

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

U N I T E D S T A T E S,        ) FINAL BRIEF ON BEHALF  
                                  ) OF APPELLANT  
                                  )  
                                  ) Crim. App. Dkt. No. 20090608  
                                  )  
                                  ) USCA Dkt. No. 12-0414/AR  
Private First Class (E-3)        )  
DAVID G. SPICER, JR.            )  
United States Army,             )  
                                  ) Appellant                    )

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE  
ARMED FORCES:

**Issue Granted**

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT  
TO SUPPORT THE FINDINGS OF GUILTY OF MAKING  
FALSE OFFICIAL STATEMENTS UNDER CHARGE I.

**Statement of Statutory Jurisdiction**

The Army Court of Criminal Appeals [hereinafter Army Court]  
had jurisdiction over this matter pursuant to Article 66,  
Uniform Code of Military Justice, 10 U.S.C. § 866 (2008)  
[hereinafter UCMJ]. This Honorable Court has jurisdiction over  
this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)  
(2008). On May 18, 2012, review of the issue stated above was  
granted.

**Statement of the Case**

On February 17, May 8, June 8, and July 8-11, 2009, a mixed  
panel of officer and enlisted court members, sitting as a

general court-martial, convicted Private First Class David G. Spicer, Jr., of two specifications of false official statements and two specifications of child endangerment by design, in violation of Articles 107 and 134, Uniform Code of Military Justice [hereinafter U.C.M.J.], 10 U.S.C. §§ 907 and 934. (R. 878). PFC Spicer had pled guilty only to child endangerment by neglect, the lesser included offense under Article 134. (R. 97, 155-190). The members sentenced PFC Spicer to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for ten (10) years and to be discharged from the service with a dishonorable discharge. (R. 1042).

On January 29, 2010, the convening authority approved the sentence as adjudged. The adjudged forfeitures were deferred effective July 27, 2009 and were terminated on the date of action. The automatic forfeitures were waived effective July 27, 2009 for a period of six (6) months.

The Army Court affirmed the findings and the sentence on January 31, 2012. (Appendix A). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review. Review was granted on May 18, 2012.

### **Statement of Facts**

At trial, PFC Spicer's defense counsel argued, with respect to the two specifications brought under Charge I, as a matter of law the false statements SPC Spicer made to civilian authorities during and after making a 911 phone call were not "official." The military judge rejected these arguments and instructed the members, over defense objection, that the term "official" could include such statements. (R. 588-612, 820-821, 851).

Additional facts necessary for the disposition of the issue granted are contained in the argument, below.

### **Summary of Argument**

The evidence is legally insufficient to support the findings of guilty of making false official statements in that PFC Spicer's phone calls to an off-base 911 operator and civilian investigator cannot be considered "official."

### **Issue and Argument**

THE EVIDENCE IS LEGALLY INSUFFICIENT TO  
SUPPORT THE FINDINGS OF GUILTY OF MAKING  
FALSE OFFICIAL STATEMENTS UNDER CHARGE I.

### *Standard of Review*

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact finder could have found all of the essential elements beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987), citing *Jackson v.*

*Virginia*, 443 U.S. 307, 319 (1979); *United States v. Pabon*, 42 M.J. 404 (C.A.A.F. 1995). Every reasonable inference from the evidence of record will be drawn in favor of the prosecution. *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). The Court's assessment of legal sufficiency is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993).

#### *Argument*

At the end of the presentation of the government's case, the defense argued a motion for a finding of not guilty of the Specifications under Charge I and Charge I, citing R.C.M. 917 and arguing that the statements, which were admittedly false, did not constitute "official" statements as a matter of law. (R. 588-612). Essentially, the defense argued then and SPC Spicer argues now that because the statements were made to civilian authorities and did not require a necessary and predictable response by on-base emergency personnel, the statements were not official as a matter of law.

In *United States v. Day*, 66 M.J. 172, 175 (C.A.A.F. 2008) (statements to on-base firefighters deemed official), this Honorable Court determined, without establishing a *per se* rule, that a phone call to a civilian 911 operator/dispatcher did not constitute an official statement under Article 107, UCMJ. In footnote four, at 175, however, this Court stated:

In theory, statements made to an off-base 911 operator might implicate Article 107, UCMJ, in situations where, among other things, there is a predictable and necessary nexus to on-base persons performing *official* military functions on behalf of the command.

After the judge denied the motion and after the defense presented their case, the military judge instructed the members regarding what constitutes an "official" statement, acknowledging *Day*, and also referencing *United States v. Teffau*, 58 M.J. 62 (C.A.A.F. 2006). (R. 820). The defense objected to the instruction, but was overruled by the judge. (R. 820-821, 851).

In *Day*, this Court did not clearly identify what facts or circumstances would make a military member's false 911 call from on-base and a subsequent false report to civilian off-base authorities false "official" statements. PFC Spicer maintains that, just as this Court ruled in *Day*, the facts present in his case do not reach the theoretical requirements set forth in footnote four of the *Day* opinion.

Although the Army Court affirmed PFC Spicer's false official statements conviction, in his concurring opinion, Judge Krauss questioned the majority's "apparent acceptance of footnote four of *United States v. Day* as establishing a standard by which courts-martial should resolved whether the official duties of nonmilitary personnel 'fall within the scope of the UCMJ's reach.'" (Appendix, at 3). This opinion makes clear that


confusion exists regarding how trial judges and lower appellate courts should interpret the meaning of footnote four.

It cannot be disputed that the statements in question were made to civilian authorities. To the extent the lower court ruled against PFC Spicer based on "[a] soldier's duty to protect his children from harm", it must be observed that every parent, military and civilian, has a duty to protect their children from harm. Appendix, at 3. There is nothing unique about military service that gives rise to some hypothetical duty that exists above and beyond duties of care held by civilian parents.


Furthermore, the lower court failed to demonstrate that "the undoubted, immediate, and substantial military interest . . . relative to the well-being of a soldier's dependents" was any different in this case than the corresponding military interest in *United States v. Day*. Appendix, at 3. Thus, there is no legitimate basis for distinguishing the facts in PFC Spicer's case from the facts in *Day*.

The actual instruction given in this case, based as it was on footnote four, arguably lowered the standard required to prove guilt. In *Day*, there is no indication that this Honorable Court intended for footnote four to serve as the basis for instructions on the law relative to 911 calls and false official statements. *United States v. Day*, 66 M.J. 172, 175 (C.A.A.F. 2008).

**WHEREFORE**, PFC Spicer respectfully requests that this Honorable Court set aside the findings of guilty of Charge I and the Specifications thereunder, set aside the sentence and authorize a rehearing on sentence.



KOR FRANK J. SPINNER  
Attorney at Law  
P.O. Box 38463  
Colorado Springs, CO 80937  
(719) 576-1175  
C.A.A.F. Bar No. 26210  
Lawspin@aol.com



JONATHAN F. POTTER  
Lieutenant Colonel, Judge  
Advocate  
Appellate Defense Counsel  
Defense Appellate Division  
U.S. Army Legal Services  
Agency  
9275 Gunston Road  
Fort Belvoir, VA 22060  
(202) 616-7804  
C.A.A.F. BAR No. 26450

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing in the case of  
*United States v. Spicer*, Crim.App.Dkt.No. 20090608, USCA Dkt.  
No. 12-0414/AR, was electronically filed with both the Court and  
Government Appellate Division on July 9, 2012.

  
MICHELLE L. WASHINGTON  
Paralegal Specialist  
Defense Appellate Division  
(703) 693-0737