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

BEFORE

J.W. ROLPH **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Richard J. ASHBY
Captain (O-3), U.S. Marine Corps Reserve

NMCCA 200000250 Decided 27 June 2007

Sentence adjudged 10 May 1999. Military Judge: A.W. Keller. Staff Judge Advocate's Recommendation: Col D.E. Clancey, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, U.S Marine Forces, Atlantic, Norfolk, VA.

Maj ANTHONY C. WILLIAMS, USMC, Appellate Defense Counsel
Maj ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
Maj ROBERT M. FUHRER, USMC, Appellate Government Counsel
LT FRANK L. GATTO, JAGC, USN, Appellate Government Counsel

ROLPH, Chief Judge:

Background

On the 3rd of February 1998, the appellant was the pilot of an EA-6B “Prowler” aircraft engaged in a low-level training mission in the Italian Alps outside of Aviano, Italy. On the final leg of the flight, he flew the aircraft well below established minimum altitudes, impacting and severing two weight-bearing suspension cables of the Alpe Cermis cable car system located at varying heights approximately 365 to 450 feet above ground level near the town of Cavalese, Italy. The mishap caused a descending gondola car and all of its passengers to plummet approximately 365 feet to the earth below. Twenty civilians from numerous nations riding in the gondola were killed, and substantial property damage (in the millions of dollars) was suffered by both the aircraft and the cable car system. Despite serious damage to their airplane including the complete loss of

hydraulics, the EA-6B crew was able to return to the North Atlantic Treaty Organization (NATO) air base in Aviano, Italy, where the appellant conducted a successful emergency landing.

On the date of this tragic incident, the appellant was an active-duty Marine Corps aviator assigned to Marine Tactical Electronics Warfare Squadron TWO (VMAQ-2) based in Cherry Point, N.C. The EA-6B's crew consisted of the appellant as pilot, along with three electronic counter measures officers (ECMO's) including Captain (Capt) Joseph P. Schweitzer, USMC, the appellant's navigator[1] and subsequent co-accused. The mishap crew's squadron had been deployed in Aviano, Italy, since August 1997 in support of NATO operations.[2]

The appellant ultimately faced two general courts-martial for offenses arising out of this tragedy, both convened by the Commanding General, U.S. Marine Forces, Atlantic, and assembled at Camp Lejeune, North Carolina. The appellant was charged at his first general court-martial with multiple offenses, including: two specifications of dereliction of duty; negligently suffering military property to be damaged; recklessly damaging non-military property; twenty specifications of involuntary manslaughter; and twenty specifications of negligent homicide in violation of Articles 92, 108, 109, 119, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 908, 909, 919, and 934. The appellant was ultimately acquitted of all offenses by officer members on 04 March 1999 (*Ashby* I).

Because he earlier refused to consent to the joinder after arraignment of an additional charge and two specifications alleging conduct unbecoming an officer by conspiring with Capt Schweitzer to obstruct justice (endeavoring to impede a criminal investigation) by secreting a videotape he removed from the cockpit of his aircraft and thereafter participating in its destruction, and actually obstructing justice based upon these same actions in violation of Article 133, UCMJ, 10 U.S.C. § 933, these offenses were referred to a second general court-martial on 15 October 1998. At his second general court-martial, officer members convicted the appellant, contrary to his pleas, of both Article 133 offenses. On 10 May 1999, he was sentenced by the members to six months confinement, total forfeitures, and a

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

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

dismissal (*Ashby* II). On 03 January 2000, the convening authority approved both the findings and the adjudged sentence.

Assignments of Error

The appellant has raised 12 separate assignments of error (AOE's) for this court's consideration, all of which relate to his second general court-martial.[3] We *sua sponte* raise and address the issue of excessive post-trial delay, which has plagued this case from the date sentence was announced -- much of which is the direct responsibility of this court. Most helpful in our thorough review of all issues assigned were the excellent briefs of appellate counsel, as well as the superb oral arguments by counsel for both the appellant and the Government presented before this court on 09 April 2007. After having carefully considered all of the appellant's AOE's,[4] the issue we have

[3] We summarize the AOE's as follows:

I. The evidence is neither legally or factually sufficient to support a conviction for obstruction of justice under Article 133, UCMJ.
II. The evidence is neither legally or factually sufficient to support a conviction for conspiracy to obstruct justice under Article 133, UCMJ.
III. The appellant received ineffective assistance of counsel when the defense team failed to present evidence relating to the appellant's acute stress disorder and/or post-traumatic stress disorder as it negated the appellant's ability to form the specific intent to impede an investigation.
IV. The military judge erred in instructing the members that the term "criminal proceedings" as used in the military's obstruction of justice offense includes foreign criminal proceedings.
V. Because the destroyed videotape contained no material evidence, its destruction could not effect the due administration of justice.
VI. The appellant was deprived of a fair trial due to apparent unlawful command influence that tainted the proceedings and may have chilled potential witnesses.
VII. The military judge erred in failing to dismiss the charge and both specifications as the convening authority was both a "type two" and "type three" accuser.
VIII. Even if the convening authority was not an accuser, he was nevertheless disqualified from taking post-trial action in the appellant's case where post-trial submissions by defense counsel required him to address issues which involved his personal credibility.
IX. The military judge erred in denying the defense motion for a mistrial based on trial counsel's reference to the appellant's invocation of his right to remain silent, as well as references to his non-disclosure of the videotape in question.
X. The military judge erred in allowing family members of the victims of the gondola crash to testify on sentencing.
XI. The convening authority abused his discretion in failing to withdraw the Article 133 offenses (conduct unbecoming an officer by conspiring to obstruct justice and actual obstruction of justice) from referral to a second general court-martial after the appellant was acquitted of all original charges at his first court-martial.
XII. A sentence which includes six months confinement and an approved dismissal is inappropriately severe.

[4] We have given thorough and careful consideration to AOE V and AOE IX and have determined each to be without merit. They will not be discussed further in this opinion. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

raised *sua sponte*, along with the evidence of record and the military judge's extensive findings of fact and conclusions of law, we believe additional fact-finding is required to properly resolve the issue of whether the staff judge advocate and his deputy were disqualified from participating in the post-trial review of this case because of their alleged actions in support of the prosecution team. We shall order such action in our decretal paragraph. *See* Arts. 59(a) and 66(c), UCMJ.

I. Legal and Factual Sufficiency of the Evidence

a. Background

In his first and second AOE's, the appellant asserts that the evidence presented at his second general court-martial was both legally and factually insufficient to support his conviction under Article 133, UCMJ, for conduct unbecoming an officer by conspiring with Capt Schweitzer to obstruct justice (by endeavoring to impede an investigation), or for actual obstruction of justice by removing, secreting, and ultimately destroying a videotape recorded by Capt Schweitzer during the mishap flight. Appellant's Brief and Assignment of Errors of 4 Dec 2003 at 8-17. The essence of the appellant's argument in this regard is that the appellant could not subjectively or objectively have known or believed that a criminal investigation or proceeding would be forthcoming as a result of the gondola mishap. *Id.* at 9. Because he had no reason to believe that a criminal investigation or proceeding was forthcoming, the appellant claims he could never have formed the specific intent to impede such, or the "due administration of justice." *Id.* at 10-11. He additionally claims he was incapable of forming any specific intent at all because he was allegedly suffering from acute stress disorder and/or post-traumatic stress disorder as a result of the mishap (*see* AOE III, Part II below). *Id*. at 20. Finally, he asserts that there was no evidence of a conspiratorial agreement or "meeting of the minds" between himself and Capt Schweitzer, and that he never formed the "conscious purpose to conspire" or to commit the alleged object of the conspiracy. *Id.* at 19. We find no merit in any of these contentions.

The evidence at trial was largely undisputed as to what took place immediately before and after this tragic aviation disaster. Capt Schweitzer borrowed the appellant's video camera for the mishap flight. It was to be his last flying mission prior to leaving active duty, and he desired to have a remembrance that would document for friends and family what he did as a naval

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In regard to AOE IX, even if error occurred, we are confident that the military judge's curative instructions rendered any such error harmless beyond a reasonable doubt.

flight officer. Record at 928; 1272-74. As Capt Schweitzer explained:

> I asked [Capt Ashby] over the weekend if I could borrow [the video camera]. Basically I wanted to take some low level -- not low level, but footage of basically how we were flying. It was the last week we were going to be there. I was getting out in June, and I wanted to have something to have so I could show my friends, my kids, and say, hey, this is what your dad did. . . .

Id. at 928. Before the flight, Capt Schweitzer purchased a pack of two blank tapes. With the appellant's assistance, he loaded one of the tapes during the flight and shot video footage during three separate legs of their six-legged mission. Record at 931-32. Capt Schweitzer claimed at trial that the camera was not in use at the time of the mishap, which occurred on the last leg of the mission. *Id.* at 932, 980.

After the cable strike, the crew was well aware that their aircraft was seriously damaged and that, under the best circumstances, an emergency landing at the NATO air base in Aviano would be required. They also feared they might have to eject from the aircraft. After successfully executing an arrested landing at the Aviano air base, the two aft crewmembers immediately executed an emergency egress from the aircraft in accordance with standard mishap protocol. Before exiting the aircraft, Capt Raney, who was in the aft cockpit, overheard someone he believed was the appellant asking "Is it blank?" *Id.* at 1173; 1287-88. The appellant and Capt Schweitzer, did not egress the aircraft, but instead elected to remain in the forward cockpit discussing what to do with the recorded videotape.

Knowing that their aircraft would be immediately impounded and inventoried due to the mishap, and seeking not to have the recorded videotape "become an issue" during the investigation they knew was forthcoming, Capt Schweitzer ultimately told the appellant, "Let's take the tape." Record at 935, 1293, 1295; Prosecution Exhibit 2 at 1. Though both were uncertain of everything depicted on the videotape, Capt Schweitzer was aware that the tape, at a minimum, showed the mishap aircraft executing a flaperon roll[5] during a ridgeline crossing on the first leg of the flight, and, in a separate segment, contained a scene of him smiling into the video camera while holding it in the air and pointing it back at himself. Record at 938, 939. Capt Schweitzer handed the appellant the video camera, and the appellant removed the recorded tape and substituted in its place a new and unused tape. *Id.* at 935, 1294; PE 2 at 1-2. The

[5] A flaperon roll is a 360-degree twisting maneuver about the long axis of the aircraft, often performed during ridgeline crossings.

appellant then placed the recorded tape in his flight suit pocket and exited the aircraft, leaving behind the video camera loaded with the unrecorded tape, along with the camera's carrying bag. Record at 936, 1294; PE 2 at 2. The recorded videotape remained in the appellant's possession during the next few days (4 to 6 February 1998), during which he and the other crewmembers learned that 20 people had died as a result of their flight mishap, that the Italian government had initiated a criminal investigation into the matter, that Italian and military defense counsel had been hired/detailed to represent the crewmembers, and that a "Command Investigation Board" (CIB)[6] had been convened by the Marine Corps to look into the facts and circumstances concerning their flight.

Three to four days after the mishap (on or about 07 February 1998) the appellant was walking from the mess hall with Capt Schweitzer and Capt Seagraves. When Capt Schweitzer described the recorded videotape to Capt Seagraves and asked his opinion as to what they should do with it, Seagraves responded, "I would get rid of it" or words to that effect. Record at 937. This statement was made in the appellant's presence.[7] Later, fully aware that the videotape contained footage of his inverted ridgeline crossing and other segments of the mishap flight, and worried that such would be "misinterpreted" by investigators, the appellant gave the videotape to Capt Schweitzer, who subsequently destroyed it by throwing it into a bonfire. *Id.* at 938-40, 950, 1299. The appellant was advised of the tape's destruction by Capt Schweitzer shortly thereafter. *Id.* at 950. The existence and destruction of this videotape only came to the attention of military investigators in August 1998, once Capt Seagraves received testimonial immunity and elected to disclose "the truth about everything." *Id*.

b. Law

This court has a duty under Article 66(c), UCMJ, to affirm only those findings of guilty that we find to be correct in both law and fact. The long established test for assessing the legal sufficiency of the evidence is whether, considering all the

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[6] A CIB is one of several authorized methods specified in the Manual of the Judge Advocate General for investigating significant operational or training mishaps that involve loss of life and/or significant property damage. *See* §0208, Manual of the Judge Advocate General (JAGMAN), JAG Instruction 5800.7D (15 March 2004). At the time of this incident, the CIB procedures and guidance were contained in § 0209 of the JAGMAN, JAG Instruction 5800.7C (03 October 1990).

[7] Though the appellant claimed to have not heard this exchange, Capt Schweitzer testified that the conversation took place within two to five feet of the appellant, and that there was "no doubt" the appellant was close enough to have heard what was said. Record at 939, 964, 966-67.

evidence in a light most favorable to the prosecution, any rational trier of fact could have found the elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979); *United States v. Barner,* 56 M.J. 131, 134 (C.A.A.F. 2001); *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. The test for assessing the factual sufficiency of the evidence is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the members, this court is nevertheless convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Our reasonable doubt standard does not require that the evidence presented be free from conflict. *United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may properly believe one part of a witness' testimony while disbelieving other aspects of the testimony, or may chose to believe one witness' testimony over that of another. *United States v. Harris,* 8 M.J. 52, 59 (C.M.A. 1979).

To convict the appellant for obstruction of justice as alleged under Article 133, UCMJ, the Government had to prove the following elements beyond a reasonable doubt:

1. That the accused wrongfully did a certain act;

2. That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

3. That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice;

4. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; and

5. That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

To convict the appellant for conspiracy to obstruct justice as alleged under Article 133, UCMJ, the Government had to prove the following elements beyond a reasonable doubt:

1. That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ;

2. That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or his co-conspirator performed an overt act for the purpose of bringing about the object of the conspiracy; and

3. That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

See MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.)[8], Part IV, ¶ 96b (obstruction of justice), ¶ 5 (conspiracy), and ¶ 59c(2)(conduct unbecoming an officer and gentleman).

The UCMJ's prohibition against obstruction of justice has as its overriding concern the protection and sanctity of the administration of justice within our military system. *United States v. Guerrero,* 28 M.J. 223, 227 (C.M.A. 1989). That said, the term "criminal proceeding" as used in defining this offense has been interpreted broadly, and includes, at a minimum, lawful searches,[9] criminal investigations conducted by police or command authorities,[10] Article 15 nonjudicial punishment proceedings,[11] Article 32 investigations,[12] courts-martial, and state and federal criminal trials.[13] *See* Military Judges' Benchbook, Dept of the Army Pamphlet 27-9 at 686 (15 Sep 2002). It has also been interpreted to include certain foreign investigations and proceedings. *See* Discussion of AOE IV, Part III below. There is no requirement that an actual criminal proceeding be underway at the time of the appellant's obstructive actions, or that actual obstruction of justice occur. *See* MCM ¶¶ 96b and c. As the offense's second element makes clear, it is sufficient if the appellant's wrongful act(s) occurred in the case of a person against whom he had reason to believe there were ***or would be*** criminal proceedings pending. *Id.* at ¶ 96b (emphasis added); *see United States v. Lennette,* 41 M.J. 488, 490 (C.M.A. 1995)(citing *United States v. Athey,* 34 M.J. 44, 49 (C.M.A. 1992); *United States v. Culbertson,* __ M.J. __, No. 200000982, 2007 CCA LEXIS 162, at 11 (N.M.Ct.Crim.App. 10 May 2007).

c. Discussion

1. Objective and subjective belief of pendency of a criminal investigation or proceeding

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[8] Unless otherwise noted, all future references the MCM will be to the 1998 edition.

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

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

[11] MCM (1984), Part IV, ¶ 96(c) notes that "the term criminal proceeding includes nonjudicial punishment proceedings."

[12] *United States v. Daminger,* 31 C.M.R. 521 (A.F.B.R. 1961).

[13] *United States v. Smith,* 34 M.J. 319, 322 (C.M.A. 1992).

The appellant argues that, at the time he removed and secreted the videotape from the cockpit of his aircraft, he could not objectively or subjectively have believed that any criminal investigation or proceeding would be forthcoming as a result of the mishap. Appellant's Brief at 11-16. Because he was not yet aware that 20 people had died, the appellant claims that the worst case scenario in his mind after landing his damaged plane was the possible pendency of an aircraft mishap board (AMB) or a CIB being conducted, both of which are completely administrative in nature. *Id.* Relying on *Athey,* the appellant asserts that he therefore could not have entertained the requisite intent for obstruction of justice as he did not surmise the possibility that, at some time in the future, a criminal investigation or proceeding might take place or that he wished to prevent such a proceeding. As was the case in *Athey,* the appellant argues that "[s]omeone who never even foresees that a criminal [investigation or] proceeding may take place cannot intend to obstruct it." Appellant's Brief at 13; *see Athey,* 34 M.J. at 49. We find the appellant's contentions unpersuasive.

At trial, the military judge specifically instructed the members, *inter alia,* that:

> It is not necessary that the charges be pending or even that an investigation be underway. The accused does not have to know that the charges have been brought or proceedings begun. The government must, however, prove beyond a reasonable doubt that the accused had reason to believe that there were **or would be** criminal proceedings against himself or Captain Schweitzer or that some law enforcement official of the military would be investigating the accused's or Captain Schweitzer's actions.

Record at 1410-11 (emphasis added). The military judge also advised the members that the term "criminal proceedings" did not include "administrative proceedings or inspections such as Aircraft Mishap Boards or Command Investigation Boards." *Id.* at 1410. Accordingly, the members were clearly instructed as to the requirements of the law.

In *United States v. Finsel,* 36 M.J. 441 (C.M.A. 1993), our superior court addressed the difficult issues often raised in distinguishing whether obstructive actions are taken by an accused simply to avoid detection of his offense(s) -- which is generally not "obstruction of justice" -- or done with the specific intent to subvert and corrupt the due administration of justice -- which would constitute this offense. Noting the dilemma this often poses, the court instructed that the answer will only be found on "a case-by-case basis, considering the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the due administration

of justice." *Id.* at 443. Our court has recently rejected the Army Court of Criminal Appeal's view articulated in *United States v. Gray,* 28 M.J. 858, 861 (A.C.C.A. 1989) that "there must be some allegation that an official authority has manifested an official act, inquiry, investigation, or other criminal proceeding with a view to possible disposition within the administration of justice of the armed forces." *See Culbertson,* 2007 CCA LEXIS 162, at 10-11. We rely instead on the plain language contained in the elements of this offense, which makes it clear that "[i]f an accused acted to destroy evidence in a case of a certain person against whom he had reason to believe that there was **or would be** criminal proceedings, and with the intent to impede those proceedings, he has obstructed justice within the meaning of Article 134 and paragraph 96b of the Manual." *Lennette,* 41 M.J. at 490 (citing *Athey,* 34 M.J. at 49)(emphasis added)); *Culbertson,* 2007 CCA LEXIS 162, at 11. It is not necessary, therefore, that formal investigative action or a criminal proceeding be ongoing at the time of the obstructive action(s); it is sufficient for this offense that the appellant anticipated such occurring sometime in the future. *Barner,* 56 M.J. at 131; *Lennette,* 41 M.J. at 490; *Athey,* 34 M.J. at 49; *Culbertson,* 2007 CCA LEXIS 162, at 11.

We believe that the direct and circumstantial evidence of record is legally sufficient to support the members' findings on all elements of both offenses, including the elements of obstruction of justice that require the appellant to have had reason to believe there was or would be a criminal investigation or proceeding following the gondola mishap; and that the appellant acted with the specific intent to influence, impede, or otherwise obstruct the due administration of justice. We make the same determination in finding that the actions of the appellant and Capt Schweitzer were carried out pursuant to a conspiratorial agreement. Most compelling in our analysis of this assignment of error are the following facts adduced at trial:

1) The appellant's statements to Major (Maj) Gross in the control tower on the day of the mishap, which indicate a clear awareness of the nature and seriousness of what had taken place during the mishap flight, and that an investigation would likely be forthcoming. The following statements are particularly germane:

> **Maj Gross:** "Where were you guys and what do you think you hit there?"
>
> **Capt Ashby:** "Uh we think we hit a, uh . . . um . . . a . . . gosh . . . ah, a tower cable . . ."
>
> **Maj Gross:** ". . . A tower cable . . . ?"
>
> **Capt Ashby:** ". . . that went to a gondola."

Maj Gross: "Okay."

Capt Ashby: "That's what we, we think we hit . . . because I saw a gondola, and then . . . I looked in front of me and saw wires and then I maneuvered and we, uh, hit the, hit the wires . . . and I think we hit the tower wires but I'm not sure because I didn't see a tower, so . . ."

Maj Gross: "Do you have the . . ."

Capt Ashby: "But just the way the wings are, and the cuts are through it . . ."

[After additional conversation attempting to pinpoint the mishap crew's coordinates at the time of the cable strike, Capt Ashby tells Maj Gross that his navigator, Capt Schweitzer, can provide more exact data, and they will call Maj Gross back. The conversation then continues.]

Maj Gross: "Okay, yeah, give me a call at the SOF[14] tower when you get that."

Capt Ashby: "Okay, if we forget, ***'cause I'm sure we're gonna get drilled really hard*** . . . so uh . . ."

Maj Gross: "Okay."

Capt Ashby: ". . . if you could call back and remind us."

Maj Gross: "Sure will."

PE 1, at 2-4 (emphasis added). Additionally, during his own testimony at trial, the appellant described portions of the mishap flight as follows:

> . . . I saw a gondola which was to the right. It was below me. And to me, it was as if -- the mountains were really high to the right, and -- it was a gondola to me. The visual picture I got was of a gondola going down. And if it was -- continued going down, it would have kept on going down even further below me. And we -- it was too late. We didn't realize it was going across our flight path.

Record at 1281. The appellant went on to state that, when he looked back at his flight path, the cable wires were instantly in his face ("as if someone threw a baseball at your head as you turned around and saw it coming at you"). *Id.* at 1282. The appellant's conversation with Maj Gross, along with his own testimony at trial, both reveal a clear knowledge by the

[14] Supervisor of Flight.

appellant at the time of the incident of what he hit and where he hit it, and that serious concerns would be raised and investigated in regard to the altitude, speed, and manner in which the mishap flight was conducted. Certainly, this knowledge placed the appellant on clear notice that, at a minimum, dereliction of duty issues would be closely investigated.

2) The appellant's and Capt Schweitzer's actions of remaining in the forward cockpit discussing the content of the recorded videotape and what to do with it in the midst of, and immediately after, conducting their emergency arrested landing -- the circumstances of which compelled their fellow crewmembers to exit the aircraft under emergency exit protocol. Their decision to remain in harm's way in order to discuss and extract the recorded videotape reflects the significance both individuals assigned to the contents of the tape, and the impact they believed it would have on the follow-on mishap investigation(s) they knew was forthcoming before they even left the plane. Their determination to remove and secret the videotape of their flight could have been interpreted by the members as reflective of their knowledge that a criminal investigation was forthcoming.

3) The appellant's and Capt Schweitzer's deceptive actions of unwrapping and substituting a new, blank tape into the video camera, then leaving the camera and its bag in the aircraft, while taking the recorded tape with them, hidden in the appellant's flight suit. These actions were clearly designed to mislead investigators, causing them to believe that the video camera was never utilized during the mishap flight, and of no significance to the mishap investigation(s). These acts also could have been interpreted by the members as reflecting upon their knowledge that a criminal investigation was forthcoming.

4) The appellant's testimony at his first general court-martial (*Ashby* I), as admitted during this trial (*Ashby* II), illustrated that when asked about his actions in regard to the video camera and the recorded videotape, he responded as follows:

> **Q:** What happened with respect to the video camera at that point?
>
> **A:** What happened at that point? After we took the trap, basically, it was like, "Okay. Now what do I need to do?" Basically, we need to shut down the engines. We got a radio call from the tower. They basically wanted to know what our trap weight was. I said, "We don't have time to talk to you now." I'm going to shut down the engines and basically get out. Did that; pulled the parking brake; raised the canopies; started unstrapping; and then, basically, what happened was, we were getting out and Captain Schweitzer just asked, "Hey, are you going to take the camera bag?" I said, "No, just leave everything. [Capt

Schweitzer responded] "Well, lets just take the tape"; and, basically, I said, "Okay," or something like that; and we proceeded to take the tape out, and we put a new tape in.

Q. Why did you put a new tape in?
A. You know, I'm telling you this. Obviously, we don't have to. It's not part of this whole judge thing, whatever, the court [*Ashby I*]; but the reason we did that is that we wanted to see -- we knew there was going to be an investigation. **We knew we were going to have to answer some questions.**

Q. When you say "investigation," what kind of investigation?
A. An AMB.

Q. What is an AMB?
A. An Aircraft Mishap Board.

Q. And is that effectively a safety investigation?
A. Yes, it is, sir. **So, we knew we were going to have to answer up to this. I mean, I can't say exactly why we did it. We were wrong, and I admit we were wrong. I was wrong;** but we basically took it, put a new one in there so we could get a chance so we could look at it before anyone else could get a chance to look at it just for our own warm and fuzzy because we know they are going to basically nitpick this whole thing just like we are doing here today; and we wanted to take a look at it before so we could make our own judgments and our own calls and our own answers.

Q. At that point, who took the tape out of the aircraft?
A. I took the tape out of the aircraft.

Q. And where did you put it?
A. I put it in my lower G-suit pocket.

Q. And you left the camera inside the aircraft?
A. Yes. We left the camera inside the aircraft at that time.

PE 2 at 1-2 (emphasis added). Though the appellant went on to carefully deny any knowledge or belief that a criminal investigation or proceeding would be forthcoming, the direct and circumstantial evidence, and common sense, clearly dictated otherwise. The members obviously chose not to believe the appellant's disclaimer.

5) The day after the mishap, on 4 February 1998, the appellant and his crewmembers were specifically informed that 20 individuals had been killed in the gondola mishap, and that the Italian government had commenced a criminal investigation against them in relation to the mishap flight. PE 11 and 12; Record at 878-80. Both Italian and military defense counsel were hired/detailed (respectively) to represent each of the crewmembers. Record at 945-46. Capt Schweitzer specifically admitted knowing he was under investigation by the Italians on that date, and that the entire crew had been advised of such. *Id.* at 944, 967. *See also id.* at 1043, 1176, and 1329. The appellant also specifically admitted realizing there may be "some other kind of investigation" (with potential criminal consequences) when he was escorted to the Italian magistrate's office on 4 February 1998. *Id.* at 1299-1300, 1329. *See United States v. Tedder*, 24 M.J. 176, 179 (C.M.A. 1987)(neither the preferral or referral of charges is required before obstruction may occur; "An obstruction during the process of investigation fully suffices.").

6) Capt Schweitzer's admitted lack of candor with his squadron commanding officer regarding whether the video camera had been used during the mishap flight. Record at 973, 1062-63.

7) Capt Schweitzer's testimony and related circumstantial evidence establishing that the appellant -- with full knowledge of the ongoing Italian criminal investigation and CIB investigation (that could ultimately recommend preferral of criminal charges) -- heard the recommendation made by Capt Seagraves outside the mess hall to get rid of the tape, and acceded to it. *Id.* at 964, 966-67. *See also* Record at 1030-1034. Though the appellant in this trial disclaimed hearing the conversation between Capt Schweitzer and Capt Seagraves regarding getting rid of the videotape (*see* footnote *7,* Part I above), his testimony during *Ashby* I was less convincing. For example, in *Ashby* I the appellant, when asked about the conversation with Capt Seagraves concerning the tape's content, responded, "***We*** said, '***We*** don't know' because ***we*** didn't have a chance to see it." PE 2 at 14.

8) Capt Schweitzer's unambiguous admission on the record that, in his opinion, the appellant subsequently gave the tape to him to "get rid of it." Record at 952. Capt Schweitzer went on to testify that, in his opinion, the appellant was in agreement with him to destroy the tape. *Id.* at 971. Also compelling as circumstantial evidence of the appellant's intent was Capt Schweitzer's unequivocal admission that, when he destroyed the videotape, he specifically intended to impede the Italian criminal investigation that had commenced against him and the appellant. *Id.* at 946, 972. Both Capt Schweitzer and the appellant admitted on the record that leaving the blank tape behind was done with the intent to deceive **"anybody that was going to look at it."** *Id.* at 946, 1319 (emphasis added).

These facts in combination -- along with all other evidence in the record -- strongly suggest that the appellant's assertion that he did not know or believe a criminal investigation or proceeding was forthcoming was less than credible.

When an accused acts to destroy evidence in the case of a person against whom he has reason to believe there is or will be a criminal investigation or proceeding, having the subjective intent to impede such, he has obstructed justice. *Lennette,* 41 M.J. at 490-91; *United States v. Jones,* 20 M.J. 38, 40 (C.M.A. 1985); *accord United States v. Gravely,* 840 F.2d 1156, 1160-61 (4th Cir. 1988). As a general rule, property owners are free to dispose of their property in whatever manner they wish. *United States v. Richards,* 63 M.J. 622, 630 (Army Ct.Crim.App. 2006); *United States v. Davis*, 62 M.J. 691, 694-95 (Army Ct.Crim.App. 2006), *set aside and remanded on other grounds*, 64 M.J. 173 (C.A.A.F. 2006). However, as our Army brethren observed in *Davis*, an otherwise lawful act may become wrongful and constitute obstruction of justice if it is performed for an improper purpose. 62 M.J. at 694. When a normally lawful disposal of property is accomplished primarily because it is evidence of wrongdoing, the act "negatively affects society and crosses the line from legal to wrongful activity." *Id*. at 695 (citing *United States v. Reeves,* 61 M.J. 108 (C.A.A.F. 2005).

It was clear that the appellant and Capt Schweitzer both knew the tape contained footage of what actually transpired during the mishap flight, and that it would be of great interest and potential value to anyone investigating the tragedy. *See Davis,* 62 M.J at 694-95; *Richards,* 63 M.J. at 630. We believe the direct and circumstantial evidence presented to the members was legally sufficient to support their conclusion that the appellant and Capt Schweitzer anticipated a criminal investigation and/or proceeding flowing from the gondola tragedy, and were actively attempting to impede that investigation and weaken any case against them when they removed the videotape from the aircraft, secreted it among the appellant's possessions, and eventually destroyed it by fire.

On 04 February 1998, the day following the mishap, they were specifically advised that 20 people had died as a result of their flight, and that the Italian government had launched a criminal investigation of the crews' actions. The appellant's claim that, even at this point, he could not reasonably foresee a U.S. military criminal investigation taking place strains all logic and credibility. Nor would such a belief, even if legitimate, have shielded the appellant from liability on the obstruction of justice offense. The members certainly could have convicted the appellant if they believed he intended to impede the ongoing Italian criminal investigation. As the military judge instructed the members:

> Acts which obstruct foreign criminal proceedings or investigations can also adversely affect the United

> States military criminal justice system; therefore, the term "criminal proceedings" also includes obstruction of foreign criminal proceedings or investigations when such obstruction of the criminal proceedings or investigation have (sic) a direct impact on the efficacy of the United States criminal justice system by being directly prejudicial to good order and discipline in the Armed Forces or being directly discreditable to the Armed Forces.

Record at 1410.[15]

2. Evidence establishing the existence of a conspiratorial agreement to obstruct justice

For the same reasons stated above, we reject the appellant's assertion that the evidence was legally and factually insufficient to show that he had the "conscious purpose to conspire" as well as the "conscious purpose to commit the substantive offense [of obstruction of justice by endeavoring to impede an investigation]." Appellant's Brief at 19.

The law is well-settled that there must be a "meeting of the minds" among conspirators as regards the criminal object of their conspiracy. *United States v. Valigura,* 54 M.J. 187, 188 (C.A.A.F. 2000); *United States v. LaBossiere,* 32 C.M.R. 337, 340 (C.M.A. 1962). However,

> The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

MCM (1998 ed.), Part IV, ¶ 5c(2); *see United States v. Jackson*, 20 M.J. 68, 69 (C.M.A. 1985). "The agreement [in a conspiracy] need not be expressed but need only be implied to sustain a finding of guilty." *United States v. Matias*, 25 M.J. 356, 362 (C.M.A. 1987). The existence of a conspiracy is generally established by circumstantial evidence and is often manifested by the conduct of the parties themselves. *Id.; see United States v. Barnes,* 38 M.J. 72, 75 (C.M.A. 1993); *United States v. Staley,* 50 M.J. 604, 607 (N.M.Ct.Crim.App. 1999). Also, the conspiracy or agreement need not precede a substantive or overt act but, rather, may be made contemporaneous with the offense. *Barnes,* 38 M.J. at 75 (citing *Matias*, 25 M.J. at 362).

[15] *See* Discussion of AOE IV, Part III below, regarding foreign criminal proceedings satisfying the "criminal proceeding" requirement for the offense of obstruction of justice.

Based upon our careful and thorough review of the record of trial, we are more than satisfied that any rational trier of fact could have found beyond a reasonable doubt that a conspiracy was consciously entered into by the appellant and Capt Schweitzer, which had as its specific object obstruction of justice by impeding an anticipated criminal investigation. The conspiratorial agreement to obstruct justice was manifested in both the words and the actions of the appellant and Capt Schweitzer immediately after landing their aircraft, and continued in the days following their tragic flight up through the actual destruction of the videotape, as discussed above. There is no evidence to suggest that the appellant ever withdrew from this conspiracy, and we are completely unpersuaded by the appellant's argument that he was "only following orders" given to him by Capt Schweitzer.[16] Appellant's Brief at 20. Like the members, we find more than sufficient evidence to establish beyond a reasonable doubt that the appellant possessed the "deliberate, knowing, and specific intent to join the conspiracy," *United States v. Mukes,* 18 M.J. 358, 359 (C.M.A. 1984), and to consciously execute it.

d. Summary

Having weighed all the evidence in the record of trial and recognizing that we did not personally see or hear the witnesses, as did the members, we are nevertheless convinced of the appellant's guilt of both specifications under the Charge beyond a reasonable doubt. *Turner,* 25 M.J. at 325; *see also* Art. 66(c), UCMJ. In our opinion, the direct and circumstantial evidence of the appellant's guilt on both offenses was compelling and highly persuasive. In particular, we are satisfied beyond a reasonable doubt by the evidence of record that the appellant knew a criminal investigation or proceeding would be forthcoming immediately after the mishap flight; that the appellant formed and possessed the specific intent to impede such an investigation or proceeding at the times when he removed, secreted, and participated in the destruction of the recorded videotape; and that the appellant entered into a "conscious" conspiratorial agreement with Captain Schweitzer to obstruct justice by endeavoring to impede an investigation (by withholding and destroying evidence relevant thereto).

We are similarly convinced that the members, considering all the evidence in a light most favorable to the Government, could have found the elements of both offenses beyond a reasonable doubt, and, therefore, that the evidence of the appellant's guilt is legally sufficient. In light of our resolution of AOE III, Part II below, we also reject the appellant's contention that he

[16] Ironically, in his closing argument on findings, the appellant's civilian defense counsel expressly stated that the appellant was ***not*** claiming he was just "following orders" when he replaced the recorded tape in the camera with a blank tape, and removed the recorded tape from the aircraft in his flight suit. Record at 1383.

lacked the ability to form the requisite specific intent for both offenses. We find AOE's I and II to be without merit.

II. Ineffective Assistance of Counsel

In his third AOE, the appellant asks us to find that his trial defense counsel were ineffective when they failed to recognize, secure, and present evidence and expert testimony concerning the impact that post-traumatic stress disorder (PTSD) and/or acute stress disorder (ASD) had upon the appellant's ability to form the specific intent required for both offenses. Appellant's Brief at 24-30. *See generally United States v. Axelson,* No. 20020193, 2007 CCA LEXIS 140 (Army Ct.Crim.App. 30 Apr 2007). We find this assignment of error to be without merit for two reasons: 1) there was no evidence presented (before or after trial) indicating that the appellant was ever diagnosed as suffering from PTSD or ASD; and 2) the trial defense team clearly elected a trial strategy that excluded arguing that the appellant lacked *mens rea* due to PTSD, ASD, or any other mental infirmity.

All service members are guaranteed the right to effective assistance of counsel at their court-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We presume that trial defense counsel provided effective assistance throughout the trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Id.* The evidence of record must establish that counsel "made errors so serious that [they were] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687.

Even if there is error, it must be so prejudicial "as to indicate a denial of a fair trial or a trial whose result is unreliable." *Davis,* 60 M.J. at 473 (citing *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001)). Thus, an appellant alleging ineffective assistance of counsel "'must surmount a very high hurdle.'" *United States v. Saintaude*, 61 M.J. 175, 179 (C.A.A.F. 2005)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). We will not judge attorney performance by a more exacting standard under the often distorting view provided solely by hindsight. *Strickland,* 466 U.S. at 687. Additionally, we recognize that the tactical and strategic choices made by defense counsel during trial need not be perfect; instead, they must be judged by a standard ordinarily expected of fallible lawyers. *United States v. Anderson,* 55 M.J. 198, 202 (C.A.A.F. 2001)(citing *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993); *United States v. Curtis,* 44 M.J. 106, 119 (C.A.A.F. 1996)

Ineffective assistance of counsel involves a mixed question of law and fact. *Davis*, 60 M.J. at 473 (citing *Anderson*, 55 M.J. at 201). Whether an appellant received ineffective assistance of counsel and whether the error was prejudicial are determined by a *de novo* review. *Id.* (citing *Anderson*, 55 M.J. at 201, *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004), and *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)). We apply a three-prong test to determine if the presumption of competence has been overcome:

> (1) Are the allegations true; if so, "is there a reasonable explanation for counsel's actions?";
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
>
> (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991); *see also Anderson,* 55 M.J. at 201.

We can discern no deficiency in the performance of any of the appellant's counsel that would overcome the presumption of competence they enjoy under the law. Indeed, we are fully confident that the appellant was well and ably represented throughout his trial by all of his counsel (military and civilian), and that each of his lawyers was, in all regards, effective within the standards required by law.

There was testimony presented during the defense case on the merits from an Air Force psychologist, Maj T. Dillinger, who was then serving as the Chief of the Mental Health Unit at Aviano Air Base, and acting head of the Critical Incident Response Team. She described in detail how she, along with the VMAQ-2 squadron flight surgeon (Lieutenant (LT) Curran), became involved with the mishap crew immediately after the gondola tragedy. She interpreted her primary responsibility to be observing the crewmembers after the mishap, assessing their mental health, and assisting them in coping with the anxiety, stress, depression, and other emotions they might experience as a result of their harrowing flight and emergency landing, and as they learned of the human deaths and associated details of their tragic flight. Record at 1092. Though Maj Dillinger testified that the appellant was "obviously distressed" when he learned that numerous individuals were killed by the mishap flight, *Id.* at 1093, and thereafter was "internalizing stress," *Id.* at 1095, she was clear that the appellant and his crewmembers were not suffering from any severe mental disease or defect, that they were acting rationally, and that they were each sane and responsible for their actions. *Id.* at 1102, 1118.

The defense also presented the testimony of LT Curran, the squadron flight surgeon, who echoed much of what Maj Dillinger said concerning the appellant's reaction to the abject aftermath of his mishap flight.

Noteworthy as regards this testimony -- along with all other evidence in the record concerning the appellant's reactions and mental health after the mishap flight -- is the complete absence of any evidence suggesting that the appellant ever suffered from PTSD or from ASD. Also conspicuously absent from the record is any post-trial affidavit or other evidence suggesting that the appellant suffered PTSD or ASD. However, appellate defense counsel believes that the trial defense team should have found an expert who would identify these maladies from the "obvious" evidence that "even a layman can clearly discern." Appellant's Brief at 28. As appellate defense counsel briefed the issue:

> The existence of specific intent would have been made less probable had the defense team presented readily available expert testimony on the effect of Capt Ashby's mental state on his inability to form specific intent. Even without an expert opinion the members could have applied a tailored instruction to the plain and obvious facts that Capt Ashby's ability to form specific intent was impacted by the stress, medication, and lack of sleep.

Id. This claim strikes us as disingenuous in light of appellate defense counsel's failure on appeal to submit any evidence or expert opinions on this matter for our consideration.[17] *See United States v. Shaw,* 64 M.J. 460, No. 06-0403, 2007 CAAF LEXIS 537 (C.A.A.F. April 24, 2007). Also dubious is the appellant's claim that his trial defense counsel simply did not understand the law in this area, or how this evidence might be used to negate specific intent. Appellant's Brief at 27.

There was, in fact, extensive discussion of this matter at trial between the military judge and trial defense counsel. Record at 1358-61. Trial defense counsel specifically affirmed that they were not raising the defense of lack of mental responsibility, and that the evidence did not raise such. *Id.* at 1358-59. They also made it perfectly clear that they were not asking for an instruction in regard to partial mental responsibility or the negation of *mens rea* due to any trauma or mental condition. *Id.* at 1359-60. This was an expressly declared tactical decision on the part of the appellant and his defense team (*see id.* at 1361), as the defense theory of the case throughout the trial was that the appellant never believed he did anything wrong during the mishap flight, and that is why he never formed any intent to obstruct justice. *See United States v.*

[17] On 21 September 2004, this court denied the appellant's "Motion to Compel R.C.M. 706 Psychological Evaluation" due to the absence of any supporting evidence demonstrating that such an examination was necessary.

Gutierrez, 64 M.J. 374 (C.A.A.F. 2007)(affirmative waiver of defenses potentially raised by the evidence is a tactical decision to be made by counsel and the accused); *United States v. Paxton,* 64 M.J. 484, No. 06-0695, 2007 CAAF LEXIS 555 (C.A.A.F. April 26, 2007)(reviewing courts will generally not second-guess the strategic or tactical decisions made at trial by defense counsel). Accordingly, since the appellant never did anything wrong, the argument was that he could never have had reason to anticipate a criminal investigation or proceeding. Record at 181.

As the appellant's civilian trial defense counsel articulated it for the military judge:

> In other words, why would [the Appellant] hide evidence, or be a party to destroying evidence, if he thinks it has no evidentiary value, and, if he thinks it has no evidentiary value because he flew the flight in a professional manner? The experts are merely those who can say . . . the flight was flown in a professional way, and so if a camera was used and did record or document certain information, then [the Appellant] would never have formed the intent to hide or destroy that tape if he believed that it was flown professionally.

Id. Making this particular defense argument – one no doubt greatly enhanced by the appellant's earlier complete acquittal in *Ashby* I – appeared to be the clear intent of the appellant and his defense team from the outset. *Id.* at 181, 1361. We interpret the civilian defense counsel's argument claiming that "there is no evidence raised sufficient to require that instruction" regarding negation of *mens rea* (*id.*) differently than appellate defense counsel do. Rather than seeing it as evidence that the trial defense team "missed the issue," we view it as the defense counsel and the appellant clarifying why **they** presented to the members evidence concerning how the appellant reacted in the aftermath of the tragedy. It was not, as they explained, for the purpose of attacking the appellant's ability to form specific intent; instead, it was simply to explain the appellant's subsequent actions in regard to the secreting and ultimate destruction of the tape despite steadfastly believing he and his crew had done nothing wrong. Record at 1387-88. Essentially, the argument was that the videotape was initially taken because the appellant simply "wanted to see what was on the tape," *id.* at 1392, and later -- in the midst of their post-mishap isolation, depression, and anxiety -- destroyed only to avoid the increased negative publicity it might bring to the appellant and his crew -- not to obstruct any ongoing or eventual criminal proceeding. *Id.* at 1392-94, 1387-88. Ironically, this same argument has also been reiterated by the appellant during this appeal. Appellant's Brief at 16.[18]

[18] "Capt Ashby's involvement with the videotape does not rise to the level of attempting to conceal criminal misconduct, as he had no reason to believe he

The law does not require trial defense counsel to put forth every possible argument at trial on behalf of their client, especially when inconsistent with the primary focus of the trial strategy. It appears the trial defense team recognized the peril in arguing that PTSD and/or ASD negated the appellant's ability to form the specific intent required for obstruction of justice -- i.e., the appellant was not even aware anyone had been killed at the time he switched the tapes and removed the recorded tape from the aircraft. As Government appellate counsel put it in their response brief, it is completely reasonable for the defense team to have believed that "[t]he lesser of two evils . . . was to stick to a theory that 'explained' [Capt Ashby's] reason for removing the tape in the first place: 'From beginning to end, [Capt Ashby] possessed the tape because he wanted to see what was on [it]'." Government Answer of 2 Sep 2004 at 19. Even the military judge recognized why the defense team might elect the strategy they chose, rather than argue that the appellant lacked the *mens rea* for the offenses based on assorted possible symptoms of PTSD or ASD. Record at 1361 ("I can certainly understand why you would want to do that; but obviously, I need to put that [waiver of instruction] on the record, too.").

While the appellant has chosen to second-guess his trial defense counsel's tactical decisions, he has not shown substandard representation or that, without these decisions, the result of the proceeding would have been different. Therefore, we conclude that the appellant has not met his burden of showing that his trial defense counsel provided ineffective assistance.

III. Foreign Criminal Investigations as "Criminal Proceedings"

In his fourth AOE, the appellant urges us to set aside the findings and sentence in this case based on the assertion that the term "criminal proceedings," as used in our obstruction of justice statute, does not encompass criminal investigations and proceedings conducted by a foreign sovereign. Appellant's Brief at 30-35. He argues that the law has yet to recognize that obstruction of a foreign criminal investigation can violate the element of Article 134, UCMJ, that requires that the accused's wrongful act(s) occur "in the case of a certain person against whom the accused had reason to believe there were or would be ***criminal proceedings*** pending." *See* MCM (1998 ed.), Part IV, ¶ 96b (italics and emphasis added). We disagree.

At trial, the military judge denied a defense Motion *In Limine* which sought to prevent the Government from arguing, or the members from being instructed, that the term "criminal proceedings" as used in Article 134, UCMJ, includes foreign

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had committed criminal misconduct and he did not in fact commit criminal misconduct and thus, he had no reason to believe a criminal investigation would be forthcoming." Appellant's Brief at 16. *See also* Appellant's Brief at 22 (arguing ". . . the videotape was switched before Capt Ashby had any idea of the extent of the damage or that lives were lost.").

criminal investigations or proceedings. *See* Appellate Exhibit IV; Record at 66-119. After considering the case law cited along with the evidence on this matter presented by the litigants, the military judge ruled in favor of the Government's position, stating that acts which tend to obstruct state or foreign criminal investigations may have a prejudicial impact upon the military justice system. Record at 232. He went on to state that:

> Now, whether the effect is sufficient enough to be prejudicial to good order and discipline or a discredit to the armed forces depends upon the circumstances of each case.
>
> In this case, the court intends to advise the members of the following: That . . . the term criminal proceedings also includes obstruction of foreign criminal proceedings or investigations when such obstruction of the foreign criminal proceedings or investigations have a direct impact upon the effectiveness of the military criminal justice system by being directly prejudicial to good order and discipline in the armed forces, or by being discreditable to the armed forces.

Id. at 232-33. This ruling is consistent with the limited body of case law in the military addressing this issue. *See United States v. Smith,* 34 M.J. 319, 322 (C.M.A. 1992)(obstruction of justice offense can arise from interference with a state criminal proceeding when the "impact of the charged conduct on a later, but nonetheless probable, military investigation brought it within the intended scope of [the Article.]"; *United States v. Simpkins,* 22 M.J. 924, 924-27 (N.M.C.M.R. 1986)(a literal reading of the elements of obstruction of justice justifies a broad interpretation to include all instances of corrupt conduct intended unlawfully to influence, impede, or otherwise obstruct the due administration of justice, which is consistent with the historical genesis of the offense in 18 U.S.C. § 1503), *aff'd,* 24 M.J. 49 (C.M.A. 1987)(summary disposition); *United States v. Johnson,* 39 M.J. 1033, 1038 (A.C.M.R. 1994)(stating in dicta that interference with a criminal investigation constitutes obstruction of justice under the Code regardless of whether the investigation was conducted by military, state, or foreign authorities); *United States v. Kirks,* 34 M.J. 646, 650-51 (A.C.M.R. 1992)(holding that a specification alleging wrongfully endeavoring to impede an investigation by German Criminal Police was sufficient to allege the offense of obstruction of justice); *United States v. Bailey,* 28 M.J. 1004 (A.C.M.R. 1990)(elements of obstruction of justice justify a broad interpretation to include all instances of corrupt conduct intended to obstruct the due administration of justice).

At trial, the military judge specifically instructed the members as follows concerning this matter:

> The term "criminal proceedings" includes lawful searches, criminal investigations conducted by police or command authorities, article [sic] 15 nonjudicial punishment proceedings, Article 32 investigations, court-martials [sic] or state and federal criminal trials.
>
> Acts which obstruct foreign criminal proceedings or investigations can also adversely affect the United States military criminal justice system; therefore, the term 'criminal proceedings' also includes obstruction of foreign criminal proceedings or investigations when such obstruction of the "criminal proceedings" or investigation have [sic] a direct impact on the efficacy of the United States criminal justice system by being directly prejudicial to good order and discipline in the Armed Forces or being directly discreditable to the Armed Forces.
>
> Criminal proceedings do not include administrative proceedings or inspections such as Aircraft Mishap Boards or Command Investigation Boards.

Record at 1410.

In assessing whether the military judge properly exercised his discretion in charging the members upon their responsibilities, we examine the instructions as a whole to determine if they sufficiently cover the issues in the case. *United States v. Maxwell,* 45 M.J. 406, 424 (C.A.A.F. 1996). The question of whether a jury was properly instructed is a question of law we review *de novo*. *United States v. McDonald,* 57 M.J. 18, 20 (C.A.A.F. 2002). We are satisfied based upon our review of the UCMJ and the case law interpreting the offense of obstruction of justice that, if the charged obstructive actions take place in the context of a military, state, or foreign criminal investigation, an Article 15 proceeding, an Article 32 investigation, a summary, special, or general court-martial, or a state or foreign criminal proceeding, the "criminal proceedings" element of this offense is met. Therefore, we find no fault in the instructions given by the military judge.

We find nothing in the UCMJ or the MCM that suggests the words "criminal proceedings" as used in our obstruction of justice offense were intended to be limited strictly to military criminal proceedings under the UCMJ.[19] Such a narrow view would

[19] The Military Judges' Benchbook definition of "Criminal proceedings" reads as follows: "'Criminal proceedings' includes (lawful searches) (criminal investigations conducted by police or command authorities) (Article 15 nonjudicial punishment proceedings)(Article 32 investigations)(courts-martial) (state and federal criminal trials)(_____)." This "laundry-list" definition, as indicated by the open bracket at the end, is clearly not

be contrary to the predisposition running through military case law to apply a broad interpretation to the elements of this offense. *See Bailey,* 28 M.J. at 1006; *Guerrero,* 28 M.J. at 226-27; *Simpkins,* 22 M.J. at 924-27. While our statute's overarching purpose is the protection of "the administration of justice in the military system," *Guerrero*, 28 M.J. at 227, there is no suggestion that the offense cannot occur when a military member endeavors to impede a foreign criminal investigation, especially when the results of that investigation will inevitably become known to, shared with, or acted upon by United States military authorities.[20] *United States v. Smith,* 32 M.J. 567 (A.C.M.R. 1991)(obstruction of a state criminal proceeding can violate the UCMJ's obstruction of justice offense when it is probable that a military investigation will follow in the wake of the state investigation), *set aside and remanded on other grounds,* 34 M.J. 319 (C.M.A. 1992); *see also United States v. Teffeau,* 58 M.J. 62, 68-69 (C.A.A.F. 2003)(UCMJ offenses are often more expansively interpreted than their civilian counterparts because the primary purpose of military criminal law – to maintain morale, good order, and discipline – has no parallel in civilian criminal law.)

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intended to be exhaustive. Military Judges' Benchbook, Dept of the Army, Pamphlet 29-9 at 686 (15 Sep 2002).

[20] We note in this case that Italy is a signatory, along with the United States, to the North Atlantic Treaty Organization Status of Forces Agreement. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.C. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (NATO SOFA). The NATO SOFA expressly contemplates that its signatories ". . . shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense." *Id.* at Art. VII, ¶ 6(A). *See Bailey,* 28 M.J. at 1006-07 (Korean police acting as a conduit for United States military officials under terms of SOFA between United States and Republic of Korea). Also, Italy and the United States have concurrent jurisdiction over criminal offenses by U.S. service members serving in Italy. NATO SOFA at Art. VII ¶ 1(b). After *Solorio v. United States,* 483 U.S. 435 (1987), it would appear especially illogical to conclude that our obstruction of justice statute reaches military, state, and federal investigations and prosecutions, but somehow does not apply to the many foreign criminal investigations and prosecutions that frequently impact our military mission, and the lives of United States military personnel worldwide. *See United States v. Smith,* 34 M.J. 319, 324 (C.M.A. 1992)(Cox, J. concurring)("In light of [*Solorio*], there can be no distinction between obstructing federal or military prosecutions on the one hand and obstructing state prosecutions on the other hand, and there are no "strictures" in the Manual for Courts-Martial that purport to so limit the scope of the offense."). *Compare United States v. Teffeau,* 58 M.J. 62 (C.A.A.F. 2003)(Where state investigation concerned potential criminal misconduct involving person subject to UCMJ, there was a parallel military investigation, and subject matter of state investigation was of interest to the military and within jurisdiction of courts-martial system, the appellant's conduct and subsequent statements to civilian police subjected him to criminal liability in the military justice system for false official statements); *United States v. Hagee,* 37 M.J. 484, 485 (C.M.A. 1993)("Nothing in the plain language of [Article 107, UCMJ] limits its scope to deceptions in which the United States is the intended or actual direct victim."); *United States v. Morgan,* No. 200401114, 2007 CCA LEXIS 138, unpublished op. (N.M.Ct.Crim.App, 10 April 2007).

The military judge made it clear in his instructions that, before any finding of guilt could be made, the offense required the members to find beyond a reasonable doubt that the appellant's conduct in regard to the foreign investigation was to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces. *See Jones,* 20 M.J. at 38 (service member's intentional destruction of discoverable evidence which could have been used by military authorities in instigating a military prosecution or investigation constituted a service disorder). Under the facts and circumstances presented in this case, we believe the military judge properly denied the defense Motion *In Limine,* and that the members were properly instructed on the law to be applied in this case. This assignment of error is without merit.

IV. The "Accuser" Issues

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

The convening authority for this trial was then Lieutenant General (LtGen) Peter Pace, USMC,[21] who at the time was serving in the dual capacity as Commander, U.S. Marine Forces Atlantic, and Commander, U.S. Marine Forces Europe. General (Gen) Pace convened the initial CIB that investigated the gondola tragedy immediately after it occurred. Upon the CIB's conclusion, Gen Pace directed that an Article 32, UCMJ, investigation be conducted to examine formal charges that had been preferred against the four aircrew members, and he ultimately convened the general courts-martial that tried the appellant and Capt Schweitzer.

Every individual accused of an offense under the UCMJ is entitled to have his or her case handled by an unbiased and impartial convening authority. *See United States v. Nix,* 40 M.J. 6, 7 (C.M.A. 1994). Accordingly, the convening authority must assume a neutral role and his motives should not be prosecutorial in nature. "An accuser may not convene a general or special court-martial for the trial of the person accused." RULE FOR COURTS-MARTIAL 504(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). *See* R.C.M. 601(c). Article 1(9) of the UCMJ defines an "accuser" as: "a person who signs and swears to charges" ["type one" accuser]; "any person who directs that charges nominally be signed and sworn to by another" ["type two" accuser]; "and any other person who has an interest other than an official interest

[21] General Pace received his fourth star in September 2000, and is currently serving as the sixteenth Chairman of the Joint Chiefs of Staff.

in the prosecution of the accused" ["type three" accuser]. *United States v. Jeter,* 35 M.J. 442, 445 (C.M.A. 1992). *See also* R.C.M. 601(c) and 201(b). Articles 22(b) and 23(b) of the UCMJ disenfranchise any statutorily defined "accuser" in Article 1(9) from convening a special or general court-martial, requiring instead that "the court shall be convened by superior competent authority." The question of whether a convening authority is an "accuser" under Article 1(9), UCMJ, is a question of law that we review *de novo. United States v. Conn,* 6 M.J. 351, 354 (C.M.A. 1979).

a. "Type Two" Accuser Issue

The appellant claims that Gen Pace improperly convened his general court-martial when he was disqualified from doing so because he "directed that charges nominally be signed and sworn to by another," making him a "type two" accuser under Article 1(9), UCMJ. Appellant's Brief at 69. As previously mentioned, if Gen Pace was in fact a "type two" accuser, he was obligated under Article 22(b), UCMJ, to forward the case for disposition by a "superior competent authority." Implicit in this specific statutory disqualification is the notion that improper personal interest in a case may not be "cleansed" simply by "directing another to formalize the pleadings" against an accused. *United States v. Shelton,* 26 M.J. 787, 791 (A.F.C.M.R. 1988)(quoting *United States v. Smith,* 23 C.M.R. 402 (C.M.A. 1957)). In assessing this issue, our essential goal is "determining whether the convening authority . . . directed a subordinate to act as his *alter ego* in preferring charges." *United States v. Allen,* 31 M.J. 572, 585 (N.M.C.M.R. 1990), *aff'd,* 33 M.J. 209 (C.M.A. 1991). After careful review of the record of trial, we answer this question in the negative.

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

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

Appellant's Brief at 69. The appellant views as particularly troubling the fact that, on 28 March 1998, within two weeks of the CIB's final report and first endorsement being issued, Gunnery Sergeant Ciarlo, USMC, of the Camp Lejeune LSSS preferred the same charges against the appellant that Gen Pace's 11 March 1998 first endorsement of the CIB report had recommended be considered. Specifically, Gen Pace's endorsement on the CIB report contained the following comments upon the report's

recommendation that "appropriate disciplinary and administrative action be taken against the mishap aircrew:"[22]

> I am providing a copy of this investigation to the legal office that supports my command for their review and the drafting of appropriate charges. I intend to commence a pretrial investigation under Article 32 of the Uniform Code of Military Justice (UCMJ) to consider whether charges such as ***involuntary manslaughter or negligent homicide, damage to private and government property, and dereliction of duty***, should be referred to a general court-martial if the United States retains jurisdiction.

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

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

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

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

In his essential findings of fact and conclusions of law on this matter, the military judge concluded that Gen Pace was not a "type-two" accuser because he "never directed the preferral of any particular charges against either Captains Ashby or Schweitzer, though he did forward the CIB report to the LSSS, at Camp Lejeune, for the drafting of appropriate charges." AE VIII at 92, finding 204. According to the military judge, the fact that the charges ultimately preferred against the appellant

[22] *See* Recommendation 1, CIB Report (page 69), *Ashby* I, AE LXXIII at 35.

mirrored those reflected in Gen Pace's draft and final endorsements was simply a by-product of lawyers for both Gen Pace and the CIB working carefully and continuously together throughout the CIB to hone proposed charges to what the evidence actually supported. *Id.*, finding 207. These findings of fact are supported by the evidence of record, are not clearly erroneous, and we adopt them for purposes of resolving this assignment of error. *See United States v. Ureta,* 44 M.J. 290, 297 (C.A.A.F. 1996).

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

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

We find nothing improper in Gen Pace consulting with his various legal advisors and commenting in his endorsement to the CIB (a strictly administrative investigation) upon criminal charges that might logically flow from this catastrophic mishap. *See Conn,* 6 M.J. at 354 (convening authority is not acting as an "accuser" when he performs command functions embraced or reasonably anticipated under the UCMJ). It is axiomatic that a convening authority must make certain preliminary "probable cause" determinations before determining whether criminal charges under the UCMJ should be forthcoming in any case, and what their ultimate disposition should be. *See Allen,* 31 M.J. at 584-85; *United States v. Wojciechowski,* 19 M.J. 577, 579 (N.M.C.M.R. 1984); R.C.M. 306 and 405(c). Complete and absolute "neutrality" by a convening authority is neither realistic nor required under the UCMJ. *Allen,* 31 M.J. at 584-85; *Wojciechowski*, 19 M.J. at 579.

There is no credible evidence to suggest that Gen Pace's actions, words, or official correspondence "directed" that charges of any nature be specifically preferred against the appellant. Gen Pace testified clearly at trial that he never dictated or directed that charges be preferred against any of the mishap crewmembers. *Ashby* I at 1000. This testimony was substantiated by both Major General (MajGen) DeLong, the CIB President (*Id.* at 1081, 1096, 1098-99, 1122) and Colonel (Col) Carver, the legal advisor to the CIB (*Id.* at 1144-45, 1155, 1203). Indeed, Gen Pace's action of forwarding the CIB report and endorsement to the LSSS at Camp Lejeune "for their review and drafting of appropriate charges" belies any intent on his part to manipulate the process towards a specific set of charges. *See United States v. King,* 4 M.J. 785, 787, 788 (N.C.M.R. 1977), *aff'd* 7 M.J. 207 (C.M.A. 1979)(summary disposition)(Convening Authority's (CA's) endorsement upon JAGMAN investigation was a

routine administrative act, entirely separate from the discretion and judgment CA was bound to utilize in acting on appellant's subsequent court-martial proceedings)). The appellant has failed to meet his burden to demonstrate that Gen Pace was a "type-two" accuser. Accordingly, we find this assignment of error to be without merit.

b. "Type Three" Accuser Issue

The appellant also claims that Gen Pace was disqualified to serve as convening authority for this case because he was a "type three" accuser in that he had an "other than official interest in the prosecution of the [appellant]." The test for determining whether a convening authority is a "type three" accuser is whether he is "so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter." *United States v. Dinges,* 55 M.J. 308, 312 (C.A.A.F. 2001)(quoting *Allen*, 31 M.J. at 585); *United States v. Voorhees,* 50 M.J. 494, 499 (C.A.A.F. 1999); *Nix,* 40 M.J. at 7. *See* R.C.M. 601. Disqualifying personal interests include those matters that would directly affect the convening authority's ego, family, property, and similar personal interests. *Voorhees,* 50 M.J. at 499. Also, personal animosity towards an accused, as manifested in "dramatic outbursts of anger" or similar action, may render a convening authority an "accuser" under this concept. *Id.* We must determine under the unique and particular facts and circumstances of this case whether a reasonable person would impute to Gen Pace a disqualifying personal feeling or interest in the outcome of this case. *Conn,* 6 M.J. at 354.

In support of this allegation, the appellant requests us to carefully scrutinize Gen Pace's personal role at every stage of this very complex and undeniably high-visibility administrative CIB investigation, subsequent Article 32 investigation, and ultimate general court-martial. The appellant asserts that the "unprecedented" extent to which Gen Pace injected himself into the CIB proceedings and ultimate report, combined with his first endorsement thereon that effectively "directed" that specific charges be preferred, evidenced his pre-determination of the appellant's guilt and a disqualifying, non-official interest in the outcome of the appellant's military justice proceedings. Specifically, the appellant directs us to evidence of multiple daily telephone calls between Gen Pace and MajGen DeLong, the President of the CIB, during the weeks that the CIB was being conducted that allegedly directed both the course and content of the investigation; evidence of extensive personal editing of the CIB report by Gen Pace; evidence of multiple facsimile copies of draft CIB reports being sent to Gen Pace and a number of his superiors; and the extensive involvement of Gen Pace's personal staff judge advocates in the CIB proceedings, the drafting of charges, and monitoring the ultimate conduct of the trial. Because the gondola tragedy "happened on his watch," ostensibly reflected poorly upon Marine Corps aviation assets under his command, generated intense "political heat" he had to deal with,

and resulted in him expressing his opinion "quite literally . . . to the world of the appellant's guilt before charges were preferred," the appellant asserts that Gen Pace could not properly convene this general court-martial, or take post-trial action on the case after the appellant's conviction. Appellant's Brief at 73-76. We have carefully examined each of the appellant's allegations in this regard, studied the record of trial in great detail, and carefully scrutinized the military judge's essential findings of fact on this matter. We find the allegations to be without merit. Our conclusion is that Gen Pace's actions were completely consistent with those of any military commander and convening authority who might be called upon to handle an incident involving such abject human tragedy, having such far-ranging and potentially serious national and international ramifications, and generating such potentially dire military justice consequences.

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

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

Significantly, Gen Pace played no role in the appointment of the CIB members, other than naming MajGen DeLong as the CIB's President, and he had no input upon who would be voting members of the CIB. *Ashby* I at 954. Gen Pace also did not discuss the nature, content, or preferral of charges with MajGen DeLong. *Id.* We find no evidence to substantiate the appellant's claim that Gen Pace expressed any opinion of the mishap crew's guilt or innocence. He did not know the appellant or any of the mishap crewmembers, and there was no evidence to suggest he harbored any

animus against any of them. Our review of the record of trial supports the military judge's findings of fact, which concluded that Gen Pace had only an "'official' interest in the disposition of the allegations and preferred charges against the mishap crew, and did not abandon his neutral role and become an 'accuser'." AE VIII at 92, finding 209. We can find no fault in Gen Pace's desire to ensure that the CIB report was thorough, clear, concise, and devoid of content unintelligible to the wide and general audience that would no doubt be scrutinizing it. Gen Pace made it clear to MajGen DeLong on many occasions that the CIB findings and recommendations must be those of the CIB members, based on the evidence before them. He was adamant in his sworn testimony that he never directed any member of the CIB to arrive at specific conclusions, nor did he direct that any finding of fact, opinion, or recommendation be included, changed or deleted. *Ashby* I at 1000.

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

c. Absence of Prejudice

The appellant has also failed to demonstrate any prejudice suffered by him in relation to the "accuser" issues in this case, as he was ultimately acquitted at his first court-martial of all

original offenses potentially impacted. The offenses to which the appellant was convicted at this court-martial were not contemplated at the time that the CIB was conducted, nor were they mentioned in the endorsement to the CIB. The Article 133, UCMJ, offenses of which the appellant was ultimately found guilty were preferred on 28 August 1998, five months after the preferral of the original charges. They were also preferred well after the conclusion of the CIB; the Article 32, UCMJ, investigation; the referral of the original charges; and the appellant's original arraignment. On 10 September 1998, the appellant waived his right to have the additional offenses investigated at an Article 32, UCMJ, investigation. The additional charge was referred to this general court-martial on 15 October 1998.

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

V. Unlawful Command Influence[23]

a. Background

In his sixth AOE, the appellant claims that the military judge erred in not dismissing all charges and specifications due to alleged unlawful command influence (UCI). The appellant complains generally about the "immense media attention" and public comment concerning the appellant's case, and specifically about Gen Pace's involvement in, and alleged UCI over, the CIB investigative and evidence gathering processes, ultimate report, and first endorsement. Appellant's Brief at 58-60. He also asserts that UCI was exerted over potential witnesses for the appellant by the actions of numerous individuals during the course of the CIB's investigation, including MajGen Ryan (Commander, 2nd Marine Aircraft Wing (MAW), Cherry Point, N.C.), Brigadier General (BGen) Bowden (Assistant Wing Comander, 2nd MAW, Cherry Point, N.C.), MajGen DeLong (President, CIB), and Lieutenant Colonel (LtCol) Sullivan (Commanding Officer, VMAQ-4). *Id.* at 60-66.

The appellant alleges that Gen Pace committed UCI during the period that the CIB was being conducted and thereafter through

[23] While the appellant's brief initially describes this AOE as only raising the issue of "apparent" unlawful command influence, Appellant's Brief at 57, his subsequent discussion of the matter confusingly suggests that the complained of actions resulted in actual unlawful command influence as well. We have considered and addressed both issues in our resolution of this AOE.

his active and "improper" participation in the CIB's investigative process and his subsequent endorsement upon the CIB's final report. Specifically, he asserts that Gen Pace exerted UCI by actively directing the course of -- and evidence collection effort throughout -- the CIB; by communicating daily with the CIB President concerning the course and content of the investigation; by actively engaging in the drafting and editing of the CIB report; by "directing" the charges that would ultimately be brought against the accused; and by essentially orchestrating the entire prosecutorial effort against the accused when he knew he would be serving as the convening authority. *Id.* at 57-60; *Ashby* I, AE LXVI at 1-15 (motion from *United States v. Schweitzer* adopted by the appellant's defense team).[24]

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

> (1) The comments of MajGen Michael D. Ryan, USMC, then Commanding General, 2nd MAW, made at squadron "all officers" meetings involving aviators assigned to the Marine Tactical Electronics Warfare (VMAQ) squadrons at Cherry Point, North Carolina, on or about 05 February 1998. Over four days (05 to 09 February 1998), similar meetings were repeated for all the aircrews of the 29 flying squadrons in the 2nd MAW. During these meetings, Gen Ryan allegedly read inflammatory news articles concerning the gondola tragedy and suggested that aircrew mistakes caused it; insinuated that VMAQ flight crews were routinely "breaking the rules" relating to low-level training flights by flying below minimum flight levels (i.e., "flathatting"); speculated that he might personally serve as the convening authority for any judicial proceedings arising out of the tragedy; and stated that anyone intentionally disregarding established Marine Corps flight safety rules would be punished. Appellant's Brief at 60-65.
>
> (2) A collateral investigation (conducted simultaneously with the CIB investigation) by BGen William G. Bowden, USMC, Assistant Wing Commander, 2nd

[24] The appellant's counsel specifically requested that the military judge in this trial consider all evidence presented during the litigation of identical "accuser" and UCI motions during the joint motion session conducted in *Ashby* I. Record at 41-42.

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

(3) A meeting between the Commandant of the Marine Corps, Gen Charles C. Krulak, USMC, and Capt Howard Marroto, USMC (aviator assigned to VMAQ-3, Cherry Point), in Washington, D.C., on 21 April 1998. Appellant's Brief at 60. Capt Marroto had earlier sent Gen Krulak two email messages expressing the squadron's concern and dismay at the relief of LtCol S.L. "Muddy" Watters, USMC, the Commanding Officer at VMAQ-3, MCAS, Cherry Point. LtCol Watters was relieved of command after a preliminary investigation substantiated that he had been personally involved in violating low-level flying restrictions (approximately 10 months prior to the mishap flight). Additionally, LtCol Watters advised his squadron officers during the course of the Aviano mishap investigation to "make disappear" any homemade videotape of low-level flying events in which they may have participated. LtCol Watters received nonjudicial punishment from Gen Pace for these two incidents. Gen Krulak responded to the emails by inviting Capt Marroto to visit with him personally to discuss this matter if he was ever in Washington, D.C. They eventually did meet approximately one month later in Washington, D.C. During their encounter, Gen Krulak ostensibly declared that "he loved the mishap crew members and would fight to get them home (to the United States); that he would not bow to political pressure in regard to how the crew was dealt with; but that did not mean they would not be disciplined," or words to that effect.

(4) MajGen DeLong's "inaccurate and biased" press conference of 12 March 1998, during which he mistakenly declared that the gondola cable system was marked as an aerial cableway on the charts available to the mishap crew. MajGen DeLong also stated the CIB's conclusion that "the cause of this mishap was aircrew error." *See Ashby* I, AE LXVI, at 49-50. At a subsequent "all officers meeting" that same day with VMAQ-4 personnel, MajGen DeLong expressed his opinion that the mishap crew was "flathatting" and that the mission data supported such a conclusion. Appellant's Brief at 62.

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

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

In forwarding this email to subordinate commanders on 20 May 1998, Col Mitchell Triplett, Commanding Officer of Marine Air Group 14, Cherry Point, NC, commented "Gents, You need to brief your people on this. You don't want be drug (sic) into this mess."

Ashby I, AE LXVI at 66. According to the appellant, all of these actions and statements enveloped and steered the ultimate prosecutorial process, negatively impacting upon his right to due process, and thus constituting UCI. Appellant's Brief at 66-67.

b. Law

UCI has often and properly been referred to as "the mortal enemy of military justice." *United States v. Gore,* 60 M.J. 178, 178 (C.A.A.F. 2004)(quoting *Thomas,* 22 M.J. at 393). Even the mere appearance of UCI has the potential to be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers,* 54 M.J. 85, 94-95 (C.A.A.F. 2000)(citing *United States v. Allen,* 33 M.J. 209, 212 (C.M.A. 1991)). Apparent UCI occurs when "a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." *Allen,* 31 M.J. at 589-90 (citing *United States v. Rosser,* 6 M.J. 267 (C.M.A. 1979)). Any brand of UCI (actual or apparent) insidiously erodes the very foundations of fundamental fairness, due process, and true justice. Article 37(a), UCMJ, firmly prohibits UCI:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with

> respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case. . . .

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

The law is crystal clear in condemning any UCI directed against prospective witnesses at a court-martial. *Gore,* 60 M.J. at 185; *United States v. Newbold,* 45 M.J. 109 (C.A.A.F. 1996); *United States v. Gleason,* 43 M.J. 69, 75 (C.A.A.F. 1995); *United States v. Stombaugh,* 40 M.J. 208, 212 (C.M.A. 1994); *United States v. Levite,* 25 M.J. 334, 340 (C.M.A. 1987); *Thomas,* 22 M.J. at 393; *Rosser,* 6 M.J. at 271-72. In *Thomas,* 22 M.J. at 393, our superior court noted that when UCI is directed against prospective defense witnesses, it "transgresses the accused's right to have access to favorable evidence," thus depriving the servicemember of a valuable constitutional right.

c. Burdens

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

connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Biagase,* 50 M.J. at 150.

During appellate consideration of UCI claims, the factors are framed for consideration in light of a completed trial. The appellant bears the burden on appeal to: (1) show facts which, if true, constitute UCI; (2) show that the proceedings at trial were unfair; and (3) show that the UCI was the cause of the unfairness. *Id; Stombaugh,* 40 M.J. at 213; *see United States v. Reynolds,* 40 M.J. 198, 202 (C.M.A. 1994); *Francis,* 54 M.J. at 637. While the trial judge most often will be evaluating UCI ***prospectively***, anticipating its impact upon the pending trial proceedings, the appellate courts will generally be viewing alleged UCI ***retrospectively***, thoughtfully evaluating the actual impact it had upon the completed trial. On appeal, prejudice will not be presumed until such time as the defense can meet its burden to show "proximate causation between the acts constituting [UCI] and the outcome of the court-martial." *Biagase,* 50 M.J. at 150 (citing *Reynolds,* 40 M.J. at 202); *United States v. Singleton*, 41 M.J. 200, 202 (C.M.A. 1994).

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

> 1. disproving beyond a reasonable doubt the predicate facts on which the allegation of UCI is based;
>
> 2. persuading the court beyond a reasonable doubt that the facts established do not constitute UCI; or
>
> 3. convincing the court beyond a reasonable doubt that the UCI will not prejudice the proceedings (trial) or did not affect the findings and sentence of the court-martial (appeal).

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

d. Discussion

We have thoroughly reviewed the military judge's extensive findings of fact and conclusions of law. Record at 224-33; *see also* AE VIII at 66-97 (*Ashby* I, AE XCVIII at 1-32)[25] and Record

[25] The UCI and accuser motions raised at this trial were also raised in *Ashby* I. For judicial economy, civilian defense counsel asked the military judge to

at 1513-15. We are confident that the military judge's findings of fact are supported by the evidence of record, are not clearly erroneous, and we adopt them as our own. We are also fully satisfied beyond a reasonable doubt that there was no UCI (actual or apparent) at any stage of the court-martial proceedings in this case. Even if the actions the appellant complained of could somehow be characterized as UCI, we are convinced beyond a reasonable doubt that they had absolutely no impact upon the findings and sentence of this general court-martial.

The military judge initially concluded that the CIB was "an administrative fact-finding body, and not a prosecutorial or judicial entity." AE VIII at 67, finding 11. As such, the CIB "was neither a part of the accusatorial or the adjudicative stages of [a court-martial proceeding], nor a part of the legal process required under the UCMJ as a condition precedent to the preferral or referral of charges to trial [by court-martial]." *Id.* at 94, finding 223. The CIB's purpose was to determine the facts surrounding and causing the gondola tragedy, "not to perfect charges against possible wrongdoers." *Id.* Accordingly, the military judge ruled that Article 37, UCMJ, and the legal principles generally surrounding UCI, did not apply to the CIB. There is strong merit in this position. *See United States v. Weasler,* 43 M.J. 15 (C.A.A.F. 1995); *United States v. Hamilton,* 41 M.J. 32 (C.M.A. 1994); *Thomas,* 22 M.J. at 388.

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

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consider the original findings of fact and conclusions of law rendered by Judge Nunley on the same motions raised in *Ashby* I. Record at 61. The military judge in this case (*Ashby* II) specifically adopted and incorporated into his own findings the findings of fact and conclusions of law rendered by Judge Nunley, as contained in AE VIII and attachment 3 thereto. *Id.* at 230.

We have carefully reviewed all the evidence and testimony of record in regard to Gen Pace's conduct of, and participation in, the CIB process, including the preparation of the CIB report and first endorsement. We have particularly scrutinized Gen Pace's personal testimony on these matters and found it to be compelling and credible. Having previously addressed Gen Pace's actions extensively in the context of other AOE's raised (e.g., *see* AOE VII ("Accuser Issues"), Part II above) we do not feel the need to elaborate much beyond what we have previously stated, other than to note the lack of credible evidence of any intent or motive on his part to influence the CIB members or their ultimate report, the Article 32 investigation, or the ultimate court-martial proceedings in this case. In particular, we are satisfied that Gen Pace did not "direct" that specific charges be brought against the appellant.[26] We are convinced beyond a reasonable doubt that Gen Pace's actions throughout the appellant's investigation and court-martial case did not constitute UCI (actual or apparent).

Likewise, we are convinced beyond a reasonable doubt that there was no improper conduct or UCI flowing from the various actions of MajGen Ryan, BGen Bowden, MajGen DeLong, Gen Krulak, or LtCol Sullivan, as discussed above. *See United States v. Simpson,* 58 M.J. 368 (C.A.A.F. 2003); *Ayers,* 54 M.J. at 85. Foremost, none of the sundry statements, meetings, collateral investigations or actions sought to attribute criminal wrongdoing or guilt to any of the mishap crewmembers. Nor did they attempt to impede or obstruct the appellant's access to evidence or witnesses favorable to his case. To the extent that the various "all officer meetings" generally addressed perceived systemic deficiencies within the 2nd MAW community, we can only observe that senior leadership was doing what they believed was necessary to prevent similar tragedies from taking place. None of the statements or actions complained of has been shown to have had any direct or negative impact upon the appellant's court-martial process. The views of the senior military and political leadership concerning the mishap were not injected into appellant's court-martial, by arguments of counsel or otherwise. *See United States v. Kirkpatrick,* 33 M.J. 132, 133 (C.M.A. 1991). The excellent reasoning of the Army Court of Criminal Appeals in *United States v. Simpson,* 55 M.J. 674, 686 (Army Ct.Crim.App. 2001), *aff'd,* 58 M.J. 368 (C.A.A.F. 2003), applies forcefully to this case: "While [the appellant] identifies certain actions by DOD and DA officials as evidence of [UCI], he does not tie those actions to specific events, outcomes, or results at trial, alleging instead that the atmosphere was so poisoned that a fair result was unobtainable." *See also Ayers,* 54 M.J. at 85. Similarly, in this case, there is no evidence that the actions

[26] In his "Motion to Correct Errata and Motion for Leave to File" of 04 April 2007, the appellant acknowledges significant errors in his brief before this court (on pp. 39 and 69) regarding the date of Col Carver's notes reflecting that Gen Pace "still wants dereliction of duty" charges. That date was 11 March 1998 (vice 11 February 1998), making such after the CIB concluded.

taken by various senior members of the Marine Corps in response to the gondola tragedy – including statements to the media and measures taken to prevent future mishaps – were intended in any way to influence the appellant's court-martial, or that they had such an effect.

Even if we were to conclude that one or more of the complained of actions constituted UCI, we would still not grant relief as we are convinced beyond a reasonable doubt that such actions did not effect the findings and sentence of the appellant's court-martial. *Biagase*, 50 M.J. at 151. The appellant has failed to demonstrate any prejudice in relation to the alleged UCI issues in this case, as the appellant was acquitted by members at his first general court-martial of all original charges referred against him. *See Ashby* I. The offenses the appellant was ultimately convicted of at this second general court-martial were not contemplated at the time that the CIB was conducted, nor were they even mentioned in the endorsement to the CIB. The Article 133, UCMJ, offenses that the appellant was ultimately found guilty of were preferred on 28 August 1998, five months after the preferral of the *Ashby* I offenses. As we noted previously, it is important to note that they were preferred well after the conclusion of the CIB; the Article 32, UCMJ, investigation; the referral of the original charges; and the appellant's original arraignment. The subject matter of the additional charges is distinct and separate from the original charges. The additional charge was referred to this general court-martial on 15 October 1998. On 09 November 1998, the appellant was arraigned on the additional charges. Record at 10.

The appellant has presented absolutely no evidence demonstrating prejudice of any kind regarding the decision to refer the additional offenses to trial. The appellant does not complain that any prosecution or defense witnesses testified falsely, were dissuaded from testifying, or somehow "curbed" their testimony based upon any of the above-discussed actions or allegations. We particularly note the robust case presented by the appellant on the merits, along with the compelling case presented at trial in extenuation and mitigation of the offenses of which he was ultimately found guilty. There is absolutely no evidence suggesting that the members were in any way impacted by the alleged UCI. Finally, the appellant has presented no credible evidence that any substantial segment of the general population suffered any loss of confidence in the military justice system as a result of the events surrounding the appellant's general court-martial. *See United States v. Cruz,* 20 M.J. 873, 882-84 (A.C.M.R. 1985), *reversed as to sentence*, 25 M.J. 326 (C.M.A. 1987); *see also Simpson,* 58 M.J. at 368; *United States v. Rockwood,* 52 M.J. 98, 103 (C.A.A.F. 1999). We are personally confident from our review of the record that none of the complained of actions or statements had any impact whatsoever on the findings or sentence of the appellant's court-martial.

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

VI. Convening Authority Disqualification in Taking Post-Trial Action

In his eighth assignment of error, the appellant asserts that even if Gen Pace was not an “accuser” he was still disqualified from taking post-trial action in this case where the post-trial submissions of the defense team on behalf of the appellant raised issues concerning his “personal credibility.” Appellant’s Brief at 76-77. Specifically, the appellant believes that, because matter submitted to the convening authority post-trial under the provisions of R.C.M. 1105(a) and R.C.M. 1106(f) called into question the veracity of his testimony on various motions, Gen Pace could not thereafter act objectively upon the findings and sentence of his general court-martial. *See* Art. 60, UCMJ; R.C.M. 1107. He asks this court to order that a new action be prepared by a convening authority who can act impartially upon his case. Appellant’s Brief at 76-78.

In the various and extensive post-trial submissions by the defense team to the convening authority, submitted pursuant to R.C.M. 1105(a) and 1106(f), the only document potentially calling into question Gen Pace’s “personal credibility” was a written clemency request dated 01 December 1999, submitted by the appellant’s civilian defense counsel, Mr. Frank Spinner (Spinner Letter). Mr. Spinner’s 3-page letter catalogued numerous alleged failings in the appellant’s trial proceeding. The only issue of “credibility” raised in the Spinner letter is the following:

> Additionally, because you appeared as a witness on motions to dismiss the charges and specifications (in both proceedings brought against Captain Ashby) based on unlawful command influence and improper referral, if you review the record now you will be required to assess your own credibility and weigh contradictory evidence. This conflict of interest disqualifies you from further participation in the post-trial review process.

Spinner Letter at 1.

Article 60, UCMJ, clearly contemplates that the convening authority will be fully capable of thoughtfully considering, and acting upon, the competing interests of the Government and the accused during the post-trial process. *See United States v. Fisher,* 45 M.J. 159, 162 (C.A.A.F. 1996). However, the simple fact that a convening authority testifies at trial in regard to one or more matters and/or motions raised is not *per se* disqualifying in regard to his subsequent ability to take action on the case under R.C.M. 1107. *United States v. Gudmundson,* 57 M.J. 493, 495 (C.A.A.F. 2002)(citing *United States v. McClenny,* 18 C.M.R. 131, 136-37 (C.M.A. 1955)); *United States v. Ward,* 1 M.J. 18, 19 (C.M.A. 1975)(citing *United States v. Choice,* 49 C.M.R. 663 (C.M.A. 1975)). There is a clear distinction between matters involving "official action" and those impacting upon "personal interest." *McClenny*, 18 C.M.R. at 137. When the convening authority's testimony "is of an official or disinterested nature only," he will not be subsequently precluded from acting on the same case. *Id.* The test to be applied in making this determination is one of "objective reasonableness" – that is:

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

Id.

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

(convening authority's trial testimony used to authenticate an official document disqualified him from taking action in the case when he would have been required on review to determine the factual accuracy of that same document).

Convening authorities are presumed to act without bias. *United States v. Brown,* 40 M.J. 625, 629 (N.M.C.M.R. 1994); *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). The appellant has the burden of rebutting this presumption. *United States v. Argo,* 46 M.J. 454, 463 (C.A.A.F. 1997); *United States v. Hagan*, 25 M.J. 78, 84 (C.M.A. 1987). After reviewing the entire record of trial, all post-trial submissions by the parties, and the findings of the military judge, we do not believe Gen Pace was disqualified from taking action in this case. The military judge found no merit in the appellant's various claims that Gen Pace was an "accuser" or had committed unlawful command influence, personally or by proxy. The credible and uncontroverted evidence at trial clearly established that all of Gen Pace's actions in relation to this case were official in nature, despite all claims to the contrary. We find *Conn,* 6 M.J. at 354-55, particularly persuasive on this issue. In *Conn,* the appellant sought to disqualify a convening authority who testified on an "accuser" motion, claiming that his "other than official" interest in the offenses, as well as his testimony on the "accuser" motion, prevented him from acting impartially on his case. Our superior court found no personal interest on the part of the convening authority where his testimony was objective in nature and unrebutted by the evidence presented on the motion. *Conn*, 6 M.J. at 355. "[N]o clear predisposition by the convening authority as to the salient issue" could be found in the record. *Id.* at 354-55. That is also the case here. Gen Pace's testimony evidenced a high degree of personal sensitivity regarding the adversarial process, and the importance of adversarial integrity in ensuring that ultimate justice is achieved. *Ashby* I at 950-1016. He was particularly astute in his knowledge of, and sensitivity towards, the negative impact and consequences of actual or apparent unlawful command influence. *Id.* at 988.

There is no evidence whatsoever that demonstrates Gen Pace was unable, unwilling, or failed to conduct a thorough and unbiased review of the legal and factual issues raised by the appellant, or was incapable of properly considering the clemency submissions. Additionally, we can discern no possible prejudice to the appellant in regard to the charges to which he was ultimately convicted, as they were never mentioned in the CIB report or its endorsement, or investigated at an Article 32, UCMJ, proceeding.[27] Absolutely no connection (real or hypothetical) has been established between the alleged conduct of Gen Pace and the offenses to which the appellant was found guilty. This assignment of error is without merit.

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

VII. Disqualification of the Staff Judge Advocate in Providing Post-Trial Recommendations

Also in his eighth AOE, the appellant collaterally alleges that the staff judge advocate to the convening authority, Col D.E. Clancey, USMC, [hereinafter SJA] and the deputy staff judge advocate, LtCol P. [C], USMC, [hereinafter DSJA] were both disqualified from providing post-trial advice and recommendations to Gen Pace, the convening authority, due to their pervasive involvement in the prosecutorial effort, which effectively rendered them *de facto* members of the Aviano prosecution team. Appellant's Brief at 76-78. In his post-trial submissions to the convening authority pursuant to R.C.M. 1105 and 1106, the appellant's civilian trial defense counsel stated his concerns as follows:

> [I]t was apparent to the trial participants that your staff judge advocate, Colonel Clancey, and his deputy, Lt Col [sic] [C], became so closely involved in advising and interacting with the trial counsel, that, from at least an appearance standpoint, their impartiality is in question. *See* RCM 1106(b). By sending the record of trial to a new staff judge advocate and convening authority, these issues will be avoided at the same time that the public interest will be served.

Spinner Letter at 1. This allegation was summarily dismissed by the SJA as "without merit." *See* Addendum to Staff Judge Advocate's Recommendation (SJAR) dtd 29 Dec 1999 at 2, ¶ 3.

In our recent decision in the companion case to this one, *United States v. Schweitzer,* No. 200000755, 2007 CCA LEXIS 164 at 67-68, unpublished op. (N.M.Ct.Crim.App. 10 May 2007), we gave lengthy consideration to this identical issue (*see Schweitzer,* discussion of AOE V, at 25-28). In *Schweitzer* we stated:

> The submissions and statements [by trial defense counsel] clearly place in dispute the SJA's ability to render a fair and impartial review in the appellant's case in light of his alleged active participation in the prosecutorial effort. At a minimum, they raise a legitimate factual dispute between the defense team and the SJA which may have signaled the need for an independent review by an SJA whose actions were not being called into question. . . . Instead, the allegations raised by no less than seven separate individuals were summarily dismissed by the SJA (the person whose actions were complained of) as "without merit." . . . The facts before us are sufficient to raise a colorable claim that the SJA who prepared the SJAR and addenda thereto became "embedded" with the prosecutorial effort in this case to an extent that it

> may have transformed his interest in the outcome to a personal one. Certainly, the numerous testimonials submitted in support of this assignment have given rise to a clear ***appearance*** that the SJA became an advocate for the prosecution. In order to determine whether the SJA should have disqualified himself from preparing the SJAR and the addenda thereto, we believe that further impartial fact-finding on this matter is required. We will order such action in our decretal paragraph, *see United States v. DuBay,* 37 C.M.R. 411 (C.M.A. 1967), as well as suggest an alternative thereto.

(Emphasis in original)(internal citations omitted). In ordering the *Dubay* hearing in *Schweitzer*, we specifically directed the government as follows:

> Based upon our resolution of assignment of error V (alleged disqualification of SJA and DSJA), the record of trial is returned to the Judge Advocate General of the Navy so that he may remand the record to an appropriate convening authority who shall order a fact-finding hearing pursuant to *United States v. DuBay,* 37 C.M.R. 411 (C.M.A. 1967). At the ordered hearing a qualified and properly detailed military judge shall inquire into, and render findings of fact concerning, the following issues:
>
> 1) The full extent and nature of the SJA's and DSJA's participation in the prosecutorial effort in both the appellant's and Captain Ashby's general courts-martial, to include: all meetings and conversations with prosecutors and/or witnesses; all written communications with/to the prosecution team; all recommendations/suggestions made in relation to the prosecutorial effort in the Aviano cases; and any other pertinent information.
>
> 2) The legitimacy, veracity and scope of the allegations made against the SJA and/or DSJA, as particularly stated in Part V of this opinion.
>
> 3) Whether there is any additional evidence of actions by the SJA and/or DSJA that would negatively impact upon their ability "to assure the accused a thoroughly fair and impartial review."
>
> 4) Any other evidence which may be reasonably and logically linked to the above matters.
>
> In the alternative, a new SJAR by a different, non-disqualified staff judge advocate, and a new convening authority's action may be ordered. Following completion of either of these alternative actions, the

> record shall be returned to this court for completion of appellate review. *Boudreaux v. U.S. Navy-Marine Corps C.M.R.,* 28 M.J. 181, 182 (C.M.A. 1989).

Schweitzer, 2007 CCA LEXIS 164, at 99. We believe an identical resolution of this issue is appropriate in this case. We shall order such in our decretal paragraph.[28]

VIII. Failure to Withdraw the Article 133, UCMJ, Offenses

In his eleventh AOE, the appellant claims that the convening authority "abused his discretion" in failing to withdraw the Article 133, UCMJ, charge and both specifications from a general court-martial once the appellant was acquitted at his first general court-martial on all offenses originally referred to trial.[29] Appellant's Brief at 83-84. In the eyes of the appellant, the Article 133 offenses standing alone were only worthy of a lesser forum such as Article 15. *Id.* at 84. Relying solely on the general admonition contained in R.C.M. 306(b) suggesting that "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition . . . ." the appellant urges us to dismiss the findings and sentence. *Id.* We decline to do so.

We interpret the appellant's assignment of error as similar in nature to a claim of selective or vindictive prosecution. The burden of persuasion on a claim of selective or vindictive prosecution is on the moving party. *Argo,* 46 M.J. at 463; *see* R.C.M. 905(c)(2)(A). To support such a claim, an appellant has a "heavy burden" of showing that "others similarly situated" have not been charged, that "he has been singled out for prosecution," and that his "selection . . . for prosecution" was "invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *Hagen*, 25 M.J. at 83 (quoting *Garwood*, 20 M.J. at 154). Prosecutorial authorities and convening authorities are presumed to act without bias. *Brown,* 40 M.J. at 629. The appellant has the burden of rebutting that presumption. *Argo*, 46 M.J. at 463; *Hagan*, 25 M.J.at 84. He failed to do so.

Every convening authority is "vested with considerable discretion in determining whether to refer charges and what to refer, so long as his selection is not deliberately based upon

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[28] While the civilian trial defense counsel in this case did not submit supporting letters and documentation in support of this assigned error, as was done in *United States v. Schweitzer,* we nevertheless feel it is appropriate to address this issue now. In light of the serious post-trial delay already existent in this case, we see no value in generating additional appellate delay ordering the parties to produce identical documentation for inclusion in the appellant's record.

[29] The original offenses included twenty specifications of involuntary manslaughter; twenty specifications of negligent homicide; two specifications of dereliction of duty; negligently suffering military property to be damaged; and recklessly damaging non-military property.

unjustifiable standards." *United States v. Blanchette,* 17 M.J. 512, 515 (A.F.C.M.R. 1983). *See Brown,* 40 M.J. at 629; *United States v. Bledsoe,* 39 M.J. 691 (N.M.C.M.R. 1993), *aff'd,* 40 M.J. 292 (C.M.A. 1994); R.C.M. 407(a). In both *Bledsoe*, 39 M.J. at 697, and *Brown,* 40 M.J. at 629, we clearly articulated the principles upon which we evaluate claims of this nature. They are as follows:

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

It is quite apparent that the Government had adequate probable cause to believe that the appellant committed the Article 133 offenses of which he was ultimately convicted. That being the case, the decision to prosecute these offenses, and the forum at which they should be handled, rested within the sound discretion of the convening authority. There is absolutely no evidence of bad faith or prosecutorial vindictiveness in this case as regards either the charges themselves or the forum at which they were handled. *See Garwood,* 20 M.J. at 152-54.

We are not persuaded by the appellant's unsubstantiated suggestion that an "abuse of discretion" caused these very serious charges to be referred to a general court-martial. We find the selection of a general court-martial to be objectively reasonable for an officer who conspired to obstruct justice in an investigation of the seriousness and magnitude involved in this case, and who then actually executed that conspiracy -- after time for thoughtful reflection -- by participating in the destruction of potential evidence in such an investigation. As previously mentioned, there is no evidence that Gen Pace was an accuser, acted out of bad faith, improper motives or

vindictiveness, applied improper standards, or abused his discretion. It is well-settled that a disposition decision does not render the decision-maker an "accuser." *United States v. Grow,* 11 C.M.R. 77, 82 (C.M.A. 1953); *United States v. Jewson,* 5 C.M.R. 80, 85 (C.M.A. 1952). We find no abuse of discretion on the part of Gen Pace in electing to refer these additional charges to a second general court-martial after the appellant's acquittal on all original charges. This assignment of error is completely without merit.

IX. Admission of Sentencing "Impact" Testimony from Family Members of Victims of the Gondola Mishap

In his tenth AOE, the appellant asks us to conclude that the military judge erred in admitting into evidence during sentencing the testimony of three family members of individuals who died in the gondola car. He contends that this testimony was not admissible because: 1) it was not relevant in that it was not directly related to or resulting from the offenses of which the appellant was convicted, and 2) even if it was relevant, the admission of this testimony violated MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), because its prejudicial impact far outweighed the "minimal probative value" of the evidence. Appellant's Brief at 81-83; Record at 1441. We disagree with both assertions.

The three witnesses in question (Mr. Giorgio Vaia of Cavalese, Italy; Ms. Rita Wunderlich of Hartmannsdorf, Germany; and Ms. Emma Aurich, of Burgstadt, Germany) each lost loved ones as a result of the mishap tragedy. The Government called them as witnesses in sentencing for the sole and limited purpose of testifying in regard to how the destruction of the cockpit videotape impacted them personally. Each testified that the missing videotape left substantial and lingering questions in their minds regarding what was actually depicted on the tape, and what truly transpired during the mishap flight. Each stated also that the families were first told that a blank videotape was found in the video camera. Later, they learned that the original videotape had been switched out for a blank tape, and that Capt Schweitzer had destroyed this recorded videotape taken from the aircraft by burning it. Ms. Wunderlich's testimony was typical of that adduced from all three witnesses when she asserted that the appellant's participation in the destruction of the cockpit videotape left the victims' families with "many questions" and that "[t]hose open questions do not give me any peace." Record at 1458. Ms. Aurich suggested that the lingering questions generated by the destruction of the videotape "will follow me my whole life because I don't know how they will be answered." *Id.* at 1461. Finally, Mr. Vaia stated that "closure" was difficult for family members to achieve when the content of the videotape could never be conclusively determined. *Id.* at 1455.

We review a military judge's decision to admit sentencing evidence in aggravation under an abuse of discretion standard.

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

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

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

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

> I find the proffered testimony of the three witnesses regarding their lingering question as to what was on the videotape, to be relevant. I also find that a reasonable link exists between such testimony and the offenses before the Court.
>
> I find the probative value of such testimony to substantially outweigh the danger of unfair prejudice, confusion or delay in the trial.
>
> Now, trial counsel, I want you to understand that this testimony will be limited to the witness identifying himself or herself as a father, mother, sister, etcetera [sic], of one of the persons who died when the aircraft struck the cable car (sic) on 3 February [1998]. It will be limited to that. The witness may then testify that the impact of never knowing what was actually on the videotape has caused a lingering

> question regarding the loss of that witness' loved one. No more than that. Just those two statements.
>
> There will not be any expounding on that point. There will be no references with regard to their impressions of guilt or innocence. There will be no references to the fact that a witness feels that something was wrong because the tape is missing.

Record at 1444-45; *see also* Record at 1446-47. Immediately following this testimony, the military judge provided the following limiting instruction for the members to follow:

> Gentlemen . . . . I want to again remind you that as court members you are not invited or asked to redress any wrong befalling the victims' family (sic) in this case but rather to perform your proper role as a member of the community at large to adjudge a just sentence – adjudge an appropriate sentence in this case.
>
> If you recall, several times yesterday I advised you that the charge and specifications that are the subject of this trial arose out of a mishap in which an aircraft piloted by Captain Ashby clipped a gondola cable, damaged the aircraft and resulted in the death of 20 civilians. Again, I advised you at that point that the conduct of the flight and the responsibility for the deaths and the damage to the aircraft have already been the subject of another proceeding and are not before you for resolution.
>
> . . . .
>
> So, again, during this phase of the trial, you will not be determining a sentence based upon either the deaths or the damage to the aircraft. Any questions about that?
>
> Negative response [from the members].

Id. at 1463-64. We are satisfied that the military judge did not abuse his discretion in admitting the testimony of each of these three witnesses. We also conclude that the testimony's probative value was not substantially outweighed by the danger of unfair prejudice or confusion of the members, that the evidence was not unfairly cumulative, and that the military judge's limiting instruction clearly advised the members of the proper contours for their consideration of the testimony. We are particularly satisfied that the "lingering questions" created in the minds of these three family members was relevant and probative evidence in aggravation. Such "lingering questions" flowed directly, logically, and foreseeably from the appellant's intentional destruction of the cockpit videotape containing actual footage of

the mishap flight, which had potential evidentiary value to understanding what took place that day in the Italian Alps.

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

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

X. Sentence Appropriateness

In his twelfth AOE, the appellant asserts that his sentence to six months confinement, total forfeitures, and a dismissal from the naval service was inappropriately severe. He directs us specifically to the evidence in the record of trial attesting to the appellant's outstanding military character, superior skills and expertise as a "well disciplined pilot," his numerous personal awards and decorations, and the fact that he saved the mishap aircraft and its crew from destruction "under the most harrowing of circumstances." Appellant's Brief at 84-85.

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

for sentence equalization." *United States v. Usry,* 9 M.J. 701, 704 (N.C.M.R. 1980).

The authorized maximum sentence for the offenses to which the appellant was found guilty included a dismissal, confinement for 10 years, and total forfeitures. The members ultimately elected to award the appellant far less punishment than that. We cannot say that an approved sentence of six months confinement, total forfeitures, and a dismissal is inappropriately severe for these offenses or for this particular appellant. This Marine Corps captain, and commander of the mishap aircraft, conspired with a fellow officer to obstruct justice in the midst of one of the most highly visible and tragic incidents in naval aviation history. After time for considerable reflection concerning the object of his conspiratorial agreement with Capt Schweitzer, the appellant nevertheless chose to obstruct justice by intentionally secreting and participating in the destruction of the videotape recording portions of the mishap flight. The intentional destruction of the videotape took place well after the appellant was fully aware that 20 human beings had perished in the gondola mishap, and multiple investigations were initiated.

After reviewing the entire record, and taking into consideration the appellant's excellent military service, we find that the adjudged sentence is appropriate for this offender and his offenses.[30] *See United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy,* 26 M.J. at 395; *Snelling,* 14 M.J. at 268.

XI. Post-Trial Delay

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

Date	**Event**
10 May 1999	Appellant sentenced by officer members.
03 Jan 2000	Convening Authority's Action.
25 Feb 2000	Case received by Navy-Marine Corps Appellate Review Activity (NAMARA).
13 Mar 2000	Case docketed with the NMCCA.
04 Dec 2003	After 33 enlargements of time, Appellant files 85-page brief raising 12 AOE's.

[30] We also carefully considered the appellant's claim that his sentence was highly disproportionate to that received by Capt Schweitzer and find that assertion to be without merit. *See Kelly,* 40 M.J. at 570.

02 Sep 2004	After 6 enlargements of time, Government files 54-page answer.
17 Dec 2004	After 4 enlargements of time, Appellant files 20-page reply brief to Government's answer.
01 Feb 2005	Case to NMCCA panel for decision.
09 Apr 2007	Oral argument heard at NMCCA.
27 Jun 2007	NMCCA issues opinion.

This was a lengthy and complex general court-martial involving multiple motions and legal rulings. The appellant's records of trial from *Ashby* I and *Ashby* II exceed 7,400 pages in length and contain hundreds of exhibits and attachments. The two records of trial span 83 volumes. The lengthy appellate briefs from both the appellant and the Government attest to the complexity of the issues presented in this case. The basic chronology above demonstrates that the appellant did not receive his first level appeal of right for more than eight years after he was sentenced. It also showcases the disturbing fact that more than seven years have passed since NAMARA received this case.

A convicted service member has a constitutional due process right to a timely review and appeal of his court-martial conviction. *Diaz v. The Judge Advocate General of the Navy,* 59 M.J. 34, 37-38 (C.A.A.F. 2003). In thoughtfully evaluating whether post-trial delay has violated the due process rights of an appellant, we first ask whether the delay in question is facially unreasonable. *United States v. Moreno,* 63 M.J. 129, 136 (C.A.A.F. 2006). If we answer that question in the affirmative, we must then apply, examine, and balance the four factors set forth in *Barker v. Wingo,* 407 U.S. 514, 530 (1972), which are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See Moreno,* 63 M.J. at 135-36; *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)("*Toohey* I"). This case was tried prior to the date our superior court decided *Moreno,* so the presumptions of unreasonable delay that apply to post-trial processing prior to docketing by this court do not apply here. Nevertheless, we find the delay in this case was facially unreasonable, triggering a due process review.

As our superior court noted in *Moreno,* "no single factor [is] required to find that post-trial delay constitutes a due process violation." *Moreno,* 63 M.J. at 136 (citing *Barker,* 407 U.S. at 533). We look at "the totality of the circumstances in a particular case" in deciding whether relief is warranted. *United States v. Allison,* 63 M.J. 365, 371 (C.A.A.F. 2006). If we ultimately conclude that the appellant's due process right to speedy post-trial review and appeal has been violated, we will

generally grant relief unless we are convinced beyond a reasonable doubt that the constitutional error is harmless. *Id.* at 370. We may also initially assume a constitutional due process violation, yet deny relief after concluding that the error was harmless beyond a reasonable doubt. *Id.*

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

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

However, after considering the record as a whole and the totality of the circumstances relating to the delay in this case, we are fully confident that this constitutional error was harmless beyond a reasonable doubt, and that no relief is warranted at this time. *Id.* at 363. *See United States v. Kreutzer,* 61 M.J. 293, 298 (C.A.A.F. 2005)(citing *Chapman v. California,* 386 U.S. 18, 24, (1967)). *See also Allison,* 63 M.J. at 370. No claim of denial of speedy review and appeal has ever been asserted in this case. *See Allison,* 63 M.J. at 371. We have determined that the appellant's AOE's on appeal lack merit, albeit we have ordered additional fact-finding in regard to the pending issue of whether the SJA should have been disqualified from authoring the SJAR. We will reconsider the issue of harm

to the appellant anew upon return and subsequent review of the appellant's record to this court in light of the outcome of the *DuBay* hearing we order in the following paragraph, or upon the completion of a new SJAR and CA's action. *See Dearing,* 63 M.J. at 488 ("Consistent with *Moreno,* Appellant may in any later proceeding demonstrate prejudice arising from post-trial delay."). We will also, at that time, consider whether it is appropriate in this case to grant the appellant discretionary relief under our Article 66(c), UCMJ, authority. *Toohey I,* 60 M.J. at 102; *United States v. Tardiff,* 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown,* 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

Based upon our resolution of AOE VIII (alleging, in part, disqualification of the SJA and DSJA), the record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority who shall order a fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.A. 411 (C.M.A. 1967). At the ordered hearing a qualified and properly detailed military judge shall inquire into, and render findings of fact concerning the following issues:

> 1) The full extent and nature of the SJA's and DSJA's participation in the prosecutorial effort in both the appellant's and Captain Schweitzer's general courts-martial, to include: all meetings and conversations with prosecutors and/or witnesses; all written communications with/to the prosecution team; all recommendations/suggestions made in relation to the prosecutorial effort in the Aviano cases; and any other pertinent information.
>
> 2) The legitimacy, veracity and scope of the allegations made against the SJA and/or DSJA, as particularly stated in Part VII of this opinion.
>
> 3) Whether there is any additional evidence of actions by the SJA and/or DSJA that would negatively impact upon their ability "to insure the accused a thoroughly fair and impartial review.
>
> 4) Any other evidence which may be reasonably and logically linked to the above matters.

In the alternative, a new SJAR by a different, non-disqualified SJA, and a new CA's action may be ordered. Following completion of either of these actions, the record shall be returned to this court for completion of our review under Article 66, UCMJ. *See*

Boudreaux v. U.S. Navy-Marine Corps C.M.R., 28 M.J. 181, 182 (C.M.A. 1989).

Senior Judge VOLLENWEIDER and Senior Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court