NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 0697

STATE OF LOUISIANA

VERSUS

STEPHEN F. DAVIS

Judgment Rendered: NOV - 1 2010

* * * * * *

Appealed from a
Special Court-Martial
Conducted by the Louisiana Army National Guard
Convened by the Adjutant General of the
State of Louisiana
Convening order S-07-01
Military Judge Colonel (Retired)
Jules D. Edward, III, Presiding

* * * * * *

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Defendant/Appellant
Stephen F. Davis

* * * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

The defendant, Sergeant First Class Stephen F. Davis, was convicted by special court-martial, after pleading guilty to conspiring to effect the enlistment of ineligible recruits, unlawful enlistment, signing false official enlistment documents with intent to deceive, and wrongfully attempting to impede an investigation. The convening authority approved and executed Davis's sentence, which included a $200 fine, an official reprimand, the forfeiture of two-thirds pay and allowances for four months, and a reduction in rank. He appeals to this Court, and we affirm.

FACTS

In March 2008, Davis was a recruiter employed full-time as a member of the Active Guard Reserve Program. He and several other recruiters entered into an agreement to create forged general equivalency diplomas ("GEDs") for recruits. Davis used his personal computer to create forged GEDs for four individuals by removing the name from a legitimate GED and inserting the name of the person to be enlisted. Those four individuals were then enlisted in the Louisiana National Guard. Davis also forged in the same manner junior ROTC certificates for three recruits, allowing them to enlist at a higher pay grade.

One of the ineligible recruits for whom Davis forged a GED was Bryant McConnell. McConnell signed the enlistment papers on March 12, 2008. McConnell's mother, Michelle Green, called Davis on March 13 to discuss his enlistment, because she did not believe that McConnell had earned a GED. During that phone call, Davis asked Green to put McConnell on the phone and then asked McConnell to "please, please, get that paper and burn it." Green recorded this conversation and provided it to the media.

On March 14, 2008, Davis was charged with three counts (referred to as "specifications" in the official Charge Sheet) of attempting to effect the enlistment of recruits knowing that they were ineligible for such enlistment in violation of

Louisiana Code of Military Justice ("LCMJ") article 80,[1] three counts of conspiring to commit an offense under the LCMJ in violation of LCMJ article 81,[2] three counts of effecting the unlawful enlistment of persons known to be ineligible for enlistment in violation of LCMJ article 84,[3] five counts of signing false official documents in violation of LCMJ article 107,[4] and one count of attempting to impede an investigation in violation of LCMJ article 134[5].

On November 17, 2008, Davis pled guilty pursuant to a pretrial agreement, wherein the Article 80 violations (attempting to effect enlistment of ineligible recruits) were dismissed and he pled guilty to the remaining charges. The military judge sentenced him to pay a fine of $200 or, in lieu of the fine, to serve confinement of not more than one day for each dollar of the fine, to forfeit two-thirds pay and allowances for four months, to receive a reprimand, and to receive a reduction in pay grade and rank from E-7 (Sergeant First Class) to E-6 (Staff Sergeant).

Pursuant to the Rules of Military Justice, Davis received a legal sufficiency review and post-trial recommendation and was advised that he had ten days in which to submit written matters to the convening authority in accordance with R.C.M. (Rules for Courts-Martial) 1105. On September 4, 2009, Davis submitted his written matters and requested clemency. The convening authority issued a Promulgating Order that approved the sentence.

On November 30, 2009, Davis filed a notice of appeal to this Court. He asserts that the special court-martial occurred in violation of the Louisiana Constitution. Specifically, he contends the following:

I. The Accused Was Deprived of [D]ue Process Because of Unreasonable Post-Trial Delay.

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[1] La. R.S. 29:180
[2] La. R.S. 29:181
[3] La. R.S. 29:184
[4] La. R.S. 29:207
[5] La. R.S. 29:234

II. The Accused's Conviction Was Invalid Because the Trial Was Conducted in Violation of the Louisiana Constitution Art. 5 Section 26.

III. The Accused's Conviction Was Invalid Because the Trial Court Lacked Jurisdiction.

IV. The Accused's Conviction Was Invalid Because He Was Not Brought to Trial Within 120 days Pursuant to R.C.M. 707.

V. The Accused's Conviction Was Invalid Due to Unlawful Command Influence.

VI. The Convening Authority Did Not Consider Clemency Requests As Required by R.C.M. 1105.

APPLICABLE LAW

The Louisiana Code of Military Justice, La. R.S. 29:101-242, applies to all members of the state military forces when not subject to the Uniform Code of Military Justice (UCMJ) and while in a duty status or under a lawful order to be in a duty status. The processing of charges and all proceedings, including trial, may be conducted without regard to the duty status of the accused. La. R.S. 29:102(A) and (C).

The Louisiana Administrative Code, Title 41, Part II, Section 109 details construction and precedence in the administration of military justice:

> A. Principles of Construction. This Regulation and other military justice source materials shall be construed to secure simplicity in procedure, elimination of unjustifiable expense and delay, and fairness and efficiency in administration to the end that truth may be ascertained and proceedings justly determined.
>
> B. Order of Precedence. Unless express authority or the context clearly indicate[s] otherwise, the following authorities are applicable to the administration of military justice under the LCMJ in the following order of precedence:
>
> > 1. the LCMJ and other provisions contained in La. Revised Statutes Title 29 [See, e.g., La. R.S. 29:11 (F)];
> >
> > 2. the Military Rules of Evidence (M.R.E.) and Rules for Courts-Martial (R.C.M.);
> >
> > 3. Louisiana laws concerning criminal trials and procedures (e.g. La. C.Cr.P., La. C.E., etc.);

4. the UCMJ.

C. Special Rules/Secondary Authorities.

1. Louisiana court decisions may be used in interpreting or construing Louisiana authorities (the LCMJ, La. R.S., this Regulation, and other Louisiana laws and rules concerning criminal trials and procedures). Decisions of the U.S. Supreme Court, other federal courts, and the U.S. Court of Military Appeals (U.S.C.M.A.) may be cited in interpreting or construing federal authorities (e.g. M.R.E., R.C.M., UCMJ, and MCM). Decisions of the Courts of Military Review do not constitute precedent authority, but they may be cited as guidance or persuasive authority.

2. Other active component publications (regulations, pamphlets, etc.) not applicable to the National Guard when not in federal service may be used for guidance in administering military justice, but shall not be regarded as directive, particularly if they are incompatible with the general nature and organization of, or special procedures established or authorized by law for Louisiana National Guard military justice activities.

D. Matters Not Covered. All matters relating to the administration of military justice in the organized militia not otherwise provided for herein shall be decided by the customs and usage of the appropriate force or of the Armed Forces of the United States.

E. Consensual Departure Authorized. Nothing contained in this Regulation or other military justice authority shall prevent departure from any of the procedural requirements prescribed for military justice actions provided that the defendant makes a voluntary, knowledgeable, and intentional declaration on the record of his intention and desire to so depart.

DISCUSSION

POST-TRIAL DELAY

In his first assignment of error, Davis contends that his due process right to timely post-trial processing was violated when seventeen months (521 days) lapsed between the special court-martial, which ended on November 17, 2008, and the lodging of the appeal in this Court.

There are no Louisiana cases interpreting post-trial delays. As the LCMJ is modeled upon federal laws, we look to the United States Court of Appeals for the Armed Forces (C.A.A.F.) for guidance in appellate review of military justice

matters. See State v. Powdrill, 95-2307, p. 4 (La. 11/25/96), 684 So. 2d 350, 354. Military courts have routinely discussed post-trial delay due to the unique procedure of courts-martial. Such courts review *de novo* claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. See U.S. v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing U.S. v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)). These courts further recognize a presumption of unreasonable delay when the convening authority's action is not completed within 120 days of announcement of the sentence, thereby triggering a four-factor analysis articulated in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Moreno, 63 M.J. at 142. Pursuant to Barker, we must consider and balance (1) length of delay, (2) reason for delay, (3) whether the accused asserted the right to timely review and appeal, and (4) prejudice to the defendant. Barker, 407 U.S. at 530-33, 92 S.Ct. at 2192-93.

In early November 2008, Davis entered into a pretrial agreement with the State. The agreement required Davis to enter an unconditional guilty plea in exchange for dismissal of Count I and a cap on the maximum sentence that could be imposed on the remaining counts, which included no punitive separation, no confinement or restraint, a reduction in rank and pay grade to E-4, and forfeitures and fines as adjudged. Davis entered his guilty plea on November 17, 2008, and was sentenced at that time to pay a fine of $200, to forfeit two-thirds pay and allowances for four months, to receive a reprimand, and to receive a reduction in rank and pay grade to E-6 from his status of E-7.

After the plea, trial counsel[6] had the record prepared and sent to Davis's counsel on January 30, 2009. Two-and-one-half months to transcribe and compile a record is not unreasonable. On February 23, 2009, Davis's counsel prepared an error memo. The record was not signed for by the military judge and trial counsel

[6] Under military law, "trial counsel" is the prosecutor for the state. See La. R.S. 29:138(A).

until April 17, 2009. On July 24, 2009, Davis received a legal sufficiency review. On August 25, 2009, Davis was advised that he had ten days in which to submit written matters to the convening authority, which he did on September 4, 2009. On October 16, 2009, Major General Landreneau, the convening authority, issued a Promulgating Order approving the sentence imposed. Thus, the length of delay in post-trial review was eleven months.

Moreover, an additional delay of approximately six months occurred from the action of the convening authority until the date of notice that the appeal had been lodged, which occurred on April 20, 2010. Davis waited 45 days, which was his right, to file a notice of appeal with the military judge and convening authority. See La. R.S. 29:166C(1) (providing 60 days for filing of the notice). The military judge signed the order of appeal 46 days thereafter, and trial counsel lodged the record 95 days later; resulting in a total length of delay of 475 days.

We find the time that elapsed between the order issued by the convening authority and the lodging of this appeal to be reasonable. Although the delay of more than 120 days from court-martial to action by the convening authority is presumptively unreasonable, see Moreno, 63 M.J. at 136, a review of the timeline set out above shows that none of the delay was tactical in nature or occurred in bad faith. Furthermore, the State notes in its brief that, in addition to units deploying to Afghanistan and Iraq in support of overseas contingency operations, the National Guard was fully mobilized in September and October of 2008 in response to Hurricanes Gustav and Ike. Accordingly, we do not find the delay to be unreasonable.

As for the third Barker factor, Davis states in his brief that he "repeatedly tracked and attempted to expedite the matter with the convening authority." It appears that the convening authority took action 42 days after Davis made an official request for clemency.

Regarding the fourth Barker factor, we find Davis has not established prejudice. He asserts that he was prejudiced because he "did not feel able to return to his civilian job with the State due to the conviction" and "was forced to seek dangerous work offshore to support his family." Without evidence to support his allegation that he was unable to return to his civilian job, we find his claim of prejudice to be mere speculation unsupported by any evidence in the record. Davis was not confined during the delay and, in fact, received a lenient sentence in response to his guilty plea; more lenient than his plea agreement provided.

After careful analysis and balancing of the Barker factors, we find no deprivation of due process and find this assignment of error lacking merit. See Barker, 407 U.S. at 533, 92 S.Ct. at 2193; Moreno, 63 M.J. at 136.

LOUISIANA CONSTITUTION ARTICLE 5, SECTION 26

In his second assignment of error, Davis contends that his court-martial occurred in violation of Article 5, Section 26(B) of the Louisiana Constitution because a district attorney or his designated assistant did not bring the prosecution. However, civilian and military court systems have markedly different safeguards and procedures. See O'Callahan v. Parker, 395 U.S. 258, 261-62, 89 S.Ct. 1683, 1685, 23 L.Ed.2d 291 (1969) (recognizing "the establishment and development of a system of military justice with fundamental differences from the practices in the civilian courts"), overruled on other grounds, Solorio v. U.S., 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987); U.S. v. Mariea, 795 F.2d 1094, 1101 (1st Cir. 1986) ("[M]ilitary courts-martial and the civilian court system constitute totally separate systems of justice, with different procedures, protections and personnel.").

"The 'exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply.'" Palmore v. U.S., 411 U.S. 389, 404, 93 S.Ct. 1670, 1679, 36 L.Ed.2d 342 (1973) (quoting O'Callahan, 395 U.S. at

261, 89 S.Ct. at 1685). Furthermore, various procedural protections available in state and federal district courts are absent from military courts-martial. Most notably, courts-martial lack the constitutional guarantees of indictment by grand jury and trial by jury. See O'Callahan, 395 U.S. at 273, 89 S.Ct. at 1691; see also Reid v. Covert, 354 U.S. 1, 22, 77 S.Ct. 1222, 1233, 1 L.Ed.2d 1148 (1957) ("[T]he Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions - safeguards which cannot be given in a military trial.").

The legislature enacted the Louisiana Code of Military Justice to provide for good order and discipline within the ranks. See La. Admin Code, Title 41, Part II, Section 405 (2010). Although courts-martial are in some sense courts, they are not the courts to which the Constitution refers. State ex rel. Lanng v. Long, 136 La. 1, 66 So. 377, 378 (1914). Therefore, we find the instant proceeding was implemented in accordance with the Louisiana Code of Military Justice, La. R.S. 29:101-242, and we are unable to find any constitutional defect therein. This assignment of error is without merit.

PERSONAL JURISDICTION

In his third assignment of error, Davis contends that his special court-martial is invalid because the court lacked personal jurisdiction over him. Specifically, he contends that the military court lost jurisdiction over him when he was discharged from the armed forces. We decline to address the issue of whether the court would lose jurisdiction once the accused is discharged from duty, because the record in this case fails to support Davis's assertion that he was discharged.

At the time of the commission of the offenses for which Davis was subjected to court-martial, he was classified as an AGR soldier serving full-time with the purpose of "organizing, administering, recruiting, instructing, or training the

reserve components." See 10 U.S.C. §12310(a)(1). His service orders specifically provided that "[u]pon release from the AGR Program, unless otherwise indicated, soldier will revert back to M-Day status," which is traditional service of one inactive duty training period per month and fifteen days of active duty training per year. See 32 U.S.C. § 502(a). On October 9, 2008, Davis made a request to be placed on retired reserve status. The record does not reflect when or if that request was granted. At the conclusion of the hearing, the court disclosed the contents of "P-12," the pretrial agreement between Davis and the State. It includes the following:

> I acknowledge that I have been allowed the opportunity to retire from the National Guard and will request retirement within two working days of the imposition of sentence. I acknowledge that I have had adequate opportunity to consult with and have so consulted with my defense counsel regarding the meaning and ramifications of each and every term of this pretrial agreement. This agreement and its appendices constitute all of the conditions and understandings of both the government and the accused regarding the pleas in this case[.]

Thus, although there is some evidence in the record of Davis's intent to seek retirement, nothing in the record supports his assertion that he was discharged from service. We, therefore, decline to consider what effect discharge would have on these proceedings. This assignment of error is without merit.

RIGHT TO SPEEDY TRIAL

In his fourth assignment of error, Davis contends that he was denied a speedy trial. However, R.C.M. 707(e) specifically provides that "a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." Furthermore, Davis's pretrial agreement states, in pertinent part: "That, as consideration for this agreement, I agree to waive all motions which do not deprive me of the right to due process, the right to challenge the jurisdiction of the Court-Martial, or which are otherwise non-waivable per R.C.M. 705(c)(1)(B), which motions may be made at any time."

Additionally, Davis agreed to "dismiss the petition for supervisory writs, Writ Docket Number 2008 KW 1965, pending before the Louisiana Court of Appeals [sic] for the First Circuit." The sole issue in writ number 2008 KW 1965 was failure to comply with the 120-day speedy trial limitation in R.C.M. 707.

Thus, we find that Davis unequivocally waived any speedy trial complaints by entering an unconditional plea of guilty. Davis relies on U.S. v. Benitez, 49 M.J. 539, 541 (N.M. Ct. Crim. App. 1998), for the proposition that a pretrial agreement cannot preclude appeal on speedy trial grounds. However that reliance is misplaced. We find that Benitez is no longer good law. See U.S. v. Mizgala, 61 M.J. 122 (C.A.A.F. 2005). In Mizgala, the Court of Appeal for the Armed Forces held that a right to a speedy trial under the Sixth Amendment and R.C.M. 707 are waived by an unconditional guilty plea. Mizgala, 61 M.J. at 124-25; see also U.S. v. Dubouchet, 63 M.J. 586, 587 (N.M. Ct. Crim. App. 2006) ("Based on the plain language of R.C.M. 707(e), and the appellant's unconditional plea of guilty resulting in a finding of guilty, we conclude that this speedy trial issue was waived.") This assignment of error is without merit.

UNLAWFUL COMMAND INFLUENCE

In his fifth assignment of error, Davis contends that "[c]ommand influence was raised in the court below... and was not waived by the subsequent guilty plea and conviction or dismissed... since unlawful command influence is a violation of the Constitution and due process." However, case law provides that an accused can initiate an affirmative waiver of allegations of unlawful command influence. U.S. v. Weasler, 43 M.J. 15, 19 (C.A.A.F. 1995). Nevertheless, because the record does not reflect an affirmative waiver of this specific allegation, we address it in the interest of justice.

The cases provide a specific procedure to address allegations of actual unlawful command influence at trial. First, the defense must "show facts which, if

true, constitute unlawful command influence." U.S. v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999). Second, the defense must show "that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." Biagase, 50 M.J. at 150. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." Biagase, 50 M.J. at 150. The defense is required to present "some evidence" of unlawful command influence Biagase, 50 M.J. at 150 (quoting U.S. v. Ayala, 43 M.J. 296, 300 (C.A.A.F. 1995)). Third, if the defense has made the requisite showing under the first two steps, the burden shifts to the Government to: (1) disprove "the predicate facts on which the allegation of unlawful command influence is based"; (2) persuade the military judge "that the facts do not constitute unlawful command influence"; or (3) prove at trial "that the unlawful command influence will not affect the proceedings." Biagase, 50 M.J. at 151. "Whichever tactic the Government chooses, the quantum of evidence required is proof beyond a reasonable doubt." U.S. v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. 2002) (citing Biagase, 50 M.J. at 151).

Depending on the nature of the alleged unlawful command influence and other pertinent circumstances, the Government may demonstrate that unlawful command influence will not affect the proceedings in a particular case as a result of ameliorative actions. Such actions might include transfer of responsibility for disposition of charges to commanders not subject to the influence, orders protecting service members from retaliation, changes in venue, liberal grants of challenges for cause, and the use of discovery and pretrial hearings to delineate the scope and impact of alleged unlawful command influence. See Biagase, 50 M.J. at 152; U.S. v. Rivers, 49 M.J. 434, 443 (C.A.A.F. 1998).

During appellate consideration, the three factors are framed in terms of evaluation of a completed trial. "[T]he defense must (1) show facts which, if true,

constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness." Biagase, 50 M.J. at 150 (citing U.S. v. Stombaugh, 40 M.J. 208, 213 (CMA 1994), cert denied, 513 U.S. 1156, 115 S.Ct. 1113, 130 L.Ed.2d 1077 (1995)).

In the course of addressing these issues, military judges and appellate courts must consider apparent, as well as actual unlawful command influence. Once unlawful command influence is raised, it is incumbent on the military judge to act in the spirit of the UCMJ and LCMJ Code by avoiding even the appearance of evil in the courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings. See Stoneman, 57 M.J. at 42-43

Allegations against Davis were first raised by a civilian who took her complaints to the media and, thus, Davis's court-martial was particularly high-profile. On April 9, 2008, First Lieutenant William T. Conger sent an e-mail to seven soldiers indicating that Colonel Ball had stated that they were not to speak with anyone regarding Davis. It states:

> ALCON,
>
> Just received a directive from COL Ball...no one in RRC is to speak with anyone, especially JAG, ref SFC Steve Davis or RRC in general as it relates to the on going investigations of several RRNCO's in SouthROC. If anyone calls from JAG or any where else particularly COL Stroud (who is assigned as Davis' defense and gathering information) they are to be referred to MAJ Mann who is assigned to RRC as our JAG rep. No one in SouthROC will be bullied. If anyone is contacted I need to know immediately. We will discuss this further tomorrow when we meet in LAF. Thank you...

Colonel Ball then sent a subsequent e-mail that explained:

> The intent of the e-mail was to NOT interfere with the defense "investigation", but was to protect you from feeling like you were bullied or coerced into speaking with the defense counsel. That e-mail was a result of the poor guidance I had given him, so the fault lies with me....
>
> If anyone from SFC Davis defense team or our JAG office contacts you in regards to this case, you are free to speak with them. It is not

> my intent to discourage or encourage you to speak or not speak with anyone from the defense team of SFC Davis. The choice is yours.
>
> I caution you to verify/validate anyone who calls you or e-mails you. If a reporter contacts you, then please refer them to me.
>
> If you have any questions about this guidance, please feel free to call me.

Undoubtedly, interference with the defense's attempt to interview witnesses is improper. Stombaugh, 40 M.J. at 213. Davis contends that his investigation was hampered by the lack of access to information and witnesses as a result of the initial e-mail sent on Colonel Ball's behalf. He contends that nine prospective witnesses refused to be interviewed subsequent to receiving the initial e-mail.

The State concedes that the threshold for triggering further inquiry into an allegation of unlawful command influence is low and that Davis meets the threshold in this case. See U.S. v. Plumb, 47 M.J. 771, 777 (A.F. Ct. Crim. App. 1997).

Once there is a threshold showing of unlawful command influence, the State has the burden to prove that the command influence did not influence the proceedings. Biagase, 50 M.J. at 151. The State points out that numerous favorable character witnesses testified on Davis's behalf, "so that it could be inferred that [the initial e-mail] had not inhibited the availability of character witnesses." See U.S. v. Gleason, 43 M.J. 69, 74 (C.A.A.F. 1995). Furthermore, an order rescinding a direction that witnesses not speak with the defense can ameliorate command influence. U.S. v. Washington, 42 M.J. 547, 555 (A.F. Ct. Crim. App. 1995) (Commander rescinded "no contact" order and the court held any unlawful command influence did not render proceedings unfair). Here, the "no contact" order was rescinded, although not immediately, as the original e-mail was sent on April 9, 2008, and it was rescinded by e-mail on June 9. Once the initial order was rescinded, Davis had no impediments to his investigation. This

case is unlike that in U.S. v. Gore, 60 M.J. 178 (C.A.A.F. 2004), upon which Davis relies.

In Gore, the commander ordered a sailor not to testify favorably for the defense, ordered those in his command not to testify, and further interfered with their efforts to aid the accused. Furthermore, no corrective action was taken in Gore. Although Davis argues that nothing could erase the terror of potential retribution by command, the record does not support the assertion that potential witnesses feared retribution for cooperation with the defense. On the contrary, the defense took depositions of multiple witnesses and called several guardsmen to testify on his behalf. We do not find that the proceedings were influenced by unlawful command influence.

Additionally, Davis argues that Colonel Dunlap's conduct violated the restrictions against unlawful command influence when he sent threatening e-mails and a letter to Colonel Stroud, who, he asserts, had established an attorney-client relationship with Davis.[7] The record reflects that Stroud did attempt to act as defense counsel in this case. Colonel Dunlap indicated Stroud's actions were inappropriate because he had not been detailed as defense counsel, as is normal for military court proceedings. One example of Dunlap's actions is an e-mail sent from Dunlap to Stroud on March 19, 2008:

> Bill: MSG Litchfield just sent this to me. Why was I not copied? This kind of e-mail just stirs up shit which is exactly what you are trying to do. This kind of provocative quasi-official e-mail is not good for you, me or the system of Military Justice in the LANG.
>
> SGT Davis is not entitled to an answer to any of the questions in your email, nor will he receive any. If you are detailed as defense counsel by TAG, then you will have to play by the rules in the MCM and LANG 27-10. If Davis wants to make a 138 complaint, then make one. If you and Walter feel like Davis has been the subject [of] illegal pre-trial punishment, make a motion for credit. But just don't send any more e-mails to the chain of command about this case.

On March 24, Dunlap questioned Stroud about his role in Davis's defense:

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[7] Colonel John Dunlap was the National Guard State Judge Advocate.

> Bill: Walter told me that SFC Davis will make a written request for you to represent him. I will ask MSG Litchfield to help SGT Phillips draft the request. I intend to respond by asking him to acknowledge your rating chain and waive any conflict, perceived or actual.

On March 26, Dunlap reminded Stroud that he had not been detailed on the Davis case:

> Again, be careful on the Davis case. You have not been detailed. I have not received a written request and Davis has not waived the conflict of interest you have under the LSBA Rules of Professional Conduct. I understand you are trying to be an aggressive advocate for someone who you perceive is your client, however, without the waiver and detail in-hand, you are working without a net.

Again on April 2, Dunlap informed Wells[8] as follows:

> I am anxious to resolve the issue of whether Colonel Bill Stroud will be requested by your client to be detailed as his defense counsel....
>
> ...
>
> SFC Davis will have to acknowledge and waive the fact that Colonel Stroud is the Active Duty Deputy State Judge Advocate and he works for and is rated by me and the Convening Authority, MG Landreneau.... Kindly forward any Article 38(B) request for the detail of Colonel Stroud to me immediately or advise me that your client will not make such a request.

Finally, on April 11, Stroud sent an e-mail to interested parties, including Ball and Dunlap, indicating he no longer desired to be a part of the defense team:

> After discussions with Mr. Wells we have decided that it would be in the best interest of SFC Davis for me to terminate my participation on the defense side of the case. I say ""terminate my participation"" [sic] because I was never formally enrolled as counsel. However, the conversations I have had up to this point do constitute an attorney-client relationship and will be treated as such....
>
> **My only participation from this time forward will be to provide logistical and other required assistance to trial and defense counsel, and to assist the SJA as I do daily as the AGR-SJA.** [Emphasis in original.]

Despite notice that he was terminating his participation, Stroud's name continued to appear on various correspondence with regard to the charges against Davis.

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[8] John B. Wells is Davis's civilian counsel.

Davis contends that these and other similar e-mails give the appearance of an attempt to intimidate Stroud and served to deprive Davis of his choice of military counsel. However, the record does not support this contention. On the contrary, Davis never agreed to waive any potential conflict of interest with regard to Stroud's participation in his case and, thus, never took the action requested of him in order for Stroud to be detailed to his defense. We do not find that Dunlap's actions amounted to unlawful command influence.

Lastly, Davis argues that Dunlap held a press conference that presented his case in an extremely negative light and thereby "stamped the imprimatur of the State Judge Advocate and the Adjutant General on the allegations." The press conference was held the day after the original allegations were made, and Dunlap indicated that Davis would be court-martialed. He was quoted as stating "Davis knew better, he's old enough, he's been in (the military) long enough that the recruiting commander, Col. Jonathan Ball, decided to charge him immediately, today...." Relying on U.S. v. Simpson, 55 M.J. 674, 687 (A. Ct. Crim. App. 2001), aff'd, 58 M.J. 368 (C.A.A.F. 2003), Davis contends that Dunlap's public statements constituted unlawful command influence, even if it was unintended. "Even the perception that pretrial publicity has been engineered to achieve a prohibited end—regardless of the intent of those generating the media attention—may lead to the appearance of unlawful command influence." Simpson, 55 M.J. at 687.

Members of the armed forces are entitled to have their cases adjudged by fair and impartial court-martial panels whose evaluation is based solely upon the evidence, and not upon prejudgment that may occur as a result of pretrial publicity. U.S. v. Curtis, 44 M.J. 106, 139 (C.A.A.F. 1996) (findings affirmed and sentence reversed); see Chandler v. Florida, 449 U.S. 560, 574, 101 S.Ct. 802, 809, 66 L.Ed.2d 740 (1981); see also Wainwright v. Witt, 469 U.S. 412, 423, 105 S.Ct.

844, 851-52, 83 L.Ed.2d 841 (1985); Reynolds v. U.S., 98 U.S. 145, 154-57, 25 L.Ed. 244 (1878). The doctrine of unfair pretrial publicity is based upon the constitutional right to due process. See U.S. Const. amend. V.

The defense may raise the issue of unfair pretrial publicity by demonstrating either presumed prejudice or actual prejudice. To establish presumed prejudice, the defense must show that the pretrial publicity (1) is prejudicial, (2) is inflammatory, and (3) has saturated the community. See Curtis, 44 M.J. at 139 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)). To establish actual prejudice, the defense must show that members of the court-martial panel had such fixed opinions that they could not judge impartially the guilt of the accused. See Curtis, 44 M.J. at 139 (citing Mu'Min v. Virginia, 500 U.S. 415, 430, 111 S.Ct. 1899, 1908, 114 L.Ed.2d 493 (1991); Irvin v. Dowd, 366 U.S. 717, 721-28, 81 S.Ct. 1639, 1642-45, 6 L.Ed.2d 751 (1961)). Without such a showing, evidence that the members of the court-martial panel had knowledge of highly significant information or other incriminating matters is insufficient. Id. Davis fails to make such a showing. The assignment of error lacks merit.

CLEMENCY

In his last assignment of error, Davis contends that his request for clemency was not considered by the convening authority. We note that the request is missing from the record. Although we granted Davis's motion to supplement the record with the request for clemency, by June 1, 2010, that supplementation never occurred. Nevertheless, in the absence of evidence to the contrary, we presume that the convening authority considered the request. See U.S. v. Zaptin, 41 M.J. 877, 881 (N.M. Ct. Crim. App. 1995). Moreover, we question whether the convening authority's decision regarding clemency is a decision within our purview to review and we hereby decline to do so. See U.S. v. Anderson, 46 M.J.

540, 546 (N.M. Ct. Crim. App. 1997) ("[W]e will not reconsider the convening authority's decision on the matter of clemency."). This assignment of error is without merit.

CONCLUSION

Therefore, after a thorough review of the applicable law and the record in this matter, we affirm the conviction by the special court-martial and the associated sentence of Sergeant First Class Stephen Davis.

AFFIRMED.