge sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of indecent broadcasting and one specification of indecent recording, in violation of [Article 120c, Uniform Code of Military Justice, 10 U.S.C. § 920c](#) [UCMJ]. The convening authority approved the adjudged sentence of a dismissal and confinement for three months. We have given full and fair review of appellant's four other assignments of error and of the matters appellant personally submitted pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#). We find these claims warrant neither discussion nor relief.

¹ Judge Ewing decided this case while on active duty.

friends attended the party, along with two of his West Point classmates; his friend, CDT JW; and the victim, CDT JB. The partygoers consumed alcohol throughout the evening. During the party, appellant sent multiple *Snapchat* videos to a group of his male West Point classmates, the self-labeled "1st Gangster Battalion."³ After smoking marijuana and consuming numerous alcoholic beverages, CDT JB felt ill and wanted to go to sleep. Appellant and CDT JW escorted her to an upstairs bedroom. Once in the bedroom, appellant and CDT JW took turns engaging in sexual intercourse with CDT JB. Appellant did not ask CDT [*3] JB for permission to film any of the sexual activity and she did not consent to any filming. Despite this, appellant made two *Snapchat* videos.

In the first *Snapchat* video, appellant filmed himself engaging in sexual intercourse with CDT JB. He was positioned behind her as she faced away from him on her hands and knees. The video depicted CDT JB's exposed buttocks. In the second *Snapchat* video, appellant filmed CDT JW engaging in sexual intercourse with CDT JB. The second video also depicted CDT JB's exposed buttocks. As *Snapchat* videos delete by design, witnesses who had received and viewed the videos described their contents at appellant's trial.

After recording the two videos, appellant sent them via *Snapchat* to his associates in the 1st Gangster Battalion, separated by approximately fifteen minutes. After receiving and viewing the second video, one member of the group, CDT CB, responded, "HOLY [expletive] [expletive] IVE NEVER LAUGHED SO HARD IN MY LIFE . . . [CDT JW] GAVE HER THE OLE JACK

HAMMER."

Following the party, CDT JB learned of a possible video depicting her engaged in sexual activity. Her friend, CDT CH, a female West Point classmate, contacted appellant and demanded that [*4] he delete any such video. Appellant denied to CDT CH that any video existed. Appellant also sent CDT JB a text message stating that there was no video and that he "wouldn't do that." In a subsequent phone call between appellant and CDT JB—surreptitiously recorded by appellant—he told CDT JB that "maybe [she] sent him a *Snapchat* and just [did not] remember it." At the end of the call, appellant told CDT JB that he "promised" he would not "tell anyone [she] smoked weed." In another conversation with CDT WD, a member of the 1st Gangster Battalion, appellant acknowledged that he sent the videos and that CDT JB found out.

B. The charges and pretrial litigation.

On 23 April 2018, the government preferred a litany of court-martial charges against appellant. In addition to the Article 120c, UCMJ, offenses, the government charged appellant with four specifications of sexual assault against CDT JB and one specification of conspiring to do the same. On 28 September 2018, consistent with the advice of his staff judge advocate (SJA), the convening authority referred all charges and specifications to trial by general court-martial with the exception of one sexual assault offense against a different cadet.⁴

³ *Snapchat* is a social media platform where users can send text messages, pictures, and videos. Pictures and videos sent via *Snapchat* are generally viewable to the recipient once before disappearing.

⁴ This offense was originally Specification 1 of Charge III. At the initial *Article 32, UCMJ*, preliminary hearing, the hearing officer found that probable cause did not exist to support the allegation. The offense was dismissed on 5 September 2018, approximately three weeks prior to referral.

During pretrial [*5] litigation in January 2019, the military judge granted defense counsel's motion to suppress certain evidence found on appellant's phone and granted, in part, defense counsel's motion for a new [Article 32, UCMJ](#), hearing based on the government's failure to disclose certain evidence prior to the initial [Article 32, UCMJ](#), proceeding. In his 19 January 2019 ruling on the [Article 32, UCMJ](#), motion, the military judge directed that the [Article 32, UCMJ](#), hearing be reopened and ordered the hearing officer to produce an addendum to his initial report. The military judge also directed that the convening authority, following receipt of the hearing officer's addendum, "state, in writing, whether he affirms his prior decision to refer these charges to a general court-martial or whether he decides to take some other action." On 15 February 2019, the [Article 32, UCMJ](#), hearing officer completed his addendum. In light of the military judge's suppression ruling and other intervening events, the hearing officer found probable cause existed for The Specifications of Charge IV (indecent broadcasting and recording) and The Specification of Charge I (attempt to indecently record another alleged victim). He did not find probable cause existed for any of the sexual assault offenses alleged [*6] in Charge III or for the alleged conspiracy to commit sexual assault alleged in The Specification of Charge II. In conclusion, the hearing officer recommended the case not proceed to a general court-martial.

Shortly after the military judge's favorable pretrial rulings, on 24 January 2019, appellant submitted a request for resignation in lieu of trial by court-martial (RFGOS). Both the West Point Commandant and CDT JB, in a 15 February 2019 memorandum, recommended disapproval of appellant's RFGOS.

C. The convening authority's speech.

On 25 February 2019, the West Point Superintendent addressed the entire corps of cadets and West Point staff during a Sexual Harassment/Assault Response and Prevention (SHARP) stand-down event. At this point in time, the [Article 32, UCMJ](#), hearing officer had completed his addendum, but the convening authority had neither acted on appellant's RFGOS nor made a second referral decision as required by the military judge's ruling (nor had he been advised by his SJA on either action). The convening authority's speech to the cadets was video recorded and lasted over an hour. It also contained PowerPoint slides and video vignettes that were played throughout his speech on a screen [*7] in the auditorium.

The genesis for the speech was an April 2018 survey of West Point cadets which purportedly revealed that 273 of the 3,193 respondents indicated they had been a victim of some kind of unwanted sexual harassment or assault. The convening authority stated during the speech that he had recently returned from testifying in front of Congress in Washington, D.C. He informed the audience that twenty-three members of Congress told him he "was breaking" the West Point cadets by his failure to address this issue. He stated the Chief of Staff of the Army (at the time), General (GEN) Mark Milley, spoke to him separately and relayed the same concerns with a message to fix the problem at West Point. Throughout the speech, the convening authority—oftentimes animatedly—took ownership of the problem, said he was currently failing, but promised everyone in the audience that he would ensure the problem was fixed before his tenure ended. According to him, nothing short of a report of zero SHARP incidents would satisfy him.

During a portion of the speech, the convening authority stated that, based on the survey results, there were "predators" in the audience and, looking out into the audience, [*8] asserted, "some of you are predators."

The convening authority never mentioned any specific cases or accused cadets. He briefly talked about the UCMJ, noting it was an essential "tool" for commanders and that there was an ongoing debate in Congress about removing that tool from commanders and giving it to "the lawyers" because lawyers would "get more conviction rates." To this, the convening authority said, "No they won't, no they won't no they won't. Lawyers assist . . . Commanders take action." He told the cadets that if they, as future commanders, wanted this tool, then they needed to own the solution by eliminating the commission of sexual offenses at West Point.

D. The convening authority's actions on referral and appellant's RFGOS.

Approximately two weeks later, on 8 March 2019, the SJA advised the convening authority that in light of the [Article 32, UCMJ](#), hearing officer's addendum, he should affirm his previous referral decision with respect to trying the indecent recording and broadcasting offenses at a general court-martial, but recommended that all remaining offenses be dismissed. The SJA also recommended to the convening authority that he recommend to the Deputy Assistant Secretary of the [*9] Army that appellant's RFGOS be approved.

On 22 March 2019, the convening authority adopted the SJA's recommendation with respect to referral, sending only the indecent broadcasting and recording offenses (The Specifications of Charge IV) to trial by general court-martial. This decision left only two specifications on the charge sheet, the offenses for which appellant was ultimately found guilty. All of the sexual assault offenses were dismissed. That same day, the convening authority—contrary to his SJA's advice but consistent with the recommendations of the West Point Commandant and CDT JB—recommended to the Deputy Assistant Secretary of the Army that appellant's

RFGOS be disapproved. The convening authority recommended disapproval because he believed "proceeding with a General Court-Martial is best for good order and discipline." On 28 March 2019, appellant's RFGOS was disapproved.

E. The UCI litigation.

On 28 March 2019, defense counsel filed a motion to dismiss based on UCI. Defense counsel alleged the convening authority committed both actual and apparent UCI in his 25 February 2019 speech. In support of the motion, the defense offered the convening authority's video-recorded speech [*10] and called one witness, CDT CB, appellant's friend and a member of the 1st Gangster Battalion. The government also called one witness, the SJA.

On direct examination, CDT CB, who attended the SHARP stand-down event, testified that he felt nervous about testifying at appellant's trial because he feared he would be ostracized by the corps of cadets and "possibly the command." He also said he felt nervous about testifying in the motions hearing for the same reasons. When asked if he attributed his fear of backlash specifically to the convening authority's speech, he answered "not necessarily." On cross-examination, trial counsel confirmed that CDT CB had not received any kinds of threats from the chain of command or fellow cadets for testifying at the [Article 39\(a\), UCMJ](#), hearing. The military judge asked CDT CB, "What is it specifically that the [convening authority] said that caused you to be concerned about testifying?" Cadet CB replied, "Um, specifically, Sir, just his tone of voice and the repetition of the word 'rape' over and over during his speech. He was very aggressive. That's pretty much it, sir."

The SJA discussed the convening authority's decision-

making process with respect to appellant's RFGOS [*11] and the referral of charges. The SJA said he discussed a "range of options" for both decisions. The SJA confirmed that at no time did the two discuss any pressure from senior military leaders or members of Congress with respect to appellant's case or any other case. He testified, "It was the [convening authority's] independent discretion." On cross-examination about appellant's RFGOS, the SJA acknowledged his recommendation that the convening authority recommend approval, but stated "just because I recommend something, he's free to recommend something else, and, in fact, he should if that's what he thinks is what's best for good order and discipline."

In a seven-page written ruling, the military judge denied appellant's UCI motion. The military judge concluded appellant failed to present a threshold showing of "some evidence" of UCI. Alternatively, the military judge reasoned that even if appellant had presented "some evidence," the government had proven beyond a reasonable doubt that the evidence presented did not constitute UCI. Additionally, the military judge found that even if appellant had presented "some evidence" of UCI, and the government failed to prove beyond a reasonable [*12] doubt that the evidence presented did not constitute UCI, the government nevertheless proved beyond a reasonable doubt that an objective disinterested observer fully informed of the facts and circumstances would not harbor a significant doubt about the fairness of the proceedings.

II. LAW AND DISCUSSION

Before this court, appellant argues his conviction cannot stand based on apparent UCI. [HN1](#) [↑] We review his claim de novo. [United States v. Bergdahl, 80 M.J. 230, 234 \(C.A.A.F. 2020\)](#) (citing [United States v. Barry, 78 M.J. 70, 77 \(C.A.A.F. 2018\)](#)).

[Article 37\(a\), UCMJ](#), states, in relevant part: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." [UCMJ art. 37\(a\)](#) (2016).

[HN2](#) [↑] "Actual unlawful influence occurs when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." [United States v. Barry, 78 M.J. 70, 77 \(C.A.A.F. 2018\)](#) (internal quotation marks and citation omitted).

[HN3](#) [↑] Even where there was no actual UCI, there may be an appearance of UCI. See [United States v. Lewis, 63 M.J. 405, 415 \(C.A.A.F. 2006\)](#); [United States v. Stoneman, 57 M.J. 35, 42-43 \(C.A.A.F. 2002\)](#). In analyzing a case with allegations of apparent UCI, "an accused bears the initial burden of presenting 'some evidence' that unlawful command [*13] influence occurred." [Bergdahl, 80 M.J. at 234](#) (quoting [United States v. Boyce, 76 M.J. 242, 249 \(C.A.A.F. 2017\)](#)). "This burden on the defense is low, but the evidence presented must consist of more than 'mere allegation or speculation.' *Id.* (quoting [Boyce, 76 M.J. at 249](#)); see [United States v. Ayala, 43 M.J. 296, 300 \(C.A.A.F. 1995\)](#) ("The quantum of evidence necessary to raise unlawful command influence is the same as that required to submit a factual issue to the trier of fact.").

[HN4](#) [↑] If an accused meets the threshold of presenting some evidence of apparent UCI, "the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the predicate facts proffered by the appellant do not exist, or (b) the facts as presented do not constitute unlawful command influence." [Bergdahl, 80 M.J. at 234](#) (quoting [Boyce, 76 M.J. at 249](#)) (internal quotation marks omitted). If the government cannot

succeed in demonstrating (a) or (b), its last line of defense is to prove "beyond a reasonable doubt that the unlawful command influence did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding." *Id.* (cleaned up).⁵

A. Did appellant present "some evidence" of UCI?

While we ultimately agree with the military judge's denial of appellant's UCI motion, we disagree with his initial finding that appellant failed to show "some evidence" of apparent UCI. [HNS](#)^[↑] As our superior court has explained, the "some evidence" threshold is "low." [Boyce, 76 M.J. at 249](#). Appellant met that threshold here.

⁵ While the change occurred too late to affect this appeal, we note that Congress amended [Article 37, UCMJ](#), in December 2019. The new [Article 37, UCMJ](#), includes several changes, including a provision that expressly requires that "[n]o finding or sentence of a court martial may be held incorrect on the ground of a violation of this section *unless the violation materially prejudices the substantial rights of* [***14**] *the accused.*" [UCMJ art. 37\(c\)](#) (2019) (emphasis added). The change would seem to vitiate the current apparent UCI "intolerable strain/ disinterested observer" jurisprudence in favor of Judge Ryan's approach in her dissent in *Boyce*, in which she argued that the Court of Appeals for the Armed Forces' (CAAF) apparent UCI cases (including the *Boyce* majority) were in tension with the [Article 59\(a\), UCMJ](#), prejudice requirement. See [Boyce, 76 M.J. at 256](#) (Ryan, J., dissenting) ("I posit that Congress had good reason to tether appellate relief to [Article 59\(a\)](#)'s requirement of prejudice to the accused."). Whether there is anything left of the apparent UCI doctrine after the 2019 change to [Article 37, UCMJ](#), is a question for another day.

Appellant points to three potential sources of apparent UCI: (1) members of Congress' influence on the convening authority related to sexual assault during his February 2019 D.C. trip and testimony; (2) the Army Chief of Staff's influence on the convening authority during that same trip on the same topic; and (3) the convening authority's influence on the Corps of Cadets and broader West Point community during his 25 February 2019 SHARP stand-down speech.

Appellant has not met the "some evidence" threshold related to either the members of Congress or the Army Chief of Staff. There is no evidence in the record that any of the members of Congress were, for example, on the military's retired roles. Thus, they were not "subject to" the UCMJ and therefore could not commit UCI. See [Bergdahl, 80 M.J. at 234-35](#) (holding that because Senator John McCain [***15**] was also a "retired member of the United States Navy" and subject to the UCMJ, he was "capable of committing" UCI). In the absence of a showing of retiree status or other status subjecting a member of Congress to the UCMJ, neither this court nor the CAAF has ever held that a member of Congress is capable of committing UCI.

Likewise, while the Army Chief of Staff is subject to the UCMJ, the convening authority's references to his interactions with the Chief of Staff did not show "some evidence" of UCI. Rather, the convening authority described two senior leaders discussing the on-going problem of sexual assault at West Point, which is the type of discussion expected and required of Army leaders. Appellant offered no evidence that the convening authority even discussed his case, or any specific court-martial proceeding, with the Chief of Staff, or that the Chief of Staff somehow tried to influence the convening authority's actions related to his case. To the extent the record is sparse about the specifics of the discussion between Chief of Staff and the convening authority, this was appellant's failure of proof.

One aspect of the convening authority's speech did raise "some evidence" of [*16] UCI. Specifically, in reference to the 2018 survey in which 273 cadets had responded that they had been the victims of unwanted sexual harassment or assault, the convening authority said to the Corps of Cadets, "some of you are predators," or words to that effect. While the convening authority did not mention appellant, at the time of the speech he had referred appellant's case (including sexual assault charges) to a general court-martial, and public court-martial proceedings were underway. The Corps of Cadets would have been well aware of appellant's court-martial proceeding. Thus, logic and the calendar would suggest that audience members might well have believed that appellant was one of the "predators" to whom the convening authority referred, regardless of whether the convening authority so intended. [HNG](#) [↑] The term "predator" in relation to sexual assault prosecutions presupposes guilt, and is inadvisable in virtually every context save discussing those actually convicted of sex offenses. *Cf. United States v. Hollenbeck, ARMY 20170237, 2019 CCA LEXIS 289, at *5-7 (Army Ct. Crim. App. 27 June 2019)* (mem. op.) (setting aside the appellant's sexual assault conviction based on actual bias of panel member who asked multiple questions using the term "sexual predator"). The convening authority's [*17] use of "predator" in this context thus gave rise to some evidence of UCI.⁶

⁶We do not find that either CDT CB's testimony or the convening authority's brief mentioning of "conviction rates" and the UCMJ amounted to "some evidence" of UCI. The convening authority made the isolated comment about "conviction rates" in the context of discussing the debate about taking UCMJ authority away from commanders, and did not call for any particular outcome in appellant's, or any other, court-martial. Cadet CB's motions hearing testimony was inconsistent and contradictory, and he ultimately attempted to

B. Did the government prove the facts as presented did not constitute UCI?

Moving to the second step of the analysis, the government does not claim that "the predicate facts proffered by the appellant do not exist," but rather that those facts "do not constitute unlawful command influence." [Bergdahl, 80 M.J. at 234](#). We agree.

While appellant has accurately quoted certain passages from the convening authority's hour-plus speech that, at first blush, raise some concerns, watching the *entire speech* conveys quite a different impression. First, the convening authority did not mention appellant, appellant's court-martial, or *any* specific court-martial for that matter, during the speech. *Cf. Bergdahl, 80 M.J. at 239-44* (finding no apparent UCI despite repeated and specific references to Sergeant Bergdahl himself and his specific court-martial proceeding by Senator McCain and President Trump before, during, and after the court-martial). Second, the convening authority only briefly mentioned the UCMJ during his speech, and that was in the context of the on-going debate about whether commanders should remain in their current role within the UCMJ in sexual assault cases, or [*18] whether Judge Advocates should play a more central role. Likewise, while the convening authority used the term "predator" in a few isolated instances, he did not link the term back to *any* court-martial proceeding, much less appellant's, nor did he call for a particular outcome in any case. Rather, the convening authority used the term in the context of the 273 reports of sexual assault and/or harassment from the 2018 survey. This is quite different from the panel member's use of "sexual predator" in

testify on the merits at appellant's court-martial in a manner that helped appellant, by saying that he was "not 100% sure" and expressing "doubt" about what he had seen in the [Snapchat](#) videos.

Hollenbeck, where, in the context of that case, it was apparent that the panel member was directing the term at the accused himself. [2019 CCA LEXIS 289 at *5](#) ("[A]s to the issue of whether MAJ SW was referring to 'sexual predators' generally, or to appellant specifically, on a single sheet of paper she used the term in five consecutive questions, then named appellant by name in a sixth question, then used 'sexual predator' in a seventh question."). Particularly when viewed in the context of the convening authority's entire speech, the convening authority's use of the "predator" term is akin to undifferentiated UCI "in the air," which is not a cognizable claim. [United States v. Shea, 76 M.J. 277, 282 \(C.A.A.F. 2017\)](#).

But third, and most fundamentally, when the speech [*19] is viewed as a whole it is apparent that this was a leader who had identified a deficiency in his formation and was attempting to fix that deficiency by changing behavior moving forward. In other words, the speech was *what Army leaders do*. The convening authority spoke in terms of the impact that sexual assaults have on military readiness, morale, and discipline, and implored the Corps of Cadets to take it upon themselves to change the behavior that led to the 273 reports of sexual assault or harassment. While certain words and phrases of the speech could have been better said (or left unsaid), as a whole the speech was an appropriate exercise of the convening authority's leadership responsibilities, and amounted to "lawful command emphasis" rather than unlawful command influence.⁷ As such, we hold that the government has

shown that the facts "as presented do not constitute unlawful command influence." [Bergdahl, 80 M.J. at 234](#).⁸ This conclusion is buttressed by the fact that approximately one month after the convening authority's speech, he dismissed all of the most serious sexual assault offenses against appellant, and referred only the indecent recording and indecent viewing specifications to a court-martial. [*20]

C. Did the government prove the UCI did not create an intolerable strain?

Even assuming *arguendo* that appellant was able to satisfy the second analytical step of the apparent UCI

4-21.

We further note that the 2019 version of [Article 37, UCMJ](#), expressly countenances "statements regarding criminal activity or a particular criminal offense that do not advocate a particular disposition, or a particular court-martial finding or sentence, or do not relate to a particular accused," as "[c]onduct that does not constitute" unlawful command influence. [UCMJ art. 37\(a\)\(4\)\(B\)](#) (2019). While, again, this recent change to [Article 37, UCMJ](#), is not applicable to appellant's court-martial as a technical matter, this example of what does "not constitute" UCI is instructive, as it is a close fit for the convening authority's speech here.

⁸ In several apparent UCI cases in which appellants clear the threshold "some evidence" showing for an apparent UCI showing, appellate courts have skipped right to the third "intolerable strain/ disinterested observer" test. *See, e.g., Bergdahl, 80 M.J. at 236-39* (finding "some evidence" of UCI and proceeding directly to the "intolerable strain/ disinterested observer" analysis); [United States v. Salyer, 72 M.J. 415, 425-28 \(C.A.A.F. 2013\)](#) (same). But the structure of the apparent UCI test makes clear that there will be cases where an accused is able to show some evidence of UCI, but that the government would then be able to disprove that those facts amounted to UCI beyond a reasonable doubt once the issue was fully joined. This is one of those cases.

⁷ For a discussion about the difference between "lawful command emphasis" and unlawful command influence, see Colonel James F. Garrett, Colonel Mark "Max" Maxwell, Lieutenant Colonel Matthew A. Calarco, and Major Franklin D. Rosenblatt, *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, Army Law., Aug. 2014, at

test, the convening authority's speech did not rise to the level of creating an "intolerable strain" on the military justice system, because a reasonable disinterested observer knowledgeable of the facts would not harbor a significant doubt about the fairness of appellant's court-martial proceeding. Bergdahl, 80 M.J. at 234. The knowledgeable disinterested observer would have heard the entire speech, and therefore would have known that the convening authority did not mention appellant's court-martial, or any specific court-martial, during the speech, but rather was imploring the Corps of Cadets to tackle the problem of sexual assault in their ranks. The disinterested observer would also have known that the convening authority took an action highly favorable to the accused approximately one month after the speech when he dismissed the most serious sexual assault charges against appellant. While the military judge's suppression of the evidence from [*21] appellant's cell phone put a dent in the government's case, there was nothing keeping the convening authority from re-referring those charges as well. The fact that he did not do so is strong evidence that the convening authority was exercising his appropriate detached and disinterested role in his decisions about appellant's case.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge ALDYKIEWICZ and Judge WALKER concur.

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United States v. Owens

United States Navy-Marine Corps Court of Criminal Appeals

June 17, 2005, Decided

NMCCA 200100297

Reporter

2005 CCA LEXIS 182 *; 2005 WL 1420788

UNITED STATES v. Franklin OWENS, Jr., Aviation
Boatswain's Mate (Launching and Recovery Equipment)
First Class (E-6), U.S. Navy

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS
OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by United States v.
Owens, 62 M.J. 224, 2005 CAAF LEXIS 1315 (C.A.A.F.,
Sept. 26, 2005)

Review granted by United States v. Owens, 63 M.J.
259, 2006 CAAF LEXIS 557 (C.A.A.F., Apr. 25, 2006)

Affirmed by United States v. Owens, 64 M.J. 176, 2006
CAAF LEXIS 1602 (C.A.A.F., Sept. 11, 2006)

Prior History: Sentence adjudged 21 June 2000. Military
Judge: B.W. MacKenzie. Review pursuant to Article
66(c), UCMJ, of Special Court-Martial convened by
Commanding Officer, USS GEORGE WASHINGTON
(CVN 73).

Counsel: LCDR ROBERT EVANS, JAGC, USNR,
Appellate Defense Counsel.

LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate
Government Counsel.

Judges: BEFORE C.L. CARVER, D.A. WAGNER, R.W.
REDCLIFF. Senior Judge CARVER and Judge
WAGNER concur.

Opinion by: REDCLIFF

Opinion

REDCLIFF, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of assault consummated by a battery, unlawful entry, and communicating indecent language, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. ¹ The members sentenced the appellant to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

[*2] We have carefully considered the record of trial, the appellant's eleven assignments of error, ² and the

¹The appellant was also convicted by the members of disorderly conduct, in violation of Article 134, UCMJ. This offense was dismissed by the military judge prior to sentencing.

²The appellant has raised the following assignments of error (AOEs):

I. THE CONVENING AUTHORITY WAS DISQUALIFIED BY HIS PERSONAL FEELINGS ABOUT THE OUTCOME OF THE CASE AND BY THE BIASED ADVICE OF HIS JUDGE ADVOCATE.

II. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S PRETRIAL MOTION TO DISMISS ON

GROUND OF DUE PROCESS, EQUAL PROTECTION, AND DOUBLE JEOPARDY.

III. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDECENT LANGUAGE SPECIFICATION FOR FAILURE TO STATE AN OFFENSE.

IV. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS AA H's TESTIMONY.

V. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE EVIDENCE OF OTHER ACTS.

VI. THE COURT WAS IMPROPERLY INFLUENCED BY OJAG'S DECISION AUTHORIZING ACTION AGAINST APPELLANT.

VII. THE MILITARY JUDGE ALLOWED THE GOVERNMENT TO MANIPULATE THE SELECTION OF THE PANEL.

VIII. THE COURT'S INSTRUCTION DID NOT CURE THE GOVERNMENT'S IMPROPER CLOSING ARGUMENT.

IX. THE CONVENING AUTHORITY'S ACTION INCORRECTLY REPORTS THE RESULTS OF TRIAL.

X. THE SENTENCE CANNOT BE APPROVED, AS THE GOVERNMENT HAS FAILED TO INCLUDE A COMPLETE ARTICLE 32, UCMJ, REPORT IN THE RECORD OF TRIAL.

XI. THERE IS INSUFFICIENT FACTUAL AND LEGAL SUPPORT FOR THE FINDINGS OF GUILTY, AS AN AFRICAN-AMERICAN MALE WHO WAS RAISED IN THE CITY OF CHICAGO, ILLINOIS, WOULD NOT REFER TO A WOMAN AS A "WHITE SLUT" OR A "TEASE." *See record at 155.* IF HE WERE DIRECTING DERISIVE COMMENTS TO A WOMAN, APPELLANT WOULD NOT USE THAT TYPE OF SLANG, THUS, AA H's IDENTIFICATION OF APPELLANT AS THE PERPETRATOR WAS AN OBVIOUS FABRICATION.

Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

[*3] Background

At about 0930 on the morning of 3 January 2000, the appellant, a first class petty officer, went uninvited to the off-base apartment of a female shipmate, Airman Apprentice (AA) "H." After being denied entry by AA H, the appellant forced his way into her apartment. He screamed at her, calling her a "bitch," a "white slut," and a "tease," and said that he hadn't had sex in a month-and-a-half. He then struck her repeatedly with his hands, causing her to fall down. As she lay on the floor, the appellant got on top of her, hitting and scratching her. When she tried to get up, he pushed her head forcefully against the floor. Then he pulled out an unknown metal object (described by AA H as possibly a nail file or nail clippers), pushed up her shirt, and scratched AA H's face and stomach areas with this object. The appellant then left the apartment.

After the attack, AA H contacted a friend, who drove her to her command, the USS GEORGE WASHINGTON (CVN 73). An examination of AA H by the ship's medical personnel disclosed numerous fresh bruises and cuts, but no serious injuries. Although she was initially reluctant to discuss the assault, later that day AA H identified the [*4] appellant as her attacker.

The case was initially prosecuted by civilian authorities in Norfolk, Virginia. The case was charged as a misdemeanor, and no prosecutor was assigned to the case. After AA H testified, the state court judge dismissed the case for lack of jurisdiction -- on the

For the sake of convenience and clarity, we will address

several AOE's out of order.

motion of the appellant's civilian defense counsel -- apparently because AA H failed to state where the assault had occurred and also failed to make an in-court identification of the appellant as her assailant.

After the conclusion of the state court proceeding, the appellant's command ordered the charges investigated pursuant to Article 32, UCMJ. The investigating officer recommended that the charges be disposed of by special court-martial. As required by section 0124 of the Manual of the Judge Advocate General,³ the command judge advocate then requested permission from the Judge Advocate General of the Navy to refer the charges to a court-martial. The package forwarded to the Judge Advocate General included letters from the appellant's defense counsel, the assigned trial counsel, the convening authority, and the command judge advocate. Based upon this input, the Judge Advocate General approved [*5] the request, specifically finding that "the interests of justice and discipline require further action under the Uniform Code of Military Justice against ABE1 Owens." (Appellate Exhibit XXIX at 1).

BIAS OF THE CONVENING AUTHORITY AND THE COMMAND JUDGE ADVOCATE

The appellant's first assignment of error contends that both the convening authority and his command judge advocate were biased against the appellant, and that this bias disqualified the convening authority from convening the court-martial. We disagree.

As evidence of this purported bias, the appellant points to the following remarks contained in the letters submitted to the Judge Advocate General:

1) The command judge advocate explained that the

³ Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C § 0124 (CH-3, 27 Jul 1998).

ship's Naval Criminal Investigative Service (NCIS) special agent initially assumed responsibility for this case, and, without consulting with the command, told AA H to file a complaint with [*6] the civilian authorities. When the command judge advocate learned of the assault, "I immediately directed our Security Division conduct a full investigation into what I considered a potentially serious crime." (Appellate Exhibit XXIX at 3.)

2) When the civilian authorities assumed jurisdiction, the command judge advocate "continued processing our investigation to preserve the information for any subsequent action the command might have desired." (Appellate Exhibit XXIX at 3).

3) After the civilian authorities brought charges, the command decided not to postpone any further decisions about the case until after the civilian charges had been resolved. The command judge advocate commented: "At this point in the process, I felt, even though we were dealing with a serious assault, the commonwealth attorney's office would handle it sufficiently." (Appellate Exhibit XXIX at 3).

4) While the ship began to prepare for an upcoming deployment, the command judge advocate noted that: "My office continued to track the case and coordinated with the civilian courts to ensure the victim and accused would be available for appearances during underway periods." (Appellate Exhibit XXIX at 3.)

5) The [*7] command judge advocate's letter then explained that no prosecutor was assigned to the case (a fact of which he was not aware until after the conclusion of the proceedings), and the case was dismissed on jurisdictional grounds. The letter goes on to comment: "I am confident, had the government's interests been properly represented by a prosecutor there would have been a different result. In light of the outcome, I discussed options with the Commanding

Officer and he decided to refer the case to an Article 32 Investigation." (Appellate Exhibit XXIX at 3-4).

6) The convening authority provided a brief endorsement to the defense counsel's letter to the Judge Advocate General. In this endorsement, he challenges an assertion by the appellant's counsel that the command had allowed the civilian authorities to handle the case, pointing out that the latter had assumed jurisdiction and that he had merely awaited disposition of the offenses as required by policy issued by higher authority. He then commented: "I believed at the time, the incident would be fairly adjudicated in the civilian court system." (Appellate Exhibit XXIX at 5).

On appeal, the appellant asserts that these remarks show that [*8] both the command judge advocate and the convening authority had more than an official interest in his case, and that this disqualified the convening authority from convening the court-martial. The appellant did not raise this issue at trial.

Article 23(b), UCMJ, prohibits an officer from convening a special court-martial in which he is also an accuser. Instead, such an officer must refer the case to higher authority, and should advise the superior authority of his disqualification. Art. 23(b), UCMJ; *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Article 1(9), UCMJ, defines an "accuser" as:

a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

A staff judge advocate can be similarly disqualified from participating in the review of a case if he has more than an official interest in the case. Art. 6(c), UCMJ; *United States v. Sorrell*, 47 M.J. 432, 433 (C.A.A.F. 1998).

However, the disqualification of a convening authority as

an accuser under Article 23(b), UCMJ, [*9] is not jurisdictional, and the error must be raised in the trial court to be preserved for appeal, absent plain error. *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994). ³After considering the challenged comments and actions discussed above, we find no error, let alone "plain error." Thus, no relief is appropriate.

On this record, the evidence does not establish that either the command judge advocate or the convening authority had "other than an official interest" in this case. In context, the remarks cited by the appellant appear to reflect these officers' official interest in seeing that justice was done and that good order and discipline was preserved, as well as a perception that these interests may not have been adequately protected [*10] by the civilian proceeding. We perceive no improper action or improper motives in their written remarks, and we will not impute improper motives to the command judge advocate or the convening authority on the basis of the evidence presented in this record. We conclude that this assignment of error is without merit.

DOUBLE JEOPARDY, DUE PROCESS, AND EQUAL PROTECTION

In his second assignment of error, the appellant asserts that his prosecution and punishment in a military court-martial after his acquittal in Virginia Commonwealth criminal court is a violation of his double jeopardy and due process rights under the Fifth Amendment, and his Fourteenth Amendment right to equal protection of the law. The appellant raised each of these contentions at trial, and now reasserts them before this court. We

³ The majority in *Shiner* held that the failure to raise the error in the trial court waives the error. However, Judge Wiss, in his concurring opinion, declined to endorse the doctrine of waiver in such cases, preferring to test the error for prejudice.

concur with the ruling of the military judge that the appellant's rights to due process and equal protection, as well as his rights against double jeopardy, were not abridged via trial by court-martial.

The law is well-settled that multiple prosecutions of an accused by different sovereigns -- in this case, the Commonwealth of Virginia and the United States -- does not violate either [*11] double jeopardy or due process. *Bartkus v. Illinois*, 359 U.S. 121, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959); *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982). The continuing vitality of this "dual sovereignty doctrine" has recently been reaffirmed by the United States Supreme Court in *United States v. Lara*, 541 U.S. 193, 158 L. Ed. 2d 420, 124 S. Ct. 1628 (2004).

The appellant claims that the Supreme Court has carved out an exception to the dual sovereignty doctrine in *Bartkus* in that "federal and state authorities may not manipulate a system to achieve the equivalent of a second prosecution," and contends that his prosecution before a court-martial constitutes such a case. (Appellate Exhibit VIII at 6). Contrary to the appellant's contention, we find no such language or support for his position in *Bartkus*. The Supreme Court did state in *Bartkus* that "at some point the cruelty of harassment by multiple prosecutions by a State would offend due process. . . ." *Bartkus*, 359 U.S. at 127. However, this is not such a case. And even if the appellant was correct that a "manipulation" exception to the dual sovereignty doctrine does or should exist, we do not find that such an exception [*12] would apply in this case on the record before us. Instead, the evidence of record establishes that the military authorities prosecuted the appellant because they believed that Virginia's civilian authorities failed to protect important military's interests.

The appellant also asserts that the multiple prosecutions in this case deprived him of equal protection of the law,

because if the appellant had been a civilian -- or a service member serving in a foreign country -- he would have been protected against the multiple prosecutions by double jeopardy or by a status of forces agreement (SOFA). However, the appellant ignores that he could be prosecuted twice because his offense violated both State and military law. He is therefore in a wholly different situation from a civilian who violates only State law. The resulting "disparity of treatment" cited by the appellant is rationally related to the military's interest in maintaining good order and discipline among its service members -- a consideration entirely absent from the case of a civilian. Similarly, the disparate treatment of the appellant from that of a service member who might be protected from multiple prosecution under a SOFA [*13] finds a rational basis in the Government's need to protect its service members who are stationed in foreign countries and to maintain positive relations with those foreign countries.

Finally, there is no evidence, and the appellant does not claim, that he was singled out for multiple prosecutions contrary to military policy or practice. Section 0124 of the Navy's JAGMAN sets forth a procedure which permits multiple prosecutions in some cases, and that procedure was followed in this case. Simply put, the appellant has not averred or proven that he was treated differently in this regard than other Sailors similarly situated. We, therefore, find no violation of equal protection in this case and conclude that this assignment of error is without merit.

UNLAWFUL COMMAND INFLUENCE

In his sixth assignment of error, the appellant claims that the military judge, in ruling on the appellant's double jeopardy and due process claims, as discussed above, was improperly influenced by the decision of the Judge Advocate General to permit a court-martial pursuant to

the provisions of JAGMAN § 0124. In support of this contention, the appellant points to the following comment by the military [*14] judge during consideration of the motion:

Don't get me wrong. I'm not trying to --- I'm not trying to supplant this court's interpretation for the Judge Advocate General of the Navy's decision, but just rather, what was the process. That's all I'm looking to see.

Record at 13. The appellant contends that this remark demonstrates that "the military judge gave undue weight to the Judge Advocate General's decision authorizing the court-martial, and he allowed that decision to intrude upon and influence his rulings on Appellant's pretrial motions." Appellant's Brief at 13.

We recognize that unlawful command influence is the "mortal enemy" of military justice, and therefore cannot be tolerated. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998)(quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). We also recognize that military judges can be the targets of unlawful command influence. *United States v. Mabe*, 33 M.J. 200, 205 (C.M.A. 1991).

However, the initial burden is upon the defense to produce "some evidence" in support of a contention of unlawful command influence; mere allegation or suspicion is [*15] not sufficient. *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003). We conclude that the appellant has failed to carry this burden.

Taken in its proper context, we are convinced that the military judge's remark does not reflect unlawful command influence. The remark occurred during a discussion of the due process aspects of the appellant's motion. The Government had presented the letter from the Judge Advocate General of the Navy authorizing prosecution of the appellant, and this letter referenced a letter from the convening authority. The military judge

simply asked to see a copy of the convening authority's letter, pointing out that it could be relevant to the court's determination of the appellant's procedural due process claim. The trial counsel apparently misinterpreted the military judge's request as expressing an intention to reconsider the wisdom of the Judge Advocate General's decision, and responded by questioning the judge's authority to do so. This was the context of the military judge's remark quoted above. It is clear to us that this remark was made, not as an indication of any type of unlawful command influence, actual or apparent, but merely [*16] as a clarification of the military judge's motive for requesting to review the documents considered by the Judge Advocate General.⁴

Thus, we perceive nothing improper in the actions of the military judge or the Judge Advocate General in this case, and conclude that the appellant's claim of unlawful command influence is without any evidentiary support. This assignment of error is without merit.

FAILURE TO STATE THE OFFENSE OF INDECENT LANGUAGE

In his third assignment of error, the appellant contends that the trial court erred by denying his motion to dismiss Specification 2 of Charge I, which alleges that the appellant communicated indecent language by calling AA H a "white slut."⁵ At trial, and now on appeal,

⁴The military judge was subsequently provided with those documents prior to ruling on the appellant's motion.

⁵Specification 2 of Charge I reads as follows:

In that Aviation Boatswain's Mate (Launching and Recovery Equipment) First Class Franklin Owens, Jr., U.S. Navy, USS George Washington (sic), on active duty, did, at or near Norfolk, Virginia, on or about 3 January 2000, orally communicate to Airman Apprentice H[], U.S. Navy, certain indecent language, to wit: "You white slut,"

the appellant urges that the specification fails to state an offense because the language used was not indecent under the circumstances, and because the appellant's conduct was neither [*17] prejudicial to good order and discipline nor service-discrediting. We disagree.

We begin by noting at the outset that the nature of the appellant's argument seems more consistent with an attack on the sufficiency of the evidence than on the sufficiency of the specification. In any event, since we have a duty to affirm only those findings that we determine to be correct in law and fact (Art. 66(c), UCMJ), we will consider the sufficiency of both the specification and the evidence.⁶

[*18] "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL (2000 ed.). The specification must be sufficient to "give the accused notice and protect him against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197

or words to that effect.

⁶ The appellant's eleventh assignment of error also challenges the sufficiency of the evidence in support of Specification 2 of Charge I, in these terms:

THERE IS INSUFFICIENT FACTUAL AND LEGAL SUPPORT FOR THE FINDINGS OF GUILTY, AS AN AFRICAN-AMERICAN MALE WHO WAS RAISED IN THE CITY OF CHICAGO, ILLINOIS, WOULD NOT REFER TO A WOMAN AS A "WHITE SLUT" OR A "TEASE." See *Record at 155*. IF HE WERE DIRECTING DERISIVE COMMENTS TO A WOMAN, APPELLANT WOULD NOT USE THAT TYPE OF SLANG, THUS, AA H]'S IDENTIFICATION OF APPELLANT AS THE PERPETRATOR WAS AN OBVIOUS FABRICATION.

The appellant's contention in this regard is unsupported by the record, is clearly superfluous, and does not merit further discussion.

(C.M.A. 1994).

The elements of the offense of communicating indecent language are:

- (1) that the accused orally or in writing communicated to another person certain language;
- (2) that such language was indecent; and
- (3) 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.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, P 89b. Language is "indecent" if it is:

grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. [*19]

Id., P 89c. "Whether or not specific language is 'indecent' for purposes of this offense is a question of fact and largely depends on the context in which it is uttered." *United States v. Caver*, 41 M.J. 556, 559 (N.M.Ct.Crim.App. 1994)(footnote omitted). Thus, profanity-laced language uttered by an accused while being apprehended and handcuffed, but which clearly had no sexual connotations, was not deemed "indecent." *United States v. Brinson*, 49 M.J. 360 (C.A.A.F. 1998). On the other hand, an adult male's request to climb into bed with his 15-year-old step-daughter was held to be indecent under the circumstances. *United States v. French*, 31 M.J. 57 (C.M.A. 1990).

Turning now to Specification 2 of Charge I, we find that it does state an offense. All of the elements of the offense are stated either expressly or by fair implication,

and the specification provides the appellant with adequate notice of the charge as well as protection against double jeopardy.

We also find that under the facts of this case, the evidence was legally and factually sufficient to establish the offense of indecent language. The evidence shows that [*20] the appellant, a married E-6, went uninvited to the apartment of an E-2 whom he appears to have had a romantic interest -- an interest which she did not reciprocate. He then forced his way into her apartment, became verbally abusive, and attacked her physically. The term used by the appellant, "slut," commonly refers to a prostitute or a woman of loose morals, and certainly carries sexual connotations. In addition, the appellant's remark, made in conjunction with the unprovoked attack, that he had not had sex for a month-and-a-half, and his lifting of the victim's shirt to expose her abdomen, add sexual connotations to his use of the term, "slut."

The facts of this case are analogous to those in *Caver*, in which this Court held that the use of the term, "bitch," was indecent when a male E-5 used the term toward a female E-3 to imply that she "would sleep around." *Caver*, 41 M.J. at 560-61. We stated in *Caver* that:

The language was part and parcel of a violent disturbance in a military barracks. It was communicated during an abusive, degrading episode. [citation omitted] It was not innocuous. It was clearly calculated to offend, shock, and carry an [*21] indecent message. [citation omitted] Applying community standards, the language was grossly offensive to modesty, decency, and propriety because of its vulgar and disgusting nature. The use of the word employed in this case might not constitute an offense under other circumstances. However, considering the factors set forth in the record, including the context of the

utterance, the intent and effect of the communication, and applying community standards, we conclude in this case the language was "indecent" within the meaning of the Manual for Courts-Martial.

Id. (footnote omitted).

Many of the factors that we considered relevant in *Caver* are also present here, such as the disparity in rank between the appellant and the victim, the abusive and degrading context in which the remark was made, and the sexual implications of the language used.

We find that the members' finding of guilty as to Specification 2 of Charge I was correct in law and fact. This assignment of error, therefore, is without merit.

PEREMPTORY CHALLENGES

The appellant's seventh assignment of error alleges that the military judge erred by allowing the trial counsel to exercise the Government's [*22] peremptory challenge after the trial defense counsel had exercised a peremptory challenge. We find no prejudice to the appellant from the process employed by the military judge and, therefore, decline to grant relief based on this assignment of error.

Six members, including three enlisted members, were detailed to the appellant's court-martial by the convening authority. Upon completion of voir dire, the military judge granted a defense challenge for cause of one of the enlisted members. Record at 132. The government peremptorily challenged one of the officer members, LCDR Koach, and the appellant peremptorily challenged another of the officer members, LT Essenmacher. Record at 132. This left a panel of one officer and two enlisted members.

The appellant's counsel did not initially object to the

Government's peremptory challenge of LCDR Koach. However, upon completion of the challenges, the military judge asked, "Defense, did you have any objections against the peremptory challenge by the government?" Record at 133. The assistant defense counsel took advantage of this opportunity by entering an untimely objection to the Government's peremptory challenge on the basis that the Government [*23] had stricken a person who appeared to favor leniency in the appellant's case. Before the military judge could rule on the defense objection,⁷ the Government voluntarily withdrew its peremptory challenge of LCDR Koach, to which the appellant made no objection. Record at 133.

Based on the Government's withdrawal of its challenge, the military judge reinstated LCDR Koach to the panel, and then gave the Government an opportunity to exercise its peremptory challenge against another member. The appellant objected to this procedure, pointing out that the military judge was effectively allowing the Government to exercise its peremptory challenge after the defense. Record at 134. The military judge overruled the defense objection, and the Government peremptorily challenged one of the remaining enlisted members.⁸

[*24] "Ordinarily," the government's peremptory challenge must be made and decided prior to the defense peremptory challenge. R.C.M. 912(g)(1); *United States v. Newson*, 29 M.J. 17, 20 (C.M.A. 1989); see also Art. 41(a), UCMJ. The military judge cannot change this procedure "without a sound basis." *Newson*, 29 M.J. at 19.

⁷ The military judge later stated on the record that he probably would have overruled the defense objection, had not the Government promptly withdrawn its challenge to LCDR Koach.

⁸ This left a panel consisting of two officers, including LCDR Koach, and one enlisted member.

On the facts of this case, we conclude that the military judge had a sound basis for departing from the "ordinary" procedure. This departure was prompted by the appellant's untimely objection to the Government's peremptory challenge of LCDR Koach. That objection should have been made prior to the defense entering its peremptory challenge. If the defense had done so, the Government could have withdrawn its challenge --- or the military judge could have ruled on the defense objection --- prior to the defense exercising its peremptory challenge. In either approach, the prosecution would have been able to assert an alternate peremptory challenge before the defense made its peremptory challenge.

However, even if we were to decide that the military judge committed error in the approach he took, that error would not result in relief for the [*25] appellant unless the error materially prejudiced his substantial rights. Art. 59(a), UCMJ; *Newson*, 29 M.J. at 21. We find no such prejudice. The appellant obtained the relief he initially desired, which was to have LCDR Koach serve as a member of his panel. As was the case in *Newson*, "there is no reason to suspect that a different mix of members would have produced results more favorable to appellant." *Newson*, 29 M.J. at 21. We find it odd indeed that the appellant now asserts as error a process prompted by his own trial defense counsel's tardy objection to the prosecution's exercise of its peremptory challenge, especially in view of the fact that the member the defense desired to retain on the panel was actually retained.

We conclude that this assignment of error lacks merit and decline to grant relief.

REMAINING ASSIGNMENTS OF ERROR

We have also carefully considered the appellant's remaining assignments of error, including his contention

that the record of trial is incomplete (because it does not contain a verbatim Article 32, UCMJ, investigation), that the military judge should have excluded the victim's testimony, that the military [*26] judge should have granted a mistrial based on the trial counsel's closing argument, and that the military judge erred by admitting the appellant's uncharged misconduct. We find no merit in these contentions and decline to provide the requested relief.

We do concur with the appellant that his court-martial promulgating order is inaccurate. Specifically, the court-martial order fails to state that the military judge dismissed Additional Charge II and its single specification prior to sentencing. While we find no prejudice to the appellant from this scrivener's error, he is entitled to correction of his official records. Art. 59(a), UCMJ; *United States v. Glover*, 57 M.J. 696, 697-98 (N.M.Ct.Crim.App. 2002). Thus, we will provide appropriate relief in our decretal paragraph.

CONCLUSION

Accordingly, we affirm the findings and sentence as approved by the convening authority. We direct that the supplement court-martial promulgating order reflect that Additional Charge II and its single specification were dismissed by the military judge.

Senior Judge CARVER and Judge WAGNER concur.

End of Document

CERTIFICATE OF SERVICE, U.S. v. COL PRITCHARD, CHARLES L., (Respondent); MSG DIAL, ANDREW J. (Real Party in Interest) (Misc 20220001)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED]

[REDACTED] on this 2nd day of March, 2022.

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