IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **RONALD C. GIVENS,** United States Army, Appellant	) FINAL BRIEF ON BEHALF OF) APPELLEE))) Crim. App. Dkt. No. 20190132)) USCA Dkt. No. 21-0086/AR))

A. BENJAMIN SPENCER
Captain, Judge Advocate
Appellate Attorney
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0786
adam.b.spencer.mil@mail.mil
U.S.C.A.A.F. Bar No. 37481

CRAIG SCHAPIRA
Lieutenant Colonel, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37128

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

Index of Brief

Table of Authorities

United States Court of Appeals for the Armed Forces

United States Court of Military Appeals

Other Federal Courts

[1] Reproduced in the Appendix pursuant to Rule 24(f)(1)(B) of this Court's Rules of Practice and Procedure.

[2] Reproduced in the Appendix pursuant to Rule 24(f)(1)(B).

Statutes and Other Resources

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20190132
Specialist (E-4) **RONALD C. GIVENS,** United States Army, Appellant	)	USCA Dkt. No. 21-0086/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFECTIVE PREFERRAL/ UNLAWFUL COMMAND INFLUENCE MOTION ON PROCEDURAL GROUNDS.

Statement of Statutory Jurisdiction

This Court exercises jurisdiction over Appellant's case pursuant to Article 67(a)(3), Uniform Code of Military Justice [UCMJ]. On February 16, 2021, this Court granted Appellant's petition for review. (JA 001).

Statement of the Case

On February 27, 2019, a military judge sitting as a general court-martial convicted Appellant, consistent with his plea, of one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military

Justice, 10 U.S.C. § 928 (2012 & Supp. IV 2016) [UCMJ]. (JA 148). On March 1, 2019, an officer panel with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of making a false official statement, one specification of larceny of military property, one specification of assault consummated by a battery (as a lesser included offense of the aggravated assault charge), one specification of communicating a threat, and one specification of child endangerment, in violation of Articles 107, 121, 128, and 134, UCMJ.[3] (JA 262–263). The panel sentenced Appellant to confinement for 90 days, forfeiture of $1,680 pay per month for 1 month, reduction to E-1, and a bad-conduct discharge. (JA 272). On January 29, 2020, the convening authority approved the adjudged sentence. (JA 018).

On October 19, 2020, the Army Court of Criminal Appeals, exercising its Article 66, UCMJ, jurisdiction, set aside Appellant's conviction for child endangerment under Article 134, UCMJ. *United States v. Givens*, ARMY 20190132, 2020 CCA LEXIS 366, at *4–5 (Army Ct. Crim. App. Oct. 19, 2020) (mem. op.); (JA 002–005). It affirmed the remaining findings of guilty and the sentence. *Givens*, 2020 CCA LEXIS 366, at *5; (JA 005).

[3] The panel acquitted Appellant of one specification each of battery and adultery, in violation of Articles 128 and 134, UCMJ.

Statement of Facts

A. Appellant committed basic allowance for housing (BAH) fraud, larceny of military property, and made a false official statement.

Appellant and KAG, a civilian, divorced on December 6, 2017. (JA 234, 273–310). Appellant married KN, another soldier, on February 5, 2018. (JA 236, 311). However, on February 21, 2018, Appellant completed and submitted a Dep't of Army, Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (Sept. 1990) [DA Form 5960], that falsely reported KAG as his spouse, even though he was divorced from her at the time. (JA 237, 239–40, 312). Appellant did not submit his divorce decree when he in-processed and completed the DA Form 5960. (JA 248–49). The consequence of this false reporting and failure to submit his divorce decree was that Appellant received a "with[-]dependent rate" for a civilian spouse, rather than the single soldier "barracks rate" for having a military spouse. (JA 237–45, 249, 313–20). Appellant subsequently received a memo backdated to February 15, 2018, from his battalion commander that authorized him to reside off post. Accordingly, he was only authorized to receive the with-dependent BAH rate from that date forward. (JA 247–48). Appellant remained unauthorized to receive the with-dependent BAH rate from the time of his divorce on December 6, 2017 until February 15, 2018. (JA 248, 321).

B. Appellant threatened and battered his wife.

On February 21, 2018, Appellant returned from Fort Stewart, Georgia, to his apartment where he lived with his wife, Specialist (SPC) KN, and their daughter, ASG. (JA 141–42, 207). Appellant and SPC KN got into an argument after Appellant put ASG to bed. (JA 142, 199, 210–11). During the argument, Appellant reached across the bed and "smacked the phone out of [SPC KN's] hand." (JA 211–12, 225–26). Specialist KN said she would leave the room and went to pick up their daughter, at which point Appellant "reached over, grabbed [SPC KN], and put [her] against the wall by [her] neck." (JA 200, 212, 226). Specialist KN described this incident at trial: "He had my arm, and he grabbed me by my neck, pushed me against the wall, and he slightly squeezed, enough for me to be afraid. I was raised a little bit off of the floor for a few seconds, then he finally let go." (JA 201, 221).

Specialist KN then called 911, at which point Appellant said, "You called 911? For real? I am going to beat your ass for real." (JA 204, 251). Then, Appellant "grabbed [her] by [her] arm, pulled [her] to the door[, and] threw [her] outside." (JA 201, 216). Specialist KN landed on her wrist and elbow, which scraped her elbow and hurt her wrist. (JA 201, 216). Appellant "grabbed [SPC KN] by [her] arm, [and] he [threw] [her] around as though he was attempting to hit [her]." (JA 202).

Specialist MM[4] and PFC JG,[5] two soldiers who lived in the apartment complex, heard SPC KN scream, "Help me. Somebody, God, please help me." (JA 151, 167). They ran toward her screams and found SPC KN lying flat on the ground with her hands over her face, screaming and flailing. (JA 152, 168, 203). Appellant stood over SPC KN and had his arms cocked back. (JA 152, 162, 183). Specialist MM pushed Appellant off SPC KN, Appellant and SPC MM then squared up on each other, and Appellant punched SPC MM in the mouth. (JA 153, 203–04, 218). Meanwhile, PFC JG took SPC KN to a neighbor's house and retrieved ASG from the apartment. (JA 153, 169, 172, 204, 218–19). Specialist MM ultimately managed to get Appellant to the ground and held him there in a chokehold for several minutes until he calmed down. (JA 153–54, 185).

C. Procedural history of the case.

On April 23, 2018, Appellant's company commander, CPT CF, preferred charges against Appellant. (JA 007, 040–46). On May 15, 2018, after reviewing the evidence, Appellant unconditionally waived his right to a preliminary hearing under Article 32, UCMJ. (JA 347). On June 5, 2018, the convening authority referred Appellant's charges to a general court-martial. (JA 046).

[4] At the time of trial, SPC MM was a civilian. (JA 149).
[5] At the time of trial, PFC JG was a civilian. (JA 165).

On August 6, 2018, the charges were withdrawn to permit Appellant to exercise his right to a preliminary hearing under Article 32(b), UCMJ, even though Appellant had previously unconditionally waived this right. (JA 036). The preliminary hearing occurred on September 4, 2018. (JA 019). On October 24, 2018, CPT CF preferred an additional charge of adultery against Appellant. (JA 040). On November 7, 2018, the convening authority referred the original charges and the additional charge to a general court-martial. (JA 041, 044).

On November 29, 2018, Appellant was arraigned. (JA 051–059). At his arraignment, he pleaded not guilty to all charges and specifications. (JA 057). Before receiving his pleas, the military judge "advise[d] [Appellant] that any motion to dismiss or grant other appropriate relief should be made at this time." (JA 057). Before defense counsel entered pleas on Appellant's behalf, he stated, "[t]he defense has no motions at this time." (JA 057). The military judge set a deadline for filing motions of December 4, 2018. (JA 322–23).

On January 11, 2019, the military judge held a hearing on all motions filed by the parties at that time; none of the motions filed by Appellant challenged or objected to the preferral of charges based on defective preferral or accusatory unlawful command influence (UCI). (JA 060–63). On February 24, 2019—two days before the trial was scheduled to begin—Appellant filed a motion for appropriate relief based in part, and for the first time, on claims of defective

preferral and accusatory UCI. (JA 324–40). On February 25, 2019, the military judge held a hearing on the defense motion for appropriate relief. (JA 129). He denied Appellant's claims of defective preferral and UCI on the grounds that the "motion [was] untimely [and] the facts upon which the defective preferral and unlawful command influence portions of the motion are based were discoverable by the defense beginning on 23 April 2018, the date of preferral." (JA 128–29). The military judge further determined "good cause d[id] not exist" for the untimely motion. (JA 128–29).

Standard of Review

Whether an appellant has waived an issue is a question of law this Court reviews de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citing *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005)). However, this Court reviews the military judge's determination that there was no good cause to grant relief from the waiver for an abuse of discretion. *United States v. Jameson*, 65 M.J. 160, 162 (C.A.A.F. 2007).

Summary of Argument

Appellant failed to raise objections based on defective preferral and accusatory UCI prior to the deadline mandated by Rule of Court Martial (R.C.M.) 905(b)(1). Under that rule and this Court's precedents, any objections based on defects in the preferral of charges "must be raised before a plea is entered." Under

the version of R.C.M. 905(e) applicable at the time of Appellant's trial, he waived the issue when he entered his pleas without lodging his objections. Because the basis for the objections was available and knowable to Appellant well before both the motions deadline and when he entered his pleas, the military judge was within his discretion to find no good cause existed to excuse the waiver. Even if it was an abuse of discretion for the military judge to deny appellant's claims of defective preferral and accusatory UCI based on waiver, the error is harmless because Appellant's objections lacked merit, and thus a procedural error could not have prejudiced Appellant's substantial rights. Consequently, Appellant's claims fail.

Argument

A. Appellant waived his claims of defective preferral and accusatory UCI by operation of law.

Appellant waived his claim of defective preferral because he did not raise it before he entered his pleas on November 29, 2018. Indeed, he failed to raise this objection until his motion for appropriate relief on February 24, 2019. Rule for Courts-Martial 905(b) provides that among the "defense[s], objection[s], or request[s] . . . [that] must be raised before a plea is entered" are "[d]efenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, or referral of charges, or in the preliminary hearing." Appellant's objection on the penultimate eve of trial—that the charges against him "should be treated as unsigned and unsworn" based on a defective preferral, (JA 334)—is an

objection that falls squarely within the scope of R.C.M. 905(b)(1). Because his tardy objection directly alleged a "defect[] . . . in the preferral . . . of charges," the rule required Appellant to bring his concern to the court's attention before he entered his plea. R.C.M. 905(b)(1). Even Appellant expressly concedes this in his brief. (Appellant's Br. 14) ("Appellant concedes the portion of the defense motion related to defective preferral was untimely.").

Likewise, the Rules for Courts-Martial required appellant to raise his objection that UCI tainted the preferral of charges prior to the entry of his pleas. Although an accused may raise at any time claims of UCI that infects the adjudicatory process, *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994), objections based on accusatory UCI—UCI bearing on the preferral, investigation, and forwarding process[6]—must be made prior to the entry of pleas:

> It is necessary, however, to determine whether the allegation of unlawful command influence in a particular case pertains to the preferral of charges, forwarding of charges, referral, trial, or post-trial review, in order to determine the applicable rules of law.
> . . .
> Defects in the forwarding process are waived if not challenged prior to entry of pleas. RCM 905(b)(1).
> . . .

[6] Generally, unlawful command influence consists of two types: accusatory (preferral, forwarding, and referral of charges) and adjudicative (interference with witnesses, judges, members, and counsel). *United States v. Weasler*, 43 M.J. 15, 17–18 (C.A.A.F. 1995). Because Appellant claims UCI in the context of the preferral of charges, he is asserting accusatory UCI.

> Unlawful command influence at the referral, trial, or review stage is not waived by failure to raise the issue at trial.

Hamilton, 41 M.J. at 36; *see also United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999) ("Defects in preferring and forwarding charges are waived if not raised at trial, unless the failure to raise the issue is itself the result of unlawful command influence.") (citing *Hamilton*, 41 M.J. at 37). As *Hamilton* makes clear, R.C.M. 905(b)(1) dictates that allegations of UCI at the preferral stage must be raised prior to the entry of pleas. *See also United States v. Argo*, 46 M.J. 454, 459 (C.A.A.F. 1997) (treating an allegation of UCI affecting the Article 32 investigation process as an objection covered by R.C.M. 905(b)(1) that "must be made before pleas").

Appellant's suggestion that the proper deadline for raising accusatory UCI that taints the preferral process is adjournment rather than prior to the entry of pleas, (Appellant's Br. 15),[7] is misplaced, flatly inconsistent with *Hamilton* and

[7] The current version of R.C.M. 905(e), which appellant cites in his brief when he refers to "R.C.M. 905(e)(2)," is the result of an amendment that took effect 1 January 2019, after charges in this case were referred to a court-martial. The President amended the structure of R.C.M. 905(e) in Executive Order No. 13,825. *See* Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018) (effective Jan. 1, 2019). This amendment does not apply to cases in which charges were referred to trial prior to the effective date of January 1, 2019. *Id*. Thus, this Court should refer to the version of R.C.M. 905(e) that appears in the 2016 edition of the *Manual for Courts-Martial, United States* [*MCM*], in which the rule is not divided into subparagraphs (1) and (2).

Richter, and would have this Court rewrite the Rules of Courts Martial. Appellant's argument that "the plain language of R.C.M. 905(b)(1) does not clearly establish that unlawful command influence qualifies as a 'defect' in the preferral," (Appellant's Br. 14), ignores this Court's language in *Hamilton* that if alleged UCI "pertains to the preferral of charges," then that constitutes an allegation of "defective preferral." *Hamilton*, 41 M.J. at 36 (discussing a situation where "a commander is coerced into preferring charges that he does not believe are true"). Further, this Court definitively stated in *Hamilton*, "[d]efects in the forwarding process are waived if not challenged prior to entry of pleas," not prior to adjournment. *Id.* (citing R.C.M. 905(b)(1)). Although *Hamilton* involved an appellant who raised the matter of accusatory UCI for the first time on appeal rather than any time "at trial," that distinction does not somehow extend the deadline for raising such objections from before entry of pleas to at any time before adjournment. Rather, this Court made clear in *Hamilton* the deadline for raising accusatory UCI objections is what R.C.M. 905(b)(1) provides—before pleas are entered.[8] 41 M.J. at 36.

[8] Appellant's argument that "this Court's characterization of accusatory unlawful influence as little more than a mere procedural 'defect' is contradictory" is without merit. (Appellant's Br. 15). Appellant's invocation of the oft-repeated mantra that UCI is "the mortal enemy of military justice," (Appellant's Br. 15), to exalt appellant's objection here to waiver-proof status is contrary to this court's precedent and conflates accusatory and adjudicative UCI. Appellant implicitly concedes his objection is one of accusatory UCI. (Appellant's Br. 14–15). This

In this case, there is no question that Appellant's UCI objection alleged accusatory UCI at the preferral stage. Appellant based his UCI objection at trial on an allegation that the trial counsel "told CPT [CF] that he had no other option but to court-martial the Accused," and thus CPT CF preferred the charges. (JA 335–36). Appellant raises no other facts or allegations suggesting UCI at any other stage of the court-martial process. As such, under this Court's precedents and R.C.M. 905(b)(1), Appellant had to raise his UCI objection before entering his pleas on November 29, 2018. *Hamilton*, 41 M.J. at 36. He failed to do this.

The consequences of Appellant's failure to raise these objections prior to his pleas are that his objections were waived. The version of R.C.M. 905(e) applicable to Appellant at the time provided: "Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver." R.C.M. 905(e) (2016)[9]; *see also Richter*, 51 M.J. at 224 ("Defects in preferring and forwarding

---

court has consistently required appellants to raise UCI concerns about the accusatory phase before they enter their pleas. *Hamilton*, 41 M.J. at 36; *see also Richter*, 51 M.J. at 224 ("Defects in preferring and forwarding charges are waived if not raised at trial, unless the failure to raise the issue is itself the result of unlawful command influence.") (citing *Hamilton*, 41 M.J. at 37); *see also Argo*, 46 M.J. at 459 (treating an allegation of UCI affecting the Article 32 investigation process as an objection covered by R.C.M. 905(b)(1) that "must be made before pleas"). Accordingly, Appellant was required to make his objection before he entered his plea.

[9] The current version of R.C.M. 905(e) is the result of an amendment that took effect on 1 January 2019 and after charges in this case were referred to a court-

charges are waived if not raised at trial, unless the failure to raise the issue is itself the result of unlawful command influence."). As this Court held in *United States v. Hardy*, this version of R.C.M. 905(e) means waiver rather than forfeiture. 77 M.J. 438, 441–42 (C.A.A.F. 2018) (acknowledging prior confusion over the matter, but holding that "[t]he plain language" of R.C.M. 905(e) and prior precedent in *United States v. Swift*, 76 M.J. 210 (C.A.A.F. 2017), and *United States v. Denton*, 50 M.J. 189 (C.A.A.F. 1998), led to the conclusion that R.C.M. 905(b) objections are waived and not subject to appellate review). This understanding of R.C.M. 905(e) is bolstered by the fact that the President amended the language of the rule (effective on 1 January 2019) to now provide that failure to raise 905(b) objections in a timely fashion "forfeits" them. *See* Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018). This change would have been unnecessary if the prior version already meant forfeiture.

B. Appellant affirmatively waived his claims of defective preferral and accusatory UCI.

Although it is apparent that Appellant did not timely raise his accusatory UCI and defective preferral objections—thus waiving them by operation of R.C.M.

---

martial. The President amended the language of R.C.M. 905(e) in Executive Order No. 13,825. *See* Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018) (effective Jan. 1, 2019). After the amendment, R.C.M. 905(e) now specifies that a failure to raise an objection under R.C.M. 905(b) "forfeits" the objection "absent an affirmative waiver." This amendment does not apply to cases in which charges were referred to trial prior to the effective date. *Id*.

905(e) and this Court's precedents—Appellant also affirmatively waived these objections. At his arraignment, the military judge said, "Before receiving your plea, I advise you that any motion to dismiss or grant other appropriate relief should be made at this time." (JA 057). Appellant's counsel responded, "The defense has no motions at this time." (JA 057). Appellant then pleaded not guilty to all charges and specifications. (JA 057). By stating, "The defense has no motions at this time," Appellant affirmatively waived any objections based on defects in the preferral of charges, including that they were tainted by accusatory UCI. *See Swift*, 76 M.J. at 217 ("[A]s a general proposition of law, 'no objection' constitutes an affirmative waiver of the right or admission at issue.") (citing *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009)); *cf. United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (finding waiver when the appellant "affirmatively declined to object to the military judge's instructions and offered no additional instructions").

The waiver consequences imposed by R.C.M. 905(e) and by this Court are no mere technicality, and the prudence of such a rule goes beyond the concern appellant notes about ensuring objections are not raised "years after the trial, when the witnesses and victims have moved or their memory has faded." (Appellant's Br. 15). Rather, this waiver rule is part of the sound administration of military justice. Objections to the preferral of charges must be raised at a point when the

trial court can remedy the defect—for example, by "allow[ing] the Government to withdraw the charges and prefer new untainted charges." *Weasler*, 43 M.J. at 19. Were this not the case, defense counsel would be able to sit on their objection and stash it away as a trump card to play down the road in the event of an adverse ruling or outcome, completely wasting the valuable time of the military judge, government counsel, and any panel members or witnesses that may have been called in service of the court-martial. *See United States v. Huffman*, 40 M.J. 225, 229 (C.M.A. 1994) (Crawford, J. and Gierke, J., dissenting in part and concurring in result) (noting that "[t]he purpose of these so-called 'raise or waive' Manual Rules are to eliminate the expense to the parties and the public of rehearing an issue that could have been dealt with by a timely objection or motion at trial"). In fact, even a rule that permitted an accused to raise defective preferral due to UCI after the entry of pleas and on the eve of trial would be problematic because not only would that be a made-up deadline contrary to the actual deadline imposed by R.C.M. 905(b)(1), but it would encourage interminable sandbagging, ambushing, and delaying tactics by defense counsel, who would have a free, de facto continuance card they could play up to the minute before the trial begins.[10] A rule

[10] The government acknowledges there may be good cause for an accused to raise objections after the entry of pleas, such as if the objections are based on information that could not have been known previously. However, as the military judge noted, those circumstances are not present in this case. (JA 128–29).

that requires an accused to raise accusatory UCI or defective preferral before the entry of pleas forecloses such an ambush.

C. The military judge did not abuse his discretion when he found Appellant lacked good cause to excuse the waiver of his defective preferral and accusatory unlawful command influence objections.

Because Appellant waived his claim of defective preferral and accusatory UCI, the military judge was under no obligation to entertain Appellant's objections unless he could *show* good cause. R.C.M. 905(e)(1) ("The military judge for good cause shown may grant relief from the waiver."). The military judge expressly found that "[g]ood cause does not exist for filing this motion on the eve of trial" because "the facts upon which the defective preferral and unlawful command influence portions of the motion are based were discoverable by the defense beginning on 23 April 2018, the date of preferral." (JA 129).

The military judge's finding of no good cause was not an abuse of discretion because Appellant could have discovered the basis for the objection before the deadline to object. *Jameson*, 65 M.J. at 162 ("Federal courts have determined that no good cause exists when the defense knew or could have known about the evidence in question before the deadlines imposed under Fed. R.Crim.P. 12. We see no reason why the same reasoning should not apply in this Court."); *compare United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993) (finding no good cause when defense counsel could have found out the necessary information by

interviewing defendant); *United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir. 1993) (finding no good cause when the defense had access to evidence before trial). Likewise, in *United States v. Richter*, this Court found that the appellant's allegations of accusatory UCI were waived for lack of good cause when "[t]he evidence was readily available from Maj Peterson and MSgt Scott before trial. Appellant does not aver, and the record does not reflect, that any evidence was concealed from him, or that he was unlawfully deterred from raising the issue." 51 M.J. at 224; *see also United States v. Upshaw*, 49 M.J. 111, 114 (C.A.A.F. 1998) (Crawford, J., concurring) ("If command influence is known, or reasonably could be known in either the accusatorial stage or the selection process, failure to raise the issue constitutes waiver.") (citing *Weasler*, 43 M.J. at 17); *United States v. Drayton*, 45 M.J. 180, 182 (C.A.A.F. 1996) ("The relevant facts were known to appellant before trial. Appellant has not asserted that he was deterred at trial from objecting to a coerced preferral or recommendation. Accordingly, we hold that any alleged defects based on coercion were waived.").

Here, there is no question that as early as April 23, 2018, Appellant and defense counsel were aware that CPT CF had preferred charges as the accuser in this case. (JA 042, 046). Further, the obligation to object to the preferral of charges as defective before the entry of pleas was well known, *Hamilton*, 41 M.J. at 36; if Appellant wished to interview CPT CF to inquire into the circumstances

surrounding the preferral and explore whether there was a basis to object, nothing prevented defense counsel from doing so. Appellant certainly presented no information to the military judge that justified raising these objections to preferral at the eleventh hour—only two days before the trial was to begin and nearly *three months after* appellant entered his plea.

Appellant may only present his waived objections at trial for good cause "shown." R.C.M. 905(e)(1). Appellant did not even attempt to show good cause, nor would he have been able to do so had he tried. Although Appellant's counsel told the military judge at the February 24, 2019 hearing, "[w]e just found [out] about Captain [CF]'s knowledge" and that he had "now discovered" "the stuff with Captain [CF]," (JA 104, 112), Appellant offered no explanation for why he did not interview or even seek to interview CPT CF prior to that day. It is beyond cavil that Appellant knew of CPT CF's role in the case on April 23, 2018, because CPT CF preferred the charges and his name was on the charge sheet. (JA 042); *see Richter*, 51 M.J. at 224 (finding that the failure to raise at trial alleged UCI in the preferral of charges waived the issue on appeal where evidence of alleged UCI was "readily available" before trial); *United States v. Harvey*, 66 M.J. 585, 588–89 (A.F. Ct. Crim. App. 2008) ("We reject the appellant's assertion that waiver does not apply because it did not come to light until after the trial. As in *Richter*, this

evidence was readily available to appellant before trial.") (citing *Richter*, 51 M.J. at 224).

Good cause is not evident here when Appellant's trial was scheduled to commence on February 26, 2019, and defense counsel sought to derail it *only two days before it was scheduled to begin*—based on a matter knowable to the defense for ten months, three months after when it was required by rule to have been made, and even well after the court's December 4, 2018 deadline for motions. That Appellant did not even attempt to explain or excuse his tardiness means the military judge could not have abused his discretion when he decided not to reach past Appellant's waiver. *See Jameson*, 65 M.J. at 163 (finding the military judge did not abuse his discretion in finding no good cause for defense to make an untimely suppression motion when "[t]he defense counsel knew about the evidence at issue and also knew the general circumstances surrounding Appellant's signing the consent form").

Based on these facts, Appellant's argument that the military judge "did not possess sufficient facts or evidence necessary to determine whether the defense knew or should have known of the relevant facts" pertaining to Appellant's accusatory UCI objection fails. (Appellant's Br. 16–17). Even Appellant concedes in his brief, "[a]dmittedly, it would have been technically possible for defense to learn about the factual basis for the defective preferral and unlawful

command influence prior to entry of pleas." (Appellant's Br. 17). This concession, on top of the facts, makes this case no different from *Hamilton* and *Richter*: the ability to discover the information upon which Appellant relies was there well before the entry of his plea and waives his claim on appeal.

Further, actions defense counsel took prior to referral undermine Appellant's claim that "there was absolutely no reason for defense counsel to suspect that CPT JE improperly influenced CPT CF" before he raised the objection. (Appellant's Br. 17). On July 20, 2018, defense counsel sought a dismissal of the charges for defective referral because he had questions about CPT JE's role in the process. (JA 012; Appellant's Br. 3). Indeed, this motion yielded results; it prompted the convening authority to withdraw the charges. (JA 036). Thus, Appellant cannot argue that "there was absolutely no reason" for him to have any suspicions regarding CPT JE's role in the preferral process. (Appellant's Br. 17). Rather, his actions show he felt he had sufficient reason to take action over six months prior to his trial.

Appellant's further assertion that "the government arguably contributed to the delay in defense discovering the factual basis for the defective preferral" is far-fetched. (Appellant's Br. 17). Although the government did not turn over an email relating to 1LT AM's questioning of Appellant until the week before trial, (JA 105), this email had no bearing on the matter of whether the preferral was

defective. The email from 1LT AM to CPT JE reported questions 1LT AM had asked Appellant—ostensibly post-preferral—that pertained to the charged BAH fraud. (JA 114, 344). The email not indicate or even suggest that "CPT CF did not have personal knowledge of the matters set forth in the charges and specifications." (Appellant's Br. 18). The factual foundation for the BAH fraud and larceny charges consisted of documentary evidence that was already known to CPT CF and pre-dated the preferral of charges. *See supra*, Statement of Facts, Part A; (JA 234, 236–45, 248–49, 273–310, 311–312, 313–20, 341). Thus, the email traffic discussed above, (JA 105, 344), could not have impacted CPT CF's ability to prefer charges because he had a separate basis for his knowledge of Appellant's charged conduct. In light of this, Appellant's assertion that 1LT AM's later-disclosed email sparked suspicion that the preferral was defective strains credulity.

It is clear from these facts that the military judge's finding that the grounds for Appellant's February 24, 2019 motion were "discoverable by the defense beginning on 23 April 2018" was not clearly erroneous, which is the standard this Court uses when determining whether there was an abuse of discretion.[11] *United*

[11] Oddly, Appellant fails to lay out the standard for abuse of discretion in his brief and presents his argument as if this Court may substitute its view of the facts for the view of the military judge. However, given that the standard is that there must be a clear error in the military judge's findings of fact, Appellant's concession that it was "possible for defense to learn about the factual basis for the defective preferral and unlawful command influence prior to entry of pleas," (Appellant's Br. 17), combined with this Court's repeated admonition that such defects must be

States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999). Further, the military judge did not apply an erroneous view of the law, given that R.C.M. 905(e) and this Court's precedents expressly indicate that the types of objections Appellant raised in his February 24, 2019 motion are waived if not raised prior to the entry of pleas. *See supra* Argument, Part A. Thus, the military judge did not abuse his discretion when he declined to consider Appellant's motion on the ground that it had been waived and found that no good cause existed to excuse Appellant's waiver. *See United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (noting "[t]he abuse of discretion standard is a strict one, calling for more than a mere difference of opinion").

D. Even if the military judge abused his discretion when he enforced the waiver provision under R.C.M. 905(e), the error was harmless because Appellant's underlying claim of accusatory UCI was meritless.

If this Court finds the military judge abused his discretion when he found no good cause to excuse Appellant's waiver, it should still affirm the judgment of the Army Court because the error did not "materially prejudice[] the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2016). For several reasons, Appellant's underlying claim lacked merit.

---

raised before entry of pleas if the information on which the objection is based was available before then forecloses a conclusion that there was an abuse of discretion here.

First, a brief reading of the statement from CPT CF that Appellant submitted in support of his defective preferral and accusatory UCI claims fails to disclose any undue influence in the preferral process:

> When I first spoke to CPT [JE] about the charges against [Appellant], I told him that I understood the domestic violence charges but I want to deal with the rest of the charges at my level. I told him that I did not agree with the charges for BAH fraud, the false official statement, the assault on the other Soldier, and the child endangerment. . . . I told CPT [JE] that I did not agree with the charges, and he told me that if I did not prefer charges, someone else would. CPT [JE] said that this was going to Court-Martial, this is a Court-Martial offense. . . . I did not want someone else to tell [Appellant] about the charges, and I thought if someone else was going to prefer charges anyway, I might as well sign the charge sheet. . . . I decided that I had to prefer charges or someone else would. Throughout the experience with CPT [JE], I felt that [Appellant's] case was dealt with especially harsh. [Appellant] deserved punishment for the domestic incident, however, not to this extent.

(JA 341). Captain CF's statement reveals no coercion or unlawful influence. His legal advisor's (CPT JE's) statements that "this is a Court-Martial offense" and "this is going to Court-Martial" merely expressed his legal opinion. Indeed, this Court has indicated that judge advocates should share their candid views when they advise subordinate commanders: "We also do not believe that SJAs must be timid in expressing their views. SJAs frequently are asked for legal advice by subordinate commanders, and they are obliged to provide competent and candid advice." *Hamilton*, 41 M.J. at 37. Further, CPT CF did not state that his will was

overborne from undue influence; rather, it is clear he made his own choice. He said "I decided" and "I might as well sign the charge sheet" because he wanted Appellant to hear about the charges from him. (JA 341). Thus, Appellant's accusatory UCI claim is meritless.

Regarding the defective preferral allegation, CPT CF's statement that he "did not agree with the charges" does not undermine the preferral and render it defective. Rule for Courts-Martial 307(b) provides: "A person who prefers charges must: (1) Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and (2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief." Captain CF did not indicate that he thought the matters stated in the charges were not true in fact; rather, he felt that they should be treated less harshly. (JA 341) (stating "I felt that [Appellant's] case was dealt with especially harsh" and "I want to deal with the rest of the charges at my level"); *see also* (JA 035) (showing CPT CF's recommendation on the transmittal form for a lesser disposition than a general court-martial). Rule for Courts-Martial 307(b) does not require a final or conclusive determination of the accused's guilt prior to a court-martial, nor does it require the officer who prefers charges to make such a determination. *See United States v. Miller*, 33 M.J. 235, 237 (C.M.A.1991)

(noting the commander's disbelief in ultimate guilt of an accused did not preclude him from determining that charges were true in fact for purposes of preferral). As a result, there is nothing defective about the preferral in this case.

E. Any procedural error by the military judge was also harmless because such an error had no bearing on whether Appellant's crimes warranted a general court-martial or on the fairness of his trial.

First, even a cursory review of the record shows that not only was preferral of charges warranted based on the seriousness of Appellant's crimes, but referral to a general court-martial was wholly appropriate. *See United States v. Murray*, 25 M.J. 445, 449 (C.M.A. 1988) ("Lack of the pretrial advice is a procedural matter which, in some instances, would have no effect on the legality or the fairness of the proceedings and findings. Normally, reviewing the record of trial will tell us if the charges were serious enough to warrant trial by general court-martial and whether they were supported by evidence prior to referral. Courts of Military Review should, when faced with such a claim of error, perform this task."). Here, Appellant violently attacked his wife, a fellow soldier. She described Appellant's attack: "He had my arm, and he grabbed me by my neck, pushed me against the wall, and he slightly squeezed, enough for me to be afraid. I was raised a little bit off of the floor for a few seconds, then he finally let go." (JA 201). Beyond spousal abuse, Appellant also committed BAH fraud by claiming marriage to someone he had divorced—rather than his military spouse—which provided him

with additional benefits to which he was not entitled. (JA 237–45). Indeed, the fact that the general court-martial convening authority in this case acted independently—by withdrawing the initial charges and only referring them to a general court-martial after receiving a report from the Article 32 hearing officer and on the advice of his own staff judge advocate—should assure this Court and the public that any defects in the preferral process did not prejudice the forwarding of these charges. (JA 019–26; Supplemental JA 001–002).

Additionally, defective preferral and accusatory UCI aimed at the preferral process are both procedural matters that have no bearing on the fairness of the court-martial proceedings in this case. Appellant does not allege his trial was unfair—nor can he. Appellant was able to bring forward and cross-examine all witnesses that were of interest and present any exculpatory or mitigating evidence. *See generally* (JA 149–272). Further, the ACCA found his convictions for assault consummated by battery, BAH fraud, making a false official statement, and larceny of military property were legally and factually sufficient. (JA 005).

Moreover, had the military judge entertained Appellant's objections and sustained them, the government could have easily withdrawn the charges and preferred the charges anew without any prejudice to Appellant; this would have only achieved further delay for Appellant, not some magical exoneration. *See, e.g.*, *United States v. Haney*, ACM 29000, 1999 CCA LEXIS 304, at *17 (A.F. Ct.

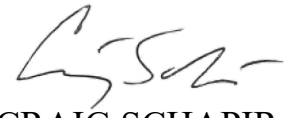
Crim. App. Nov. 4, 1999) (describing how defense counsel informed the appellant that "the result of asserting that the preferral was defective was that he would gain a short delay in the trial" and "[t]he charges would be preferred and referred to trial again," which led the appellant to "agree[] to waive the issue"). Being deprived of the opportunity merely to shift his inevitable trial date to the right is hardly the stuff of which "material prejudice" and "substantial rights" are made.

In sum, for the reasons outlined above, any error was harmless and did not "materially prejudice[] the substantial rights of [Appellant]." Article 59(a), UCMJ.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Court of Criminal Appeals.

A. BENJAMIN SPENCER
Captain, Judge Advocate
Appellate Attorney
Government Appellate Division
U.S.C.A.A.F. Bar No. 37481



CRAIG SCHAPIRA
Lieutenant Colonel, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37128

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

FOR:


STEVEN HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 6,759 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

A. BENJAMIN SPENCER
Captain, Judge Advocate
Attorney for Appellee
28 April, 2021

APPENDIX

United States v. Givens

United States Army Court of Criminal Appeals

October 19, 2020, Decided

ARMY 20190132

Reporter
2020 CCA LEXIS 366 *; 2020 WL 6146572

UNITED STATES, Appellee v. Specialist RONALD C. GIVENS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by *United States v. Givens, 2021 CAAF LEXIS 145 (C.A.A.F., Feb. 16, 2021)*

Motion granted by *United States v. Givens, 2021 CAAF LEXIS 218 (C.A.A.F., Mar. 11, 2021)*

Prior History: **[*1]** Headquarters, Fort Stewart. David H. Robertson, Military Judge, Colonel Steven M. Ranieri, Staff Judge Advocate.

Case Summary

Overview
HOLDINGS: [1]-After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court was not convinced beyond a reasonable doubt of appellant's guilt of child endangerment where the one-month old infant did not appear to have been subject to a reasonable probability of harm as she continued to sleep peacefully throughout the entirety of a physical altercation between appellant and his wife; [2]-Dismissal of the specification did not constitute a dramatic change in the penalty landscape and thus, the court affirmed the adjudged sentence.

Outcome
The finding of guilt to one specification was set aside and dismissed. The remaining findings were affirmed, and the adjudged sentence was affirmed.

Counsel: For Appellant: Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Major Jack D. Einhorn, JA; Major Benjamin A. Accinelli, JA (on brief).

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

Judges: Before BURTON, RODRIGUEZ, and FLEMING, Appellate Military Judges. Judge RODRIGUEZ and Judge FLEMING concur.

Opinion by: BURTON

Opinion

SUMMARY DISPOSITION

BURTON, Senior Judge:

On appeal, appellant contends his conviction of child endangerment is legally and factually insufficient.[1] We agree and grant relief in our decretal paragraph and reassess appellant's sentence.[2]

BACKGROUND

Appellant and SPC KN began dating while they were students in Advanced Individual Training (AIT) at Fort Sam Houston, Texas. While they were dating, SPC KN became pregnant with the couple's daughter, AG. The couple married in February 2018 when AG was one month-old.

On the evening of 21 February 2018, appellant placed their sleeping daughter, AG, in the center of an air mattress surrounded by two pillows **[*2]** in the bedroom. Appellant laid down next to his daughter and attempted to go to sleep.

Appellant and Specialist KN had previously been arguing. Specialist KN entered the bedroom, turned on the lights, and began using her phone, which upset appellant. After SPC KN refused to turn off the lights and stop using her phone, appellant reached across the air mattress and smacked the phone out of her hand. In response, SPC KN said she would leave the room. Specialist KN tried to pick up AG, but appellant reached over, grabbed SPC KN's arm, and pushed her up against the wall by her neck so that only her big toe was still touching the ground. When SPC KN again attempted to reach for their infant daughter, appellant grabbed her by the arm and pushed her out of the bedroom.

LAW AND DISCUSSION

We review questions of legal and factual sufficiency de novo. *United States v. Walters, 58 M.J. 391, 395 (C.A.A.F. 2003)*. "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gutierrez, 73 M.J. 172, 175 (C.A.A.F. 2014)* (quoting *United States v. Bennitt, 72 M.J. 266, 268 (C.A.A.F. 2013)* (citations and internal quotations omitted)). The test for factual sufficiency is "whether, after weighing the **[*3]** evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt*." *United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017)* (quoting *United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011))*.

We first address the legal and factual sufficiency of appellant's conviction for child endangerment of his infant daughter. The panel was instructed on the following elements:

(1) That the accused had a duty of care of AG;
(2) That AG was, then, under the age of 16 years;
(3) That on or about 21 February 2018, at or near Fort Stewart, Georgia, the accused endangered AG's physical health, safety, and welfare through culpable negligence by strangling, striking, and grabbing her mother, Specialist KN, while in close proximity to AG.; and
(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces, or of a nature to bring discredit upon the Armed Forces.

In reviewing the evidence contained in the record for factual sufficiency, we are concerned by the lack of evidence to support the third element. The government had the burden to establish appellant's conduct subjected AG to a "reasonable probability of **[*4]** harm." *United States v. Plant, 74 M.J. 297, 299 (C.A.A.F.*

---

[1] A military judge sitting as a general court-marital convicted appellant, consistent with his plea, of one specification of assault consummated by a battery, in violation of *Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2012 & Supp. IV 2016) [UCMJ]*. On 1 March 2019, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification each of making a false official statement, larceny of military property, assault consummated by a battery, communicating a threat, and child endangerment, in violation of *Articles 107*, *121*, *128* and *134, UCMJ*. Appellant was sentenced to confinement for 90 days, forfeiture of $1,680 pay per month for one month, reduction to E-1, and a bad-conduct discharge. Appellant was acquitted of one specification of assault consummated by a battery and one specification of adultery in violation of *Articles 128* and *134, UCMJ*.

[2] We have given full and fair consideration to appellant's other assigned errors and matters personally submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find them to be without merit.

2015).

The record indicates that there was a physical altercation between appellant and SPC KN in the room where AG was asleep. When appellant knocked SPC KN's phone from her hand, appellant reached across the bed, over AG, and smacked the phone out of SPC KN's hand. The record does not indicate where the phone landed.

Specialist KN testified that she attempted to pick up AG on two separate occasions. No further evidence is provided as to what efforts she made to pick up AG or how close she was to AG when appellant "jumped" across the bed, grabbed SPC KN and pushed her against the wall. The evidence indicates appellant was pushing SPC KN away from AG as AG slept soundly on the bed behind appellant.

Under the circumstances, AG does not appear to have been subject to a reasonable probability of harm as she continued to sleep peacefully throughout the entirety of the disturbance. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are not convinced beyond a reasonable doubt of appellant's guilt of child endangerment of AG. *See* United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

CONCLUSION

On consideration of the entire record, the finding of guilt of Specification **[*5]** 2 of Charge IV is SET ASIDE and DISMISSED. The remaining findings are AFFIRMED.

We reassess the sentence in accordance with the principles of United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986). Appellant's affirmed offenses are of the type that this court has the experience and familiarity with to reliably determine what sentence would have been imposed absent appellant's conviction of the specification of child endangerment. Based on his convictions, appellant could have been sentenced to a dishonorable discharge, twenty years of confinement, forfeiture of all pay and allowances, a reprimand, and reduction to the grade of E-1. The offense of child endangerment by culpable negligence not resulting in harm carries a maximum punishment of one year. The dismissal of this specification does not constitute a dramatic change in the penalty landscape. Accordingly, we AFFIRM the adjudged sentence of confinement for 90 days, forfeiture of $1,680.00 pay per month for one month, reduction to the grade of E-1, and a bad-conduct discharge.

All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings set aside by this decision and reassessed sentence are ordered restored. *See* UCMJ arts. **[*6]** 58b(c) and 75(a).

Judge RODRIGUEZ and Judge FLEMING concur.

NOTICE OF COURT-MARTIAL ORDER CORRECTION

IT IS ORDERED THAT, to reflect the true proceedings at the trial of the above-captioned case,

GENERAL COURT-MARTIAL ORDER NUMBER 2, HEADQUARTERS, FORT STEWART, FORT STEWART GEORGIA 31314, dated 29 January 2020,

IS CORRECTED AS FOLLOWS:

> BY reflecting in Specification 1, Charge III, a Finding of "Guilty of assault consummated by battery."

DATE: 19 October 2020

End of Document

United States v. Haney

United States Air Force Court of Criminal Appeals

November 4, 1999, Decided

ACM 29000 (f rev)

Reporter
1999 CCA LEXIS 304 *; 1999 WL 1085872

UNITED STATES v. Major CHARLES M. HANEY, JR.
United States Air Force

Notice: [*1] NOT FOR PUBLICATION

Prior History: Sentence adjudged 19 July 1990 by GCM at Peterson Air Force Base, Colorado. Military Judge: Robert N. Spencer. Approved sentence: Dismissal, confinement for 8 months, and forfeiture of $ 750.00 pay per month for 12 months.

Disposition: AFFIRMED.

marijuana and cocaine. Appellant was convicted of wrongful use of marijuana and cocaine. Appellant challenged the conviction. On appeal, the court affirmed the conviction because the court rejected appellant's arguments regarding alleged errors by the military judge during the DuBay evidentiary hearing, an allegedly defective staff judge advocate recommendation and addendum, alleged ineffective assistance of counsel, an alleged conflict of interest based on a member of the defense team working for the government prior to working for the defense, an allegedly inattentive court member, and plenary review of the case.

Outcome
Conviction was affirmed, because the court rejected appellant's arguments regarding evidentiary hearing, staff judge advocate recommendation and addendum, ineffective assistance of counsel, defense counsel conflict of interest, inattentive court member, and plenary review.

Case Summary

Procedural Posture
Appellant challenged his conviction, by a general court-martial, of wrongful use of marijuana and cocaine and his sentence of dismissal, confinement for eight months, and forfeiture of $ 750 pay per month for 12 months.

Overview
Appellant's urinalysis test report was positive for both

Counsel: Appellate Counsel for Appellant: Mr. Kevin J. Barry, Colonel Jeanne M. Rueth, Colonel Douglas H. Kohrt, Lieutenant Colonel Ray T. Blank, Jr., Major Carol L. Hubbard, and Captain Patience E. Schermer.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Colonel Michael J. Breslin, Lieutenant Colonel Ronald A. Rodgers, and Major Bryan T. Wheeler.

Judges: Before SENANDER, YOUNG and SPISAK,

Appellate Military Judges. Senior Judge YOUNG and Judge SPISAK concur.

Opinion by: SENANDER

Opinion

OPINION OF THE COURT

UPON FURTHER REVIEW

SENANDER, Senior Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial, of wrongful use of marijuana and cocaine. Article 112a, UCMJ, *10 U.S.C. § 912a*. His approved sentence is a dismissal, confinement for 8 months, and forfeiture of $ 750.00 pay per month for 12 months. We are reviewing this case for the third time. **[*2]** The appellant now asserts six errors. We find no error and affirm.

I. BACKGROUND

On 15 November 1989, the appellant was randomly selected to provide a urine sample for drug testing. During the test procedures the appellant told the drug test monitor he believed his sample would come back positive because of the prescribed drugs he was taking. Subsequently, his urinalysis test report was positive for both marijuana and cocaine. The appellant has consistently denied the use of illegal drugs. He has provided different theories as to how his test results could be positive. He first speculated that the combination of prescription drugs that he took for pain resulting from a motorcycle accident might be the cause. When that theory didn't find support, he investigated his use of herbal teas, but could find no evidence to support his theory that the teas he purchased at local shops contained marijuana or cocaine.

Following his conviction by court-martial, we resolved his first appeal, alleging 10 errors, adversely to the appellant in an unpublished opinion on 26 August 1992. *United States v. Haney, 1992 CMR LEXIS 659*, ACM 29000 (A.F.C.M.R. Aug. 26, 1992) (unpub. op.). On 6 April 1993, the substitute **[*3]** appellate defense counsel, in an Addendum to the Supplement to Petition for Grant of Review to the Court of Military Appeals (now United States Court of Appeals for the Armed Forces) asserted five additional errors plus an allegation of inadequacy of appellate representation. Because the Court of Military Appeals viewed the issues raised by substitute appellate defense counsel as matters that were not raised before this Court, the Court of Military Appeals set aside our prior affirmance and remanded the case to us for further review. *United States v. Haney, 38 M.J. 229 (C.M.A. 1993)*. On 26 May 1994, we considered the following assignment of errors: (1) ineffective assistance of trial defense counsel; (2) an assistant to the defense team had a conflict of interest; (3) the military judge erred during instructions; (4) comments by the convening authority constituted unlawful command influence; (5) the military judge erred in his finding a court member was not asleep during a portion of the trial; (6) the military judge was appointed in violation of the *Appointments Clause*; and (7) the trial and appellate judges were not appointed for fixed terms. In an unpublished opinion **[*4]** we found adversely to the appellant and again affirmed the findings and sentence. *United States v. Haney, 1994 CMR LEXIS 201*, ACM 29000 (f rev) (A.F.C.M.R. May 26, 1994) (unpub. op.).

Because our superior court found that the staff judge advocate failed to serve substitute defense counsel with the first or second addenda to the staff judge advocate recommendation (SJAR), both of which raised new matter, it set aside our opinion and returned the case to the convening authority for a new SJAR and convening authority action. *United States v. Haney, 45 M.J. 447 (1996)*. Our superior court also suggested that the convening authority consider an evidentiary hearing concerning Captain Watson's involvement in the trial and other ineffectiveness of counsel issues.

II. EVIDENTIARY HEARING

The 14th Air Force Commander, the new designated convening authority, ordered the evidentiary hearing and directed that it be conducted in the manner contemplated by *United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)*. He limited the scope of the hearing to resolving Captain Watson's alleged conflict and other ineffectiveness of counsel issues. Captain (now Lieutenant Colonel) Willner, **[*5]** Circuit Defense Counsel, served as the detailed military counsel and Captain Watson, then Peterson Air Force Base Area Defense Counsel, acted as part of the defense team at the trial. The military judge for this post-

trial Article 39(a) hearing was tasked to resolve the following questions.

a) When did Captains Willner and Watson become aware of any complaints concerning allegations of ineffectiveness-of-counsel and what were their responses?

b) What was Captain Watson's professional relationship with the accused and what services did he provide in defending the accused?

c) Who developed the initial trial strategy in defending the accused, and why was certain evidence not produced and witnesses not called? How was the accused involved in this strategy and did he consent to the defense strategy?

d) If Captain Watson was a member of the defense team, why was he not present at the initial trial? Did the accused waive Captain Watson's presence at the initial trial? Did the accused know of Captain Watson's prior representation of the government in his case and did he waive this conflict of interest?

Judge Howard R. Altschwager was detailed to preside over the hearing. **[*6]** He made specific findings of fact and answered the convening authority's questions in the chronological order of the events of the trial. We adopt those findings as our own. They are:

WHAT WAS CAPTAIN WATSON'S PROFESSIONAL RELATIONSHIP WITH THE ACCUSED AND WHAT SERVICES DID HE PROVIDE IN DEFENDING THE ACCUSED? DID THE ACCUSED KNOW OF CAPTAIN WATSON'S PRIOR REPRESENTATION OF THE GOVERNMENT IN HIS CASE AND DID HE WAIVE THIS CONFLICT OF INTEREST?

Captain Watson was assigned to Peterson Air Force Base, Colorado in March 1989, and became the Chief of Military Justice in July 1989. He became involved with the [appellant]'s case when he was notified by the base laboratory of the positive urinalysis results. Captain Watson described everything he did in this case for the government as "ministerial" in nature. Major Haney had security clearances that required the government to obtain permission before they could court-martial him. Captain Watson processed this request. He called the Armstrong Laboratory at Brooks Air Force Base and requested a litigation package. He asked AFOSI to check Major Haney's records, and follow-up an old allegation that he had distributed drugs while at **[*7]** Hanscom Air Force Base, Massachusetts. Major Haney's defense counsel, Captain Koza, approached Captain Watson asking him to investigate a theory or thesis of Major Haney's, which Major Haney had already presented to the government. Major Haney used a TENS unit, a small device which created an electrical current to stimulate his muscles. Major Haney also took numerous prescription and over-the-counter drugs for pain, high blood pressure and other ailments. The thesis was the electric current from the TENS unit caused his prescription and over[-]the [-]counter drugs to test positive for the marijuana and cocaine metabolites. Captain Watson said he thought the thesis was "laughable," but agreed to ask the laboratory to review the theory. The Armstrong Laboratory would not test the theory because they viewed it as being baseless.

Captain Watson testified that after he drafted the charges, he went to Major Haney's commander, Colonel Smith, and explained to him the judge advocate's recommendation that he prefer the charges. Colonel Smith was reluctant to prefer them, because he was not convinced Major Haney was guilty. Captain Watson explained to Colonel Smith that in order for **[*8]** him to swear to the charges, Colonel Smith had to have probable cause to believe that the offenses were committed by the accused. The question for Colonel Smith as explained by Capatin Watson was whether he believed the urinalysis testing program was valid. Captain Watson then explained to Colonel Smith what he needed to do when he informed Major Haney of the charges. He told Colonel Smith that he needed to read the charges to Major Haney and then give him a copy.

Captain Watson testified that he was present at the time Colonel Smith read the charges to Major Haney. Captain Watson said Colonel Smith introduced him to Major Haney at that time. Major Haney testified that only Colonel Smith was present when he was served with the charges. The charge sheet indicates that Colonel Smith, the accuser, preferred the charges and informed the accused of them the same day. The original record of trial is silent on the circumstances surrounding the service of charges.

I find that Major Haney was aware of Captain Watson's prior representation of the government no later than the first meeting between Captain Watson, Captain Willner and Major Haney. Captain Watson's name is on the charge **[*9]** sheet and Major Haney admits to receiving a copy on 2 April 1990. Major Haney admits he first met with Captain Willner before meeting with both of them together, he was informed Captain Watson had just transferred from the prosecution team, and Captain

Watson described his involvement with the prosecution, describing it as minimal. It is more probable that Captain Watson gave Major Haney a summary of his prior involvement with the prosecution, rather than a detailed explanation of everything he did while Chief of Military Justice. Major Haney early on viewed having a former member of the prosecution on his defense team as a distinct tactical advantage. Captain Watson told Major Haney they would have to wait and see if he could represent him.

Captain Watson researched conflict of interest cases and spoke to the base staff judge advocate about whether they would be willing to waive any potential conflict in him serving as Major Haney's defense counsel. The SJA advised Captain Watson to stay away from the case because of Major Haney's personality, but stated they would have no objections to him serving as defense counsel. Therefore, the government was aware that Captain Watson would **[*10]** be representing Major Haney.

Major Haney testified that Captain Watson was not present at the time Colonel Smith served a copy of the charges upon him. He said Colonel Smith did not read the charges to him, but merely handed him a copy and said he was sorry. Major Haney said the first time he met Captain Watson was in early June 1990. He said he was made aware at that time that Captain Watson had served in some role for the prosecution in his case, and he asked Captain Watson at that time if he would be a member of his defense team. He said he was not aware that the Captain Watson who swore Colonel Smith to the charges was the same Captain Watson who was now the new Area Defense Counsel (ADC). He said he first became aware of this when the military judge questioned him about a possible improper preferral at trial. I do not find Major Haney's testimony credible on this issue.

Shortly after the meeting between Major Haney, Captain Koza, and Captain Watson, Captain Willner traveled to Peterson Air Force Base to work on Major Haney's case. Captain Willner was aware that Captain Watson had been the Chief of Military Justice and had drafted the charges, and knew from talking with **[*11]** Colonel Smith that Captain Watson had sworn Colonel Smith to the charges. Captain Willner recalls being told by the Chief Circuit Defense Counsel, Lt Col Woodring, to speak with Captain Watson about his involvement in the case. After doing this, Captain Willner spoke with Major Haney alone and told him about Captain Watson's involvement with the prosecution on his case. Captain Willner does not recall the specifics of what he told Major Haney. All three witnesses testified that they had a discussion about Captain Watson formerly being a member of the prosecution. No one saw a conflict of interest, and Major Haney testified he concurred.

Captain Willner spoke with the Chief Circuit Defense Counsel about what he had learned about Captain Watson's prior involvement in the case. It was both Captain Watson's and Captain Willner's understanding that Captain Watson was "detailed" to the defense team. The "detailing" was not done in writing, and it was not directly communicated to Captain Watson by Lt Col Woodring. It was clearly understood by all of the parties, including Major Haney, that Captain Willner as the Circuit Defense Counsel and more experienced counsel would be the lead counsel. **[*12]** Captain Watson had never prosecuted or defended a urinalysis case before, so it was not expected that he would have any active role at the defense table during the trial.

There was no judicial inquiry into whether Major Haney waived any potential conflict with Captain Watson, because the court was never aware that Captain Watson was a detailed counsel. The record discloses that Captain Koza was reported as the original detailed counsel, and Major Haney waived any further participation by him. I find that there is sufficient evidence to show Major Haney was fully informed of his right to conflict free counsel by his trial defense counsel. The issue appears to be whether a waiver requires a judicial inquiry to be valid.

Captain Watson's role was to be a local contact point for Major Haney, Captain Willner, and local witnesses. Prior to trial, Captain Watson solicited and collected written witness statements. He interviewed witnesses with Captain Willner, but does not recall interviewing any witnesses by himself. He discussed trial strategies with Captain Willner and Major Haney. Captain Watson, Captain Willner and Major Haney all testified that they had numerous discussions **[*13]** about the trial tactics and strategy.

One of the defense theories investigated before trial was whether different teas that Major Haney drank contained ingredients that would result in positive urinalysis test results for marijuana and/or cocaine. Captain Watson was primarily responsible for investigating this theory. Captain Watson told Major Haney to bring him any teas he had left over, but Major Haney told him he had already disposed of them. Major Haney testified he threw them away in December at the

suggestion of a superior officer. They both went to the stores where he had purchased the teas. Two of the stores were now closed. Major Haney could not remember the names of the teas and they could not find them on the store shelves. Major Haney told him he also bought tea in bulk. Captain Watson spoke to the store owners to see if he could identify the supplier. He contacted two of the companies and was told they have botanists on their staffs who do quality control testing to ensure the teas do not contain any illegal substances. Major Haney's recollection was that they spent several days trying to find the teas, but was told that the suppliers and source of the tea change **[*14]** constantly.

WHY WAS CAPTAIN WATSON NOT PRESENT AT THE INITIAL TRIAL, AND DID THE ACCUSED WAIVE CAPTAIN WATSON'S PRESENCE AT THE INITIAL TRIAL?

Major Haney testified that the first he knew that Captain Watson would not be present at the defense table as a member of the defense team during the trial was the morning of trial. He said both defense counsel told him it would be better if Captain Watson was not present in court. He said they said it would be easier for Captain Watson to retrieve documents, and there was no plan for Captain Watson to question any of the witnesses. Major Haney concurred with the advice not to have Captain Watson in the court room.

Both Captain Watson and Captain Willner have a very different memory of when the question of whether Captain Watson should be present in court was discussed with Major Haney. Both say this discussion first occurred early, shortly after Captain Watson joined the defense team, and well before the first day of trial. They explained to Major Haney that because Captain Watson had no experience in urinalysis cases, he would not question any witnesses. Captain Willner had already interviewed Colonel Smith, and knew he would **[*15]** be a strong witness for the defense. Captain Willner believed that the trial counsel would attack Colonel Smith's strong opinion of Major Haney by asking him why he preferred the charges, and the defense counsel were afraid he would point to Captain Watson and say he did it upon the advice of Captain Watson. The effect of the court members wondering about a defense counsel advising a commander that there was probable cause to believe the accused committed the offenses would greatly undermine the impact of his testimony. Defense counsel say they explained all of this to Major Haney well before trial, and he concurred in the strategy. The more credible evidence supports a knowing waiver of Captain Watson's presence by Major Haney, however, the question remains whether a judicial inquiry was also required. Captain Willner at the beginning of the trial told the military judge that Captain Koza was "the original detailed defense counsel." No one informed the military judge that Captain Watson was also detailed as Major Haney's defense counsel.

Captain Watson consulted with Captain Willner and Major Haney during the recesses and discussed trial strategy issues with them. When the military **[*16]** judge raised the issue of the possibility of a defective preferral, both attorneys were involved in discussing Major Haney's options with him during the recess. Major Haney testified that this discussion was the first time they had informed him about the possibility of a defective preferral. Major Haney said he did not know until then that Captain Watson, his defense counsel, was the same Captain Watson who had sworn Colonel Smith to the charges. He said his attorneys told him they were fortunate that Colonel Smith had blurted out that he did not believe Major Haney was guilty. He said they told him there was no way he would now be convicted, even though the military judge had instructed the members to disregard the statement. Major Haney said if the military judge had asked him whether he wanted to proceed at that time and waive the issue, he would have said yes. Major Haney was asked this question by the military judge at pages 264-266 of the record of trial, he stated he discussed the issue with his counsel, and waived any issue related to a defective preferral of charges.

Captain Willner said he recognized defective preferral as a potential issue after he interviewed Colonel **[*17]** Smith prior to trial. He recalls discussing this issue with Major Haney both before the trial and during the recess after the issue was raised at trial by the military judge. Captain Watson was present during the discussion at trial, and Major Haney also discussed the issue with Captain Hedgepeth during the same recess. Captain Hedgepeth was an Air Force Judge Advocate who testified as a character witness for Major Haney. Both Captain Willner and Captain Watson recall telling Major Haney the result of asserting that the preferral was defective was that he would gain a short delay in the trial. The charges would be preferred and referred to trial again, but would be tried before a different court panel. The disadvantages discussed were that the government would now have a better insight into the defense case. The defense would also lose the effect of the members hearing Major Haney's commander state

he did not believe he was guilty, even though he preferred the charges. The government would most likely have someone else prefer the charges, and would move ahead of time to limit Colonel Smith or any other witness expressing an opinion as to guilt or innocence of Major Haney. Both counsel **[*18]** testified that after discussing the issue with Major Haney, he agreed to waive the issue and pursue this strategy.

WHO DEVELOPED THE INITIAL TRIAL STRATEGY IN DEFENDING THE ACCUSED, AND WHY WAS CERTAIN EVIDENCE NOT PRODUCED AND WITNESSES CALLED? HOW WAS THE ACCUSED INVOLVED IN THIS STRATEGY AND DID HE CONSENT TO THE DEFENSE STRATEGY?

Captain Willner as the lead defense counsel was primarily responsible for developing the trial strategy. Captain Willner discussed all of the strategies with Major Haney and Captain Watson both before and during the trial. Both defense counsel described Major Haney as the most active client either of them ever had in discussing strategies to be used in his defense.

The first defense theory was one created by Major Haney before Captain Willner or Watson ever became involved in the case. Major Haney had put together what he called a thesis and had given it to the government. It is unclear whether this was done with the knowledge and consent of his first defense counsel Captain Koza. Captain Watson had been asked by Captain Koza to explore this thesis for the defense in January 1990. Captain Watson forwarded the request to the Armstrong Laboratory, **[*19]** but they refused to explore the theory, saying it was not scientifically possible. When Captain Willner was assigned to the case, he asked Major Haney who would support this thesis. Major Haney gave him some names, but when Captain Willner talked with them they either were not competent to testify about the theory, or if competent, did not believe the theory to be true. Major Haney gave him the name of Hauser Labs who were associated with the University of Colorado in Boulder, Colorado. Major Haney had already hired them to explore his theory, and told Captain Willner that they supported his theory. Captain Willner reviewed the written report and discovered the lab did not support Major Haney's thesis. Captain Willner spoke to the chemist who had performed the tests. He told him the electrical current from the TENS unit would not coalesce into the metabolites for marijuana and cocaine. He also told Captain Willner that he had told Major Haney the lab could not support his theory. Captain Willner contacted experts in forensic toxicology that he was familiar with, and could find no one to support the theory. Captain Willner made a motion at trial to prevent the government from making **[*20]** any reference to this thesis of Major Haney's, but lost the motion. A variation of this theory was an unknowing and innocent ingestion defense. The theory was the teas used by Major Haney contained substances which unknown to him caused him to test positive for cocaine and/or marijuana. The steps taken to explore this theory have been previously discussed.

A second strategy that was explored was to attack the accuracy of the Armstrong Laboratory results by comparing them to the toxicology screen results from Major Haney's blood. Major Haney had had surgery on 20 November 1989, five days after submitting his urine specimen, which tested positive for cocaine and marijuana. Captain Willner spoke with Major Haney's physician who told him the blood toxicology screen used before surgery does not have the same sensitivity as the Armstrong Laboratory test. He told Captain Willner he would not expect to see evidence of marijuana or cocaine in the blood toxicology screen unless the patient had used the drugs between 15 and 20 November 1989. Captain Willner determined that this had no evidentiary value to the defense. He does not recall if he reviewed the medical records or asked to see **[*21]** them once he found out that they would be of no value.

A third strategy that was explored was the theory that Major Haney could not have used cocaine and marijuana during the charged time period because he was always being observed by other people, none of whom saw him under the influence of any drug. During the charged time period, Major Haney was involved with others in testing the capabilities of the Global Positioning Satellite (GPS) network. He was working long hours and was called in at irregular times. He was required to perform complex tasks at work. The defense explored this theory and presented evidence to support it. They called Major Martel at trial to testify about Major Haney's busy schedule, irregular hours, and complex tasks required to be performed by him. The defense has criticized the trial defense counsel for not calling witnesses who also observed Major Haney during his off-duty time, specifically Lt Col Roe and Major Haney's wife. Lt Col Roe submitted a statement before trial to trial defense counsel telling them he and his wife had dinner and spent most of the day with Major Haney and his wife on 7 November 1989. Lt Col Roe testified at the DuBay hearing **[*22]** that he just recently has recognized that the date he spent with Major Haney and

his wife was not 7 November 1989, but 12 November 1989. This change in the date is significant given the testimony of the forensic toxicologist at trial about the retention time for cocaine in the urine. The date given to trial defense counsel was well beyond the time period where observation of Major Haney in a social setting had any evidentiary value to rebut the charge of use of cocaine. Additionally, the error in reporting the date of the dinner party was never noticed by Lt Col Roe until recently, and the error in the date was never reported to trial defense counsel.

A corollary to this strategy was to have Major Haney testify in his defense and deny his use of marijuana and cocaine, as well as outline his activities during the charged time period. Major Haney alleges that his trial defense counsel did not prepare him for his testimony until the morning before trial, and their preparation was cursory. Captain Willner testified that he prepared Major Haney for testifying well before trial. He discussed the line of questioning he would pursue. He told him some of the specific questions he would **[*23]** ask, and elicited Major Haney's responses. He also told him other areas he would cover in his questioning, without telling him the specific questions he would ask. He told him how he should conduct himself in court, his demeanor, and to address his responses to the court members. He told Major Haney to unconditionally deny his use of drugs. He did not tell him to qualify his denial by saying "I did not use them at that time."

Captain Willner and Captain Watson spoke with Mrs. Haney a number of times before trial, as well as after trial. Mrs. Haney testified the first time they spoke to her was just two days before trial, a statement both counsel deny as being true. Mrs. Haney said trial defense counsel told her two days before trial that her husband was going to be convicted and go to jail for 7 years. Trial defense counsel deny they said this, however, they did discuss with her the possibilities of what could occur. Captain Willner did not call her as a witness because the disadvantages of calling her as a witness outweighed any advantage in calling her. Mrs. Haney had medical problems that were beginning to be resolved just before trial. Mrs. Haney was also very emotional. Major **[*24]** Haney told Captain Willner that he was not able to be honest with his wife concerning aspects of the trial. Captain Willner was concerned that if she testified she would antagonize the court members because she appeared to have a big chip on her shoulder about the Air Force. Major Haney and Mrs. Haney had met and married while both were Air Force enlisted members. When Major Haney was commissioned, she believed that she had been forced to get out of the Air Force after serving over eight years, thus giving up her right to her own retirement. Mrs. Haney appeared to be very bitter about this, and Captain Willner was concerned she would come across this way. What Mrs. Haney could testify about during findings was that they had been very busy the two weeks before 15 November 1989, because they both had busy jobs and were also meeting with realtors to try and sell their house. Captain Willner also felt that court members gave less weight to the testimony of a spouse than other witnesses, because next to an accused, she had more to lose than anyone else. Captain Willner talked about these issues with Major Haney and he agreed to this strategy.

A fourth strategy explored by the trial **[*25]** defense counsel, and one they intended on using until two weeks before trial, was the theory that the urine specimen that tested positive either was not Major Haney's or the specimen had been adulterated. Major Haney had a long history of taking prescription pain medications. If the urine specimen which tested positive for cocaine and marijuana metabolities was his, or was not adulterated, the metabolities for the prescription drugs should be found in the correct ratio to when he would take these drugs. If the urine specimen was not his, none of his prescription drugs would be found in the specimen, or if found in lower than expected ratios, would show that the urine had been diluted or adulterated. The trial defense counsel got the name of Dr. Levisky from either Major Haney or someone Captain Willner had spoken to about the TENS thesis. Dr. Levisky was a toxicologist for the El Paso County medical examiners office and was an officer in the Air Force Reserves. Dr. Levisky agreed to help the defense for free on his own time. This meant that the defense did not have to notify the government of Dr. Levisky until they decided they were going to call him as a witness, and did not have **[*26]** to request funding for the testing from the convening authority. However, to test this theory, they had to request an aliquot of the urine.

Dr. Levisky tested the aliquot for the cocaine and marijuana metabolities and found them in the same ratios as the Armstrong Laboratory and Northwest Toxicology Laboratory. He then tested for the presence of one or two of the medications being taken by Major Haney. He found both of them present, but at levels lower than expected. This supported the defense theory that Major Haney's sample had been adulterated by someone pouring into his specimen some person[']s urine which contained the metabolities for cocaine and

marijuana. Two weeks before trial, Dr. Levisky on his own initiative, examined the aliquot for the presence of Theopholine, another drug commonly taken by Major Haney. He found the Theopholine in the ratio he expected. The most likely explanation that Dr. Levisky had was that this was Major Haney's urine, but he had not taken his prescription medications at either the time or in the quantity required by the prescription. Captain Willner explained the damage that would be caused to the defense case by presenting evidence that conclusively **[*27]** identified this as Major Haney's urine. Major Haney wanted to present this defense, but in the end, agreed that it made no sense to positively identify this as his urine. Captain Willner and Dr. Levisky thought as a corollary to this theory, they would have a physician review Major Haney's medical records to see if there was any medical reason why he would secrete lower levels of the other drugs. Dr. Bowerman with the medical examiners office in El Paso County reviewed the records and found no reason why Major Haney would secrete lower levels. He also told Captain Willner that Major Haney fit the profile of a drug user and he thought Major Haney used the marijuana and cocaine.

A fifth strategy explored and used by the trial defense counsel was the good military character of Major Haney. Both trial defense counsel requested Major Haney to contact potential character witnesses and ask them to draft character statements. Captain Willner does not recall whether he gave Major Haney or potential character witnesses any specific guidance, either orally or in writing, about what to include in the character statements. Captain Watson identified certain parameters, such as not to say "he **[*28]** did not do it" or "he passed a polygraph," because neither was admissible and the second was not true. The character statements came to Captain Watson either directly or through Major Haney to review and edit. Captain Watson edited the witness statements as they came in, but not all came back in time to be re-submitted after they had been edited. Captain Watson believed it was important that the character statements admitted into evidence not have any obvious editing gaps. Trial defense counsel do not remember if everyone who submitted a statement was interviewed as a potential witness. Captain Willner interviewed potential witnesses, and often times Captain Watson was present. Captain Watson does not recall interviewing any witnesses by himself. Trial defense counsel talked about which witnesses to call both among themselves and with Major Haney. They wanted to present those they thought would be most credible and who covered different time periods. Trial defense counsel knew that the military judge would place a limit on the number of witnesses they could call on this issue. They decided after a certain point, it would be counter-productive to have repetitive testimony. The court **[*29]** members would begin to resent it, and the weaker witnesses would dilute the testimony of the stronger witnesses. The trial defense counsel discussed with Major Haney the witnesses they proposed on calling and the reasons for their decision. Neither recalls any objections to Captain Willner's choices by Major Haney.

Hearing exhibits 30 and 31 look like the lists of potential witnesses provided by Major Haney to Captain Willner. Captain Willner has no recollection as to who or how many of the witnesses he interviewed, but believes he interviewed most. Some of the interviews were by phone, but most were in person. Major Haney did not tell him the number next to the name on exhibits 30 and 31 were the desired order in which witnesses be called. Captain Willner met and spoke with each person that he called as a defense witness before trial. He does not remember how long he spoke with each one. He did not rehearse specific questions and answers with them, but instead discussed the topic areas he would ask questions about on direct examination, and what questions they could anticipate on cross-examination.

Captain Willner testified that he attempted to help Major Haney prepare an **[*30]** unsworn statement prior to trial. Major Haney refused to prepare it, and told Captain Willner it was inconceivable that he would be convicted. After he was convicted, he once again told Major Haney to prepare the statement. The next morning they reviewed the statement before trial. The defense did not call any witnesses in sentencing because all of the good character evidence had already been introduced during findings. The defense did introduce defense exhibits CC and DD. The problem for the defense was the members by convicting Major Haney showed they did not believe his testimony during findings. The defense had multiple character statements and testimony already before the members and it could be used by the members in sentencing as well. They chose not to call witnesses from his unit to testify about his rehabilitative potential because they had already presented their strongest witnesses and the members would view this as more of the same evidence they had already heard in findings. The defense was also concerned about the cross-examination they would experience about the rehabilitative potential of a major convicted of drug offenses. The defense did present to the members information **[*31]** about Major Haney's medical problems and support for his mother through his

unsworn statement. They did not present independent medical evidence because Major Haney's doctors did not view his medical problems as being as serious as Major Haney did.

After the trial, both trial defense counsel were involved in preparing clemency matters. They had read all of the letters submitted before trial, and chose to use some and not others. Some were not used at trial because they contained potentially objectionable material and the edited statements were not returned in time for use at trial. Other statements were used only during clemency because they contained either potentially negative information, did not add anything, or the court members could become irritated by their contents.

WHEN DID CAPTAINS WILLNER AND WATSON BECOME AWARE OF ANY COMPLAINTS CONCERNING ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND WHAT WERE THEIR RESPONSES?

Major Haney's first post-trial complaint is that he was not prepared to immediately go into confinement once he was sentenced to confinement. He said he was unaware that he would not be able to go back and gather his things together. Captain **[*32]** Watson said this was a detail he would have his defense paralegal instruct the client on, including giving them a handout of what to pack for confinement. In my opinion, there is a probability that this information was not passed on to Major Haney. Major Haney was Captain Watson's first defense client, his first officer client, and one of his first courts-martial as a defense counsel. Major Haney did not believe he would be convicted. There is a low likelihood that he would have been receptive to any information about sentencing or post-trial matters from the defense paralegal, let alone his own attorneys.

Captain Willner as the defense counsel of record was responsible for all post-trial duties. Captain Watson assisted him by being a contact point for Major and Mrs. Haney, and received all matters to be submitted in clemency. Major Haney said he tried contacting Captain Watson 20 to 30 times between the time he was convicted and the time he let anyone officially know he was dissatisfied with his defense counsel. He said he was only successful in contacting him about a dozen times. He said he wanted Captain Watson to give him more information about his prior role for the government **[*33]** in his case, his post-trial rights, and assistance to his wife to explain to her what was going on. Captain Willner was much harder to contact. Captain Watson was very active in gathering clemency matters for Major Haney.

Captain Willner was first aware of Major Haney having potential concerns about the performance of military trial defense counsel before the trial. Captain Willner was aware that Major Haney's wife and friends were advising him to obtain civilian counsel. Captain Willner spoke with Bob Warren, a civilian attorney contacted by Major Haney before trial, and answered his questions about the case. Captain Willner was contacted by two other civilian defense counsel after the trial sometime before Captain Willner submitted his R.C.M. 1105 and 1106 materials. Captain Willner had also heard that Major Haney was making complaints to the jail staff about his attorneys. Captain Willner spoke to the Chief Circuit Defense Counsel about this, and he was advised to talk to Major Haney about any dissatisfaction he had with them. Captain Willner spoke with Major Haney and told him he had to feel completely comfortable with his defense counsel, and if he was unhappy he needed to **[*34]** release them and get new counsel. Major Haney denied the allegations from the jail staff that he was unhappy with his trial defense counsel, and he said he was satisfied with their performance. This conversation took place before Captain Willner submitted his R.C.M. 1105 and 1106 materials.

Captain Willner submitted the defense clemency matters to the convening authority on 4 October 1990. Captain Willner submitted his R.C.M. 1105 and 1106 matters to the convening authority on 23 October 1990. Major Haney's undated request for clemency, which is Hearing Exhibit 34, was submitted with Captain Willner's clemency materials on 4 October 1990. Hearing Exhibit 35, dated November 16, 1990, says in paragraph 2a that both of his trial defense counsel quit on 23 October 1990. However, the testimony of both trial defense counsel and Major Haney is that Hearing Exhibit 33, dated 25 October 1990, is the first notice either the convening authority or either trial defense counsel had that Major Haney was dissatisfied with his trial defense counsel or that he was alleging ineffective assistance [of] counsel. Major and Mrs. Haney testified that they had been working on a draft of Hearing Exhibit **[*35]** 33 for several weeks, but they had not shared their concerns or a draft with anyone else, including their trial defense counsel. Major Haney gave Mrs. Haney what is now Hearing Exhibit 33 on 25 October 1990 to hand deliver to the convening authority, which she did on the same date. Captain Watson had never been identified in the record as an attorney of record, so there never was any formal release of him by Major Haney or the court.

Captain Willner was formally released by the court at the post-trial Article 39(a) on 31 October 1990.

III. ERRORS BY THE MILITARY JUDGE DURING EVIDENTIARY HEARING

The appellant in his first assignment of error asserts the military judge erred by (1) failing to evaluate the credibility of the witnesses and evidence; (2) failing to make findings of fact and conclusions of law; and (3) failing to reopen the hearing to allow defense cross-examination of a prosecution witness after discovery of new evidence during the hearing. He asserts these errors substantially prejudiced him and rendered the *DuBay* hearing incomplete, fundamentally unfair, and fatally flawed.

A military judge in a post-trial hearing has the burden of providing a record on which **[*36]** the convening authority and appellate courts can reach a decision on the merits of an appellant's claims. We expect the military judge, when necessary, to subject witnesses to penetrating questioning so that he can determine their credibility, reconcile inconsistencies in the testimony, and find facts. *United States v. Calamita, 48 M.J. 917 (A.F. Ct. Crim. App. 1998)*. That is precisely what Judge Altschwager did in this case. He conducted a thorough hearing and analysis of the credibility of the witness testimony. His comprehensive findings of fact both answered the questions posed by the convening authority and created a thorough record on which we can rely to resolve conflict of interest and ineffectiveness of counsel issues.

The appellant further asserted that he was prejudiced by the military judge's decision not to reopen the hearing for cross-examination of Lieutenant Colonel (Lt Col) Willner. Prior to the hearing the assistant trial counsel asked Lt Col Willner to provide the government and defense counsel any notes he made during his representation of the appellant. However, Lt Col Willner had recently moved and did not have the notes available. He brought **[*37]** them with him to the hearing. The appellant's counsel was mistakenly told there were no notes because that is what the assistant trial counsel understood. The parties became aware of the notes during cross-examination of Lt Col Willner. After assuring that the appellant waived any privilege he may have had concerning his defense counsel's notes, the hearing officer granted a recess to enable counsel to review the notes. The hearing officer announced, after the 37 minute recess, that he had been informed that the defense was prepared to continue their cross-examination, but wanted some time to review the trial defense counsel's notes to determine if it would be necessary to reconvene at a later date or if they could emphasize the points they wished to make by written brief. The cross-examination of Lt Col Willner continued and the hearing was concluded subject to the defense requesting it be reopened.

Three weeks later the appellant requested the hearing be reopened to continue cross-examination of Lt Col Willner based on a review of his file. The hearing officer denied the request to reopen after determining that all of the areas that the defense requested to reexamine were covered **[*38]** during Lt Col Willner's testimony. The hearing officer's report discussed this matter as follows:

Specifically, Lt Col Willner testified with his case file on his lap so that it was available to jog his memory. Lt Col Willner testified on each of the areas requested by defense counsel and said even though he had reviewed the file, he had no further recollection of each of these areas of inquiry. Further inquiry by the defense counsel, with specific references to his notes, was highly unlikely to result in more detailed answers.

We review a military judge's denial of a defense request to produce a witness under an abuse of discretion standard. *United States v. Miller, 47 M.J. 352, 359 (1997)*. Testimony of a witness is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. The appellant conducted extensive cross-examination of Lt Col Willner and the military judge did not abuse his discretion when he determined that reconvening the hearing for further cross-examination would not be productive. Mil. R. Evid. 611(b). The appellant's assertion that the *DuBay* hearing was **[*39]** incomplete, fundamentally unfair, and fatally flawed is without merit.

IV. DEFECTIVE STAFF JUDGE ADVOCATE RECOMMENDATION

AND CONVENING AUTHORITY ACTION

The appellant asserts the new SJAR and addendum are defective and void because they (1) are based on conclusions drawn from a fatally flawed *Dubay* hearing which failed to adequately address crucial issues in the case, including the questions set forth in the convening order, and (2) are made in a vacuum, without the benefit of any counsel by the staff judge advocate.

The appellant concludes the *Dubay* hearing was fatally flawed because he believes the military judge did not

answer two questions: (1) whether the appellant waived Captain Watson's presence at the trial, and (2) whether the appellant knew of Captain Watson's prior participation on the government side and waived any conflict. We disagree. The hearing officer's findings of fact, which are set out above, fully answer each of these questions. Based on all of the testimony it is clear that Major Haney wanted the benefit of having Captain Watson assisting in his defense. Captain Watson was careful to ensure there was no conflict of interest. The *DuBay* hearing **[*40]** brought out all of the essential facts and is not fatally flawed as claimed by the appellant.

The appellant next complains because the staff judge advocate did not include legal arguments, justifications, or other discussion of the issues in the new SJAR or addendum. However, the staff judge advocate is only required to state whether corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under Rule for Courts-Martial (R.C.M.) 1106(d)(4). The response may consist of a statement of agreement or disagreement with the matters raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required. R.C.M. 1106(d)(4). The SJAR and the convening authority action are not defective. The convening authority had all of the evidence and legal advice necessary to take action. R.C.M. 1107(b)(3). This issue has no merit.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

The appellant has again asserted ineffective assistance of counsel. Although this Court has twice ruled on this issue, we will once again examine it in light of the evidence obtained during the *DuBay* **[*41]** hearing. Appellant apparently has now narrowed his assertion of ineffective assistance of counsel to trial defense counsel's presentation of evidence on good military character.

To prevail on a claim of ineffective assistance of counsel, an appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland v. Washington, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)* (citing *Michel v. Louisiana, 350 U.S. 91, 101, 100 L. Ed. 83, 76 S. Ct. 158 (1955))*. Strategic or tactical decisions made by a trial defense counsel will not be second-guessed on appeal unless there was no reasonable or plausible basis for the defense counsel's actions. *United States v. Garries, 19 M.J. 845 (A.F.C.M.R. 1985)*, *aff'd*, *22 M.J. 288 (C.M.A. 1986)*, *cert. denied*, *479 U.S. 985, 93 L. Ed. 2d 578, 107 S. Ct. 575 (1986)*. See *United States v. Mansfield, 24 M.J. 611 (A.F.C.M.R. 1987)*. A strategic decision by defense counsel may constitute ineffective assistance of counsel only if it was so patently unreasonable that no competent attorney would have made the same decision. *Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)*. **[*42]** The reasonableness of a counsel's tactical decisions is determined by examining the facts at trial and the circumstances under which counsel's decision was made. *Mansfield, 24 M.J. at 617*.

Lt Col Willner explained that he limited the number of witnesses to call on good military character and presented the remaining evidence in statement form. He was aware that the military judge would not allow an unlimited number of witnesses and he consulted with the appellant and called those he believed would be most credible and who would cover different time periods. Lt Col Willner believed it would be counter-productive to have repetitive testimony and the members would resent it. The character statements that were presented were edited so as to show the appellant's good military character. The trial defense counsel had the statements redone to avoid having obvious editing gaps because many of the witnesses referred to never seeing the appellant use drugs. Evidence that witnesses had never seen or known the accused to use drugs was not admissible as evidence of a character trait. *United States v. Schelkle, 47 M.J. 110 (1997)*, *cert. denied, 522 U.S. 1078, 139 L. Ed. 2d 756, 118 S. Ct. 857 (1998)*. **[*43]** Trial defense counsel had a sound tactical reason for editing the statements and we will not second-guess the editing or presentation of these statements. Trial defense counsel's performance was not deficient. This claim of ineffective assistance of counsel is without merit.

VI. CONFLICT OF INTEREST

Once again the appellant asserts he was denied due process of law and the effective assistance of counsel when Captain Watson swore his commander to the charges during the preferral process and then switched sides becoming the area defense counsel and eventually assisting appellant in the preparation of his case.

When an alleged conflict of interest is at issue, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,*

446 U.S. 335, 348, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980), *quoted in* United States v. Breese, 11 M.J. 17, 20 (C.M.A. 1981). The burden of proof is on the defense. United States v. Hicks, 52 M.J. 70 (1999); United States v. Calhoun, 49 M.J. 485, 489 (1998) (citing Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). **[*44]**

We find that the appellant was aware of Captain Watson's prior participation on the government side and knowingly waived that participation because he believed there would be an advantage to having Captain Watson on his defense team. Captain Watson took all appropriate steps to be released by the staff judge advocate. The facts developed during the *DuBay* hearing demonstrate that he was equally careful to properly inform the appellant so he could make a knowing waiver of any conflict of interest based on Captain Watson's prior participation on the prosecution team.

During the course of the trial an issue arose as to proper preferral of charges by Colonel Smith. An Article 39(a), UCMJ, session was held and Captain Watson was called to testify. Captain Willner stated to the court:

IMC: Your Honor, before we do that, I wanted to point out to the court that since the time that these charges were preferred, Captain Watson has been reassigned to the Area Defense Counsel Office. As the Area Defense Counsel, he has worked with me in preparing for this case. He has also taken confidences from Major Haney.

MJ: Well, fine. We won't get into his confidential relationship with **[*45]** the accused. We'll discuss only matters pertaining to the advice given to Colonel Smith at the time of preferral. Captain Watson?

Under these circumstances the trial judge should have made inquiry into a possible conflict of interest. Regardless, as Judge Altschwager found after the post-trial evidentiary hearing, the appellant clearly understood Captain Watson's potential conflict and waived it. Furthermore, the appellant failed to meet his burden to show how Captain Watson's performance was adversely affected by the perceived conflict of interest, or how it adversely affected the outcome of his trial. This asserted error is without merit.

VII. INATTENTIVE COURT MEMBER

The appellant asserts that he was denied his right to counsel, due process, and a fair trial during the post-trial Article 39(a) session conducted by the military judge to resolve allegations that a court member was inattentive or asleep.

At the post-trial Article 39(a) session the military judge asked Captain Willner, who no longer was counsel for the appellant, what he had observed during the trial. Captain Willner had a duty to truthfully answer questions concerning his observations in the courtroom. **[*46]** His answers neither constitute a conflict of interest nor a violation of the attorney-client privilege. The military judge was not precluded from conducting this post-trial session any more than he would have been precluded from making inquiry concerning an inattentive court member during the trial. We find no basis for changing our previous opinion that the asserted error is without merit.

VIII. APPELLATE REVIEW UNDER ARTICLE 66(c), UCMJ

The appellant requests that we perform a plenary review of his case and not limit our review to the specific issues. Typically, action can only be taken that conforms to the limitations of the remand. United States v. Smith, 41 M.J. 385, 386 (1995). However, an appellate court may consider closely related issues(s) where the record is adequately developed. United States v. Jordan, 38 M.J. 346, 353 (C.M.A. 1993) (Wiss, J., dissenting). In this case, we disagree with the appellant that a complete review of this case was required. Nevertheless, we have considered the entire record, including the post trial Article 39(a), UCMJ, session record and the record of the post-trial evidentiary hearing.

IX. CONCLUSION

[*47] We conclude the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge YOUNG and Judge SPISAK concur.

End of Document

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April 28, 2021.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate
General, United States Army
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822