IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Lawrence G. HUTCHINS III, Sergeant (E-5) U.S. Marine Corps Appellant	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 200800393 USCA Dkt. No. 12-0408/MC

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

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Issues Presented

I.

WHETHER THE FINDINGS AND SENTENCE MUST BE DISMISSED WITH PREJUDICE WHERE UNLAWFUL COMMAND INFLUENCE FROM THE SECRETARY OF THE NAVY HAS UNDERMINED SUBSTANTIAL POST-TRIAL RIGHTS OF THE APPELLANT.

II.

THE APPELLANT WAS INTERROGATED BY NCIS CONCERNING HIS INVOLVEMENT IN THE ALLEGED CRIMES, AND TERMINATED THE INTERVIEW BY INVOKING HIS RIGHT TO COUNSEL. APPELLANT WAS THEREAFTER HELD INCOMMUNICADO AND PLACED IN SOLITARY CONFINEMENT, WHERE HE WAS DENIED THE ABILITY TO COMMUNICATE WITH A LAWYER OR ANY OTHER SOURCE OF ASSISTANCE. APPELLANT WAS HELD UNDER THESE CONDITIONS FOR 7 DAYS, WHEREUPON NCIS RE-APPROACHED APPELLANT AND COMMUNICATED WITH HIM REGARDING THEIR ONGOING INVESTIGATION. IN RESPONSE, APPELLANT WAIVED HIS PREVIOUSLY INVOKED RIGHT TO COUNSEL AND SUBSEQUENTLY PROVIDED NCIS A SWORN STATEMENT CONCERNING THE ALLEGED CRIMES. DID THE MILITARY JUDGE ERR WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT’S STATEMENT? *SEE EDWARDS V. ARIZONA*, 451 U.S. 77 (1981) *AND UNITED STATES V. BRABANT*, 29 M.J. 259 (C.M.A. 1989).

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant’s approved sentence included a dishonorable discharge and more than one year of confinement. This Court has

jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of conspiracy[1], one specification of false official statement, one specification of unpremeditated murder, and one specification of larceny in violation of Articles 81, 107, 118, and 121, UCMJ, 10 U.S.C. §§ 881, 907, 918 and 921 (2006). Appellant was acquitted of one specification of premeditated murder, one specification of false official statement, one specification of assault, one specification of housebreaking, one specification of kidnapping, and one specification of obstruction of justice in violation of Articles 107, 118, 128, 130, and 134, UCMJ, 10 U.S.C. §§ 907, 918, 928, 930, and 934 (2006).

The Members sentenced Appellant to fifteen years' confinement, reduction to the pay grade E-1, a reprimand, and a dishonorable discharge. The Convening Authority approved only so much of the sentence as provided for eleven years' confinement, reduction to the pay grade E-1, and a dishonorable discharge and, except for the discharge, ordered it executed.

[1] This was done by excepting the words "housebreaking, and kidnapping."

The Record of Trial was docketed with the lower court on May 30, 2008. After Appellant and the Government submitted briefs, the lower Court specified two additional issues. On April 22, 2010, after supplemental briefing and remand for a *Dubay* hearing related to the termination of one of Appellant's detailed counsel from representation, the lower court set aside the findings and sentence. *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010). On June 7, 2010, the Judge Advocate General of the Navy certified the case to this Court. On January 11, 2011, this Court reversed the lower court and remanded the case for review under Article 66(c), UCMJ. *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011).

The case was re-docketed with the lower court on February 17, 2011, and the Court later affirmed the findings and sentence. *United States v. Hutchins*, No. 200800393, 2012 CCA LEXIS 93 (N-M. Ct. Crim. App. Mar. 20, 2012). On March 26, 2012, Appellant filed a petition for grant of review with this Court. On July 2, 2012, this Court granted review of the issues presented.

Statement of Facts

A. Appellant led his squad in killing an Iraqi civilian in Hamdaniyah, Iraq.

In April 2006 Appellant was assigned as squad leader of 1st Squad, 2nd Platoon, Kilo Company, 3rd Battalion, 5th Marines.

(J.A. 567, 652, 964.) Kilo Company started their deployment to Iraq in January 2006 in an area called Zaidon, located on the outskirts of Fallujah. (J.A. 568, 964.) After several months there, the Company was attached to 1st Battalion, 1st Marines, operating out of Abu Ghraib, as part of Task Force Chromite. (J.A. 221, 568.) Kilo Company headquarters was at Abu Ghraib, while Appellant's platoon, 2nd Platoon, worked primarily out of a patrol base in the town of Hamdaniyah. (J.A. 569.)

In the evening hours of April 25, 2006, Appellant's squad was tasked to set up a deliberate ambush aimed at interdicting insurgent emplacement of improvised explosive devices (IEDs). (J.A. 569, 608, 968.) Specifically, the squad was ordered to monitor an intersection to ensure that no IED's were laid there. (J.A. 569, 608, 694, 968.) Appellant's squad left the patrol base around 1700 on April 25 and they were dropped off at a palm grove next to the intersection. (J.A. 571, 968.)

When they arrived at the palm grove, most of the Marines set up outer perimeter security, while Appellant, his two fire team leaders, and his radio operator remained in the center of the group talking to each other. (J.A. 571, 654, 696, 968.) Appellant mentioned the fact that the palm grove was near the home of Saleh Gowad, a high value individual (HVI) believed to be a local insurgent leader. (J.A. 655, 697, 968, 972.) Appellant started telling the Marines how much trouble this

individual was causing, how if he were detained he would simply be released anyway, and how no one could “take care of” him using the rules in place at the time. (J.A. 697.) Appellant then told his fire team leaders a story about another squad, who according to Appellant, had grabbed a suspected insurgent, stabbed him to death, left him in a hole, and had “gotten away with it.” (J.A. 698.) Appellant initiated the plan to capture and kill Saleh Gowad, and his fire team leaders brainstormed with him ideas on how to perfect the plan. (J.A. 697-99, 770, 968.)

Planning the killing was “complicated” and included many contingencies to facilitate the smooth operation of the plan. (J.A. 968, 573-74.) Ultimately, Appellant’s plan was to kill Saleh Gowad, but if the squad could not find him, then to kill one of his brothers or any military aged male near Saleh Gowad’s house. (J.A. 573, 708, 770.) Appellant later said in his statement that he planned to kill someone, even if Saleh Gowad could not be located because they all agreed “if Saleh was not there we would take one of his brothers and kill his brother like Saleh had killed many of our brothers.” (J.A. 968.) The squad agreed to Appellant’s plan to kill any random military aged male, if Saleh Gowad or his brothers could not be located, because “if we took a military aged male and killed him in Gowad’s place, it might send a message to Gowad that we are not

to be trifled with; and keep this up and you are next." (J.A. 770.) After discussing the planned killing, Appellant briefed the squad on what he called "the perfect plan." (J.A. 666.) He did not order anyone to participate in the plan, but rather asked each man if they wanted to participate in the plan or back out of it, telling them that if not everyone was "in" they would not go through with the plan. (J.A. 574, 666, 713.)

Considerable effort and preparation went into the execution of this conspiracy, including the theft of a shovel and AK-47 from an Iraqi dwelling to be used as props to manufacture a scene where it appeared that an armed insurgent was digging to emplace an IED. (J.A. 716, 968.) Other squad members went to the house of Saleh Gowad but left when a female saw them outside the house, and they thought the secrecy of their location was compromised. (J.A. 721.) Instead, as planned, they went to another house to grab a random Iraqi man, bound and gagged him, and brought him to the would-be IED emplacement hole, where he would be executed. (J.A. 721-27; R. 1412-14.) The Iraqi man they grabbed, a man named Hashim Awad, begged the Marines, "mister, mister, . . . mister, please," as they marched him from his house. (R. 1420.) Eventually, as he was led to and placed in the hole by the side of the road, he tried to escape by breaking through the flexi-cuffs that were binding his hands, he had to be "choked out" several times so he would stop

fighting to escape, and he lost control of his bowels out of fear. (J.A. 733-34, 969.)

When the Marines finally placed Mr. Awad in the hole, Appellant ordered the squad to "get on line" and prepare to fire at the man. (J.A. 614, 735.) Appellant then informed higher headquarters by radio that they had come upon an insurgent planting an IED and received approval to engage. (J.A. 578, 661, 969.) The squad opened fire, mortally wounding Mr. Awad. (J.A. 578-80, 661-62, 969.) Appellant approached Mr. Awad, who was on the ground dying, and fired multiple rifle rounds into the man's face at point blank range. (J.A. 969; R. 1427.) The scene was then manipulated to appear consistent with the insurgent/IED story by: removing the flexi-cuffs from the victim's hands and feet; positioning the victim's body with the shovel and AK-47 rifle that they had stolen from local Iraqis; and placing AK-47 cartridge casings next to the body to make it appear the Marines were fired upon. (J.A. 581, 664-66, 969-70.)

After the Marines finished "cleansing" the crime scene Appellant told his squad "[c]ongratulations, gents, we just got away with murder." (R. 1428.)

B. Facts related to Appellant's statement to NCIS.

1. The start of the investigation.

Appellant initially claimed in an after action report of the incident that the Iraqi man had been planting an IED and had fired on the Marines before they engaged. (J.A. 368.) That was the end of the matter until several days later, when a local Sheik reported to Appellant's Battalion Commander that a man had been kidnapped and killed by the Marines. (J.A. 83.) The Battalion Commander did not believe the claim was true, but wanted an investigation nonetheless. (J.A. 83-84.)

Naval Criminal Investigative Service (NCIS) Special Agent (SA) Connolly had been with NCIS for about twenty years and was the supervisory NCIS agent at Fallujah tasked with investigating the incident. (J.A. 76-77.) Based on his experience in Iraq, he believed that the Iraqi civilians were likely making a false claim to receive compensation, so he viewed his investigation as an opportunity to prove that this was a "good shoot" and that the Iraqis were lying. (J.A. 77-78, 94, 369.)

On May 7, 2006, SA Connelly went to Abu Ghraib where the Battalion Commander and Company Commander used an after action report and powerpoint presentation to brief him on the incident. (J.A. 84-87, 370.) Everything in the briefs indicated a lawful engagement, so SA Connelly did not suspect anyone of misconduct. (J.A. 87-88, 370.) He interviewed one of the Marines in

Appellant's squad, Corporal Thomas, who gave the same story of this being a lawful engagement of an insurgent. (J.A. 370-71.)

After the interview, SA Connelly left Abu Ghraib and traveled to the patrol base Appellant's platoon was at in Hamdaniyah. (J.A. 90.) There, the 2nd Platoon Commander, Lieutenant Pham, gave a similar brief on the incident indicating that this was a lawful engagement. (J.A. 91-92.) During the conversation between SA Connelly and Lieutenant Pham, SA Connelly mentioned that he would like to find some AK-47 brass casings from the scene, which would show that the Marines were fired upon and confirm that this was a lawful engagement. (J.A. 92, 371.) SA Connelly was talking to Lt Pham in a common area, and Appellant heard his statement, came up to SA Connelly, and told him that he had picked up some brass. (J.A. 92.) Appellant went to his room and brought the brass and an AK-47 round back to SA Connelly. (J.A. 93.)

Next, Special Agent Connelly left the patrol base and went to the crime scene accompanied by Marines including the Kilo Company Commander, 2nd Platoon Commander, and Appellant. (J.A. 93-95.) His initial review of the crime scene confirmed his view that the Marines had done nothing wrong. (J.A. 98.) However, Appellant approached SA Connelly at the scene, told him that after the victim had been shot and was "gurgling" on the ground, he walked over, and performed a "dead check" by firing

three rounds into the victim's head. (J.A. 99, 372.) This surprised SA Connelly, but he did not understand the rules of engagement and did not suspect Appellant of any misconduct. (J.A. 372.)

Later, SA Connelly interviewed local civilians who reported that Mr. Awad had been taken from his house by a group of Marines. (J.A. 102-04, 372.) SA Connelly asked one of the civilians if there was any reason Mr. Awad's fingerprints would be on his neighbor's AK-47 and shovel, and the civilian replied "no." (J.A. 103.) SA Connelly tried to find an isolated spot in the house to talk to the other investigator about the information they were learning. (J.A. 103.) He pulled the other investigator up a dark stairway in the house and said "we've got to find that AK-47." (J.A. 103.) SA Connelly wanted to find the AK-47 so he could prove the brass casings Appellant gave him were fired from the weapon, find Mr. Awad's fingerprints on the weapon, and wrap up the investigation by proving "we have a good shoot here." (J.A. 104.)

Although SA Connelly did not think anyone else heard his statement to the other investigator, Appellant was standing nearby and said that he needed to tell SA Connelly that Lieutenant Pham had him place the victim's fingerprints on the AK-47 and shovel. (J.A. 105.) SA Connelly did not ask any questions about this statement, and the group left the scene of

the shooting, dropped off Appellant and Lieutenant Pham at the patrol base, and went back to Abu Ghraib. (J.A. 107.)

The next day, SA Connelly went back out to the scene with metal detectors to look for brass shell casings fired by the Marines during the incident. (J.A. 108-09.) That evening another investigator arrived at Abu Ghraib, and SA Connelly decided that he would bring the Iraqi civilians back to Abu Ghraib for interviews, while the other investigator would conduct interviews of Marines in another squad. (J.A. 110.)

During that same time, Appellant's platoon rotated back to Abu Ghraib from the patrol base for several days of rest. (J.A. 223.) Back at Abu Ghraib, Appellant and one of his fire team leaders, Corporal Magincalda, approached the platoon sergeant, Staff Sergeant Bowen, and expressed concern with the investigation. (J.A. 225-26.) Corporal Magincalda said that he had called his attorney mother and asked her what his rights were. (J.A. 225-26.) She told him that he should ask to speak to an attorney. (J.A. 374.) Staff Sergeant Bowen did not suspect either Marine of any misconduct, and he told them that if they were concerned about the situation, he would let them speak to an attorney supplied by Prepaid Legal Services, an organization that Staff Sergeant Bowen both subscribed to and had become a salesman for. (J.A. 226-27, 374.) He told them

they could talk about this more when he got back from a range he was taking Marines to. (J.A. 228.)

2. Appellant's first statement to NCIS, during which he eventually invoked his right to counsel.

At that same time, interviews of the Iraqi civilians and screening interviews with Marines in the other squads changed the focus of the investigation into a suspicion that the Marines were involved in an unlawful homicide. (J.A. 111-12, 373.) Several hours later, Appellant and the other Marines in the squad were transported to Camp Fallujah for further interviews. (J.A. 112-13.) SA Connelly decided that because it was late, the Marines would be interviewed the next morning, after they got some sleep. (J.A. 113.) All the members of the squad were billeted in standard individual lodging trailers at Camp Fallujah that included

> an escort who remained with them at all times. The doors of the trailer rooms were locked, and the locks had to be opened with a key from both sides. [Appellant] was permitted to use the head and shower facilities and to communicate with the chaplain. He was not permitted to use MWR facilities, to have access to phones, computers, or other methods of communication, including the U.S. Mail. The members of the squad were not permitted to communicate with each other. These conditions remained in place from 10 May through 19 May 2006.

(J.A. 374.)

The next day, May 11, 2006, SA Connelly started interviews of the Marines in Appellant's squad at the NCIS trailer. (J.A.

114.) He and SA Casey started interviewing Appellant at 1934 that evening. (J.A. 117.) Appellant was advised of his rights under Article 31(b), which he waived, and he agreed to talk to the agents. (J.A. 117-20.) Appellant stuck to the story from his after action report of a lawful engagement of a man emplacing an IED. (J.A. 120.) After about ten or fifteen minutes, the agents confronted Appellant with the fact that other Marines in the squad had already admitted misconduct, and they already knew the truth. (J.A. 121.) The agents also showed Appellant a photo of the body of Mr. Awad, and noted that there was blood spatter on the ground, but none on the weapon he was supposedly holding when he was shot. (J.A. 375.) Appellant seemed agitated by this, told the agents that his statement was in his after action report, and said that he wanted an attorney. (J.A. 121.) The agents immediately stopped the interview, and made no further attempts to interview Appellant or talk him out of requesting an attorney. (J.A. 121-22, 375.)

3. Appellant's second statement to NCIS.

The agents continued interviewing witnesses until the evening of May 18, 2006. (J.A. 122.) During this time, Appellant remained in his trailer under the same conditions described earlier, but he did speak with the command chaplain. (J.A. 375.) On May 18, SA Connelly realized that each of the Marines in Appellant's squad had backpacks and personal

belongings that they had brought with them to Camp Fallujah, which might have cameras or information related to the incident that had never been searched. (J.A. 123.) He decided to ask all the Marines in the squad for consent to search their belongings. (J.A. 123.) Appellant was the fourth Marine the agents asked for consent to search that evening. (J.A. 125.)

SA Connolly knocked on the hatch of Appellant's trailer, and was greeted by the guard staying with Appellant. (J.A. 126.) The agents asked Appellant if he would consent to a permissive search of the belongings that he brought with him from Abu Ghraib, and he said yes. (J.A. 126.)

When SA Connolly approached Appellant for his signature on the Permissive Authorization for Search and Seizure (PASS), Appellant asked "if there was still an opportunity to tell [his] side of the story." (J.A. 128.) SA Connolly told Appellant that it was late, that he was tired, and that he could not question Appellant any further unless he requested them to, because he had invoked his right to counsel, but there might be time for him to talk to Appellant tomorrow or the next day before Appellant returned to the United States. (J.A. 129, 208, 216, 376.) Appellant replied that he would like to come in and speak with SA Connelly and provide a statement. (J.A. 217.) SA Connelly said, "if there's time, we can meet with you." (J.A. 217.)

The following day, May 19, SAs Connolly and Casey drove to the battalion headquarters to meet Appellant there and take him to the NCIS trailer for the interview. (J.A. 130, 183, 250.) When they returned to the NCIS trailer together, the agents offered refreshments to Appellant and again read him his rights under Article 31(b), UCMJ. (J.A. 131, 243.) After Appellant waived his rights the agents asked Appellant to provide his side of the story and he replied, "hey, if I'm going to tell you the story, I'm going to tell you the whole story of my time over here." (J.A. 132, 243-44.)

Appellant initially declined the opportunity to type his own statement, but when he saw that the NCIS agent "was not the speediest typer," he offered to type the statement himself. (J.A. 133.) Appellant typed up his own statement, while the agents spent most of the time in an adjoining room. (J.A. 134.) During this process, the agents gave Appellant four sodas, he took four smoke breaks, numerous bathroom breaks, and a break to go to dinner with the Agents at the chow hall. (J.A. 131, 134.) He finished his statement at approximately 2100, and the agents took him back to his living quarters. (J.A. 134.)

At trial, the Military Judge made extensive findings of fact, and ruled that Appellant's typed statement was admissible. (J.A. 366-86.) The statement was admitted as Prosecution Exhibit 1. (J.A. 963-71.)

C. The Secretary of the Navy made public statements explaining why he decided to deny further clemency.

The Members sentenced Appellant to fifteen years' confinement, but on May 2, 2008, the Convening Authority granted partial clemency and approved only eleven years' confinement. (J.A. 60-68.) In February 2009, the Naval Clemency and Parole Board examined Appellant's case and voted to reduce his sentence to five years of confinement. (J.A. 5.) In November 2009, the Secretary of the Navy reviewed the clemency request at the request of members of Congress, who were seeking clemency for Appellant. (J.A. 1166.) The Secretary ultimately denied the request for further clemency, and made several public statements explaining his decision. (J.A. 4, 1165-71.)

In January 2010, the Naval Clemency and Parole Board conducted another annual review of Appellant's sentence, this time voting against clemency or parole. (J.A. 5.) In April, the lower court set aside the findings and sentence. *Hutchins*, 68 M.J. at 623. On June 7, 2010, the Judge Advocate General of the Navy certified the case to this Court, and this Court later reversed the lower court. *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011).

Summary of Argument

I.

The prohibition against unlawful command influence in Article 37, UCMJ, does not apply to the civilian leadership of the military. Even assuming it is possible for the Secretary of the Navy to commit unlawful command influence, he did not do so in this case. His public statements were not improper because he had the sole discretion to award further clemency and did not need to offer any explanation. His explanation of why he did not award further clemency simply provides more transparency to the military justice system. Regardless, his statements did not cause any unfairness in these proceedings.

II.

After an accused invokes his right to counsel, law enforcement may not question him unless the accused initiates further communication. Here, the admissibility of Appellant's statement hinged on a factual dispute regarding whether Appellant initiated the conversation with NCIS after he invoked his right to counsel. The Military Judge resolved that dispute and his findings of fact are not clearly erroneous.

Even after a suspect invokes his right to counsel during an interrogation, law enforcement is still permitted to ask the suspect for consent to search his belongings. If the suspect later changes his mind and decides to waive his right to counsel

and make a statement, the statement is admissible, as long as the suspect initiated the further communication regarding the waiver of rights and making a statement.

Argument

I.

THE SECRETARY OF THE NAVY DID NOT COMMIT UNLAWFUL COMMAND INFLUENCE WHEN HE EXPLAINED HIS DECISION TO DENY APPELLANT CLEMENCY. HIS STATEMENTS HAVE NOT CAUSED ANY UNFAIRNESS IN THESE PROCEEDINGS.

A. An appellant must show facts that, if true, constitute unlawful command influence.

An allegation of unlawful command influence is reviewed *de novo*. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). The appellant bears the initial burden of raising unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). On appeal, an appellant must show: (1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness. *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999) (quoting *Biagase*, 50 M.J. at 150). An appellant shows that the proceedings were unfair by producing evidence "of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial." *Biagase*, 50 M.J. at 150. This Court considers both actual and apparent

unlawful command influence. *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003).

In determining whether an appearance of unlawful influence exists, this Court objectively evaluates "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). An appearance of unlawful command influence exists where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.*

"Mere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient." *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009).

B. The Secretary of the Navy is not covered by Article 37, UCMJ.

Article 37(a), UCMJ, establishes the prohibition against unlawfully influencing the action of a court-martial:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any

> convening, approving, or reviewing authority with respect to his judicial acts.

Article 37(a), UCMJ. A civilian service secretary such as the Secretary of the Navy is not covered by the plain text of this prohibition for two reasons.

First, the Secretary is not "subject to" the UCMJ. Article 2(a), UCMJ, explicitly lists those "persons [that] are subject to this chapter": service secretaries appear nowhere in the long list of persons Congress identifies as "subject to" the Code. Therefore, the prohibition against attempting to coerce or influence a convening, approving, or reviewing authority with respect to his judicial acts does not apply to him, as this clause only applies to persons "subject to" the UCMJ.

Second, this first sentence prohibiting the censure, reprimand, or admonishment of the court members does not apply because the Secretary of the Navy is not the authority convening this court-martial, nor is he "any other commanding officer." The statute only applies to an authority convening a court-martial who admonishes "the court" with respect to the findings and sentence adjudged by "the court." Article 37(a), UCMJ. This language contemplates that the prohibition prevents a convening authority from censuring or reprimanding the members in a particular case.

Appellant argues that this language covers the Secretary of the Navy by pointing out that the Secretary——along with the Secretary of Defense and the President of the United States—— have the power to convene a general court-martial if they so choose. (Appellant's Br. at 22 (citing Article 22, UCMJ)). True enough. But the Secretary of the Navy did not convene this court-martial. In order for the statute to arguably cover the Secretary of the Navy, the statute would have to read as follows:

> No authority convening a general, special, or summary court-martial, nor any other *individual with statutory authority to convene a court-martial* may censure. . .

But the statute does not use that language. Instead of the italicized language, the statute uses the term "any other commanding officer" and that term means only commissioned officers. Article 1(3), UCMJ, 10 U.S.C. § 801 (2006). Thus, the plain meaning of the statute does not apply in this situation, where the Secretary of the Navy is not an authority convening a court-martial or a commanding officer who has censured or admonished a member, nor is he a person subject to the UCMJ who attempted to coerce or influence a court.

Legislative intent supports the same conclusion. Congress was most concerned with preventing command control, and passed Article 98, UCMJ, as an enforcement mechanism for Article 37. H.R. Rep. No. 81-491, at 7-8 (1949); S. Rep. No. 81-486, at 6

(1949); *Uniform Code of Military Justice: Hearings before a Subcomm. of the H. Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 1019-21 (1949). Because Congress was concerned with an enforcement mechanism to prevent unlawful command influence, and the mechanism they picked does not apply to the Secretary of the Navy (because the Secretary is not subject to the UCMJ), this indicates that they never intended Article 37 to reach the civilian political leadership of the armed forces. The problem Congress was addressing was the all too common situation at that time where a "Commanding Officer "rais[es] the devil with somebody on the court" for a decision the court member made. *Id.* at 1020.

None of the congressional floor debate supports interpreting Article 37 to restrict the actions of the elected civilian leaders of the military. *See Cong. Floor Debate on the Uniform Code of Military Justice*, at 367 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf (last visited Sep. 11, 2012) (listing pages in the debate where Article 37 was discussed, none of which contemplate applying Article 37 to civilian leadership).

The plain text of Article 37, supported by legislative intent, indicates the Article does not apply to actions by the Secretary of the Navy. Nor has this Court's precedent extended the Article to reach that far by judicial interpretation.

This Court tested for unlawful command influence when senior military and civilian officials both made pretrial statements expressing a "zero tolerance" policy towards sexual harassment, but the Court found no unlawful command influence. *Simpson*, 58 M.J. at 374-75. But that case was also analyzed as an issue of unfair pretrial publicity in violation of the constitutional right to due process. *Id.* at 372-73. If only statements by civilian officials were at issue, the proper way to analyze that case would be purely as a due process issue, because there would be no statements by anyone covered by the prohibition in Article 37.

That is not to say that civilian leaders could influence a court-martial with impunity. It very well may be a "fraud on the system" for senior civilian leaders to "send the word down" to a convening authority or court member as to a desired result in a criminal case. *See United States v. Hagen*, 25 M.J. 78, 88 (C.M.A. 1987) (Sullivan, J., concurring). But if a civilian leader was in fact trying to influence a court-martial, the proper remedy would be to remove the possibility of influence through *voir dire* and challenges to ensure an accused had his case tried by a fair and impartial panel or considered fairly by the convening authority.

C. Appellant has not shown facts that constitute unlawful command influence.

Assuming *arguendo* that this is an unlawful command influence issue, Appellant has not met his burden to demonstrate the predicate facts. The newspaper articles Appellant cites show that the Secretary did nothing improper.

First, it is clear that after the Members sentenced Appellant to fifteen years confinement, his attorneys embarked on a coordinated campaign to receive clemency on behalf of their client. The Convening Authority personally met with Appellant’s parents and U.S. Congressman Delahunt before he awarded significant clemency, disapproving four years of confinement. (J.A. 68.) After the Convening Authority’s award of clemency, Rep. Delahunt and other members of Congress continued advocating for Appellant, and requested that the Secretary of the Navy review the case and award further clemency. (J.A. 1166.) The Secretary said that he reviewed Appellant’s case at the request of members of Congress who had pressed him to grant clemency, but he decided that further clemency was not warranted. (J.A. 1173.) He was not required to explain his reasoning, as the decision was his alone. However, in light of the public interest in the case, his decision to explain why he was not awarding further clemency does not undermine the fairness of the

military justice system. If anything, it creates more transparency.

Nor can anything in the Secretary's statements by construed as censuring, reprimanding, or admonishing any member of the court. In seeking clemency, Appellant was claiming that the sentence awarded by the Members, and the lesser sentence later approved by the Convening Authority, was improper and should be reduced. The Secretary's decision to deny further clemency simply leaves those previous decisions in place.

D. Appellant has not shown any unfairness resulting from the Secretary's statements.

Not only has Appellant failed to carry his burden to show facts that constitute unlawful influence, but he has also failed to show that his proceedings were unfair. Here, Appellant alleges unfairness in the lower court's decision, the Judge Advocate General of the Navy's certification decision, and the clemency/parole process. (Appellant's Br. at 26.)

1. The lower court was not influenced.

"In the absence of evidence to the contrary, judges of the Courts of Criminal Appeals are presumed to know the law and to follow it." *United States v. Schweitzer*, 68 M.J. 133, 139 (C.A.A.F. 2009) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Absent such evidence, courts will not conclude that a judge was affected by unlawful command

influence. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998). Here, nothing demonstrates that the lower court was influenced. In fact, five months after the Secretary of the Navy made the statements at issue, the lower Court issued an opinion setting aside the findings and sentence. That shows that the lower court was unaffected by anything the Secretary said. Article 66 review and the clemency determination were separate processes occurring at the same time, and there is no evidence the former was impacted by the later.

2. The Judge Advocate General's certification decision was not influenced.

The Judge Advocate General of the Navy certified relevant legal issues to this Court that needed to be resolved in light of the lower court's first decision in this case. The issue of how to handle the severance of an attorney-client relationship had implications beyond this case, as shown by the cases applying this Court's earlier decision reversing the lower court. *See United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011); *Wuterich v. United States*, No. 200800183, 2011 CCA LEXIS 148 (N-M. Ct. Crim. App. Aug. 25, 2011); *United States v. Hancock*, No. 201000400, 2011 CCA LEXIS 114 (N-M. Ct. Crim. App. Jun. 28, 2011).

Therefore, regardless of anything the Secretary of the Navy said, the Judge Advocate General would have certified the case

to this Court. The lower Court improperly presumed prejudice and set aside the findings and sentence. Their published opinion would also require overturning several other pending and future convictions. There is no evidence to support Appellant's claim that, but for the Secretary's comments, the Judge Advocate General would have let Appellant benefit from the lower court's erroneous ruling.

3. It is the Secretary's decision to grant clemency and his explanation of why he denied it cannot be said to have unfairly influenced the clemency process.

"[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (internal citations omitted). Clemency decisions "are not an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Id.* at 285 (internal citation omitted). Clemency is not part of the trial, nor of the adjudicatory process; it does not determine the guilt or innocence of the defendant; and, it does not primarily operate to enhance the reliability of trial. *Id.* Executive clemency is vested in an authority other than the courts. *Ex parte Grossman*, 267 U.S. 87, 120-121 (1925). "If clemency is granted, [Appellant] obtains a benefit;

if it is denied, he is no worse off than he was before." *Ohio Adult Parole,* 523 U.S. at 285.

The Military clemency process is similar. A convening authority has the initial opportunity to grant clemency "in his sole discretion." Article 60, UCMJ, 10 U.S.C. § 860 (2006). Likewise, after the convening authority acts, the Secretary of the Navy has the power to commute, remit, or suspend all or part of a sentence. Article 71, UCMJ; *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988).

By service regulation, the Naval Clemency and Parole Board "will act for or provide recommendations or advice to SECNAV in the issuance of decisions regarding clemency or parole matters . . . ." SECNAV Instruction 5815.3J, Jun. 12, 2003, (SECNAVINST 5815.3J) Part III, Section 306 at III-4. Clemency "*is not a right, but a discretionary decision of the NC&PB or SECNAV*." SECNAVINST 5815.3J, Part III, Section 308(a) at III-6 (emphasis in original). The NC&PB will submit to SECNAV, with recommendations for final action, cases that include, amongst others, "*[a]ny individual whose clemency may be the subject of controversy or substantial congressional or press interest as determined by SECNAV or a designee, to include the Director, NCPB*" or "[c]ases in which the NC&PB recommends clemency for any offender whose approved unsuspended, sentence to confinement is in excess of 10 years *(to include, inter alia, sentences, life*

without parole and life)." SECNAVINST 5815J, Part III, Section 308(a)(6)(d)-(e) at III-6 (emphasis in original).

Here, the Secretary of the Navy cannot unlawfully influence the clemency and parole board, because the board simply provides advice to him on a clemency decision that is ultimately his. Appellant's approved sentenced included eleven years of confinement and he had substantial congressional interest in his case, as members of Congress were requesting the Secretary to grant clemency. Either of those reasons means that in this case, the Secretary never delegated the final decision to the board. Rather, he retained the final determination to award clemency, and the board merely submits a recommendation.

Thus, there was no unlawful command influence because the Secretary cannot possibly be improperly influencing his own decision. Nor would an objective, disinterested observer, fully informed of all the facts and circumstances harbor a significant doubt about the fairness of the clemency proceeding. Appellant received significant clemency from the Convening Authority. Then he had members of Congress lobbying the Secretary of the Navy for additional clemency. No one would think Appellant did not get a fair chance at receiving clemency.

Appellant has failed to meet his burden because he has not shown facts that constitute unlawful command influence, nor has

he shown that there was any unfairness in the proceedings. Therefore, there is no unlawful command influence.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING APPELLANT'S STATEMENT ADMISSIBLE. APPELLANT CHANGED HIS MIND, AND DECIDED THAT HE WANTED TO MAKE A STATEMENT TO NCIS. HIS STATEMENT WAS VOLUNTARY.

A. The standard of review is abuse of discretion.

A military judge's denial of a motion to suppress a confession is reviewed for an abuse of discretion, and a military judge's findings of fact are to be left undisturbed unless they are clearly erroneous. *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003). However, voluntariness of a confession is a question of law that an appellate court independently reviews *de novo*. *United States v. Bubonics*, 45 M.J. 93, 94-95 (C.A.A.F. 1996).

B. Appellant's rights waiver and statement were voluntary.

An accused's confession must be voluntary to be admissible into evidence. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). A statement is involuntary "if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(c)(3).

The burden is on the Government to prove, by a preponderance of the evidence, that the confession was voluntary. Mil. R. Evid. 304(e); *Bubonics*, 45 M.J. at 95.

Whether the confession is voluntary requires examining the "totality of all the surrounding circumstances——both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The totality of the circumstances includes:

> the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions.

United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002).

Here, there is no evidence of the agents using any force, threats, promises, or deceptions. The whole process of preparing the statement took about eight hours, but Appellant had numerous breaks during that time, and the agents drove him to the chow hall for a dinner break. In addition, the circumstances of the interview process do not show coercion. Most of the time, Appellant was simply typing his own statement on the computer. All these facts show a voluntary statement.

In addition, the facts indicate Appellant voluntarily waived his rights before the interview started. During the first interview, on May 11, 2006, Appellant was informed of his

rights, understood those rights, and expressly waived them. (J.A. 375.) When he invoked his right to counsel, the "investigators terminated the interview and returned the accused to his quarters." (J.A. 375.) For the next seven days, the investigators "scrupulously honored his request to terminate the interview and to speak with an attorney and took no action to recommence the interview process." (J.A. 375.)

At that time, Appellant likely knew that: (1) he was the squad leader——the senior Marine implicated in the crime so far; (2) his culpability could easily be proven by the multiple witnesses in his squad; (3) his subordinates were already cooperating with NCIS, and some of them had confessed; (4) NCIS already had physical evidence that corroborated their stories; and, (5) after he invoked his right to counsel, NCIS did not seem interested in interviewing him again or getting his side of the story. Therefore, he probably wanted to avoid being the senior person held accountable, and it is not surprising that the statement he typed out attempts to shift the blame to Lieutenant Pham, creating a combat necessity/obedience to orders theme justifying his crimes. Under these facts, it is less likely that his request to tell his side of the story was the result of police badgering, and more likely that he had a change of heart that (rightly or wrongly) caused him to believe that cooperating with the investigation was in his interest.

1. NCIS was not required to actually provide Appellant with counsel and the failure to do so does not make his statement *per se* involuntary.

When an accused invokes his right to have counsel present during custodial interrogation, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The reason for this rule is that

> a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, thrust into and isolated in an unfamiliar, police-dominated atmosphere, where his captors appear to control [his] fate.

Maryland v. Shatzer, 130 S. Ct. 1213, 1220 (2010) (citations omitted).

Thus, the *Edwards* rule applies when a suspect is kept in uninterrupted pretrial custody after invoking his right to counsel, and the suspect is not allowed to regain a sense of control or normalcy after initially being taken into custody. *Id.* at 1221. The rule does not apply when there is a termination of pretrial custody and its lingering effects. *Id.* at 1222.

Here, the Government conceded at trial the conditions of Appellant's restraint from May 10 through May 18 were restriction tantamount to confinement. (J.A. 15.) The fact that Appellant remained in pretrial confinement is the reason the *Edwards* rule even applies. Moreover, the fact that Appellant never consulted with an attorney or met with an attorney appointed to represent him at an R.C.M. 305 hearing during the week at Camp Fallujah is irrelevant, because even if he had, a consultation with counsel is not sufficient to counter the effects of pretrial confinement and prevent the application of the *Edwards* rule. *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990).

Appellant argues that his continued confinement and inability to consult with an attorney should make his waiver and statement "*per se* involuntary." (Appellant's Br. at 55.) This would be vast expansion of the *Edwards* rule, inconsistent with Supreme Court precedent. The *Edwards* rule does not prevent finding that Appellant voluntarily waived his rights and provided a statement, so long as he initiated the conversation or discussions with the Police. *Minnick*, 498 U.S. at 156. As the Supreme Court recently noted, "an extension of *Edwards* is not justified; we have opened its protective umbrella far enough." 130 S. Ct. at 1222 (quotation omitted). Therefore, this Court should decline Appellant's invitation to expand

Edwards and create a new rule making Appellant's waiver and statement *per se* involuntary.

C. Appellant initiated the conversation with NCIS regarding making another statement.

The ultimate issue here boils down to who initiated the conversation about making another statement. If Appellant initiated further communication, exchanges, or conversations with NCIS, then his statement is admissible. *United States v. Brabant*, 29 M.J. 259, 261 (C.M.A. 1989) (citing *Edwards*, 451 U.S. at 484-85).

The question of who initiated the conversation was a hotly contested factual issue during the suppression motion before the Military Judge. Appellant submitted a sworn affidavit in which he made the following claims: (1) that NCIS agents tried to talk him out of invoking his rights when he first invoked them during the first interview on May 11; (2) after he invoked his rights, the agents used a color enhancing program on a digital photo as a ruse to trick him into confessing, and continued to question him; (3) When NCIS was conducting the consent search on May 18, SA Connelly told him he had made a mistake in invoking his rights, and talked him into providing another statement. (J.A. 1122-23.)

However, both NCIS agents disputed all of Appellant's claims, and clearly testified that Appellant initiated the

conversation about making a second statement by asking if there was still an opportunity to tell his side of the story. (J.A. 128-29, 216-17.) The Military Judge's findings of fact adopt the agents' version over Appellant's. (J.A. 376.) The Military Judge saw SA Connelly testify at the motions hearing and found him to be a credible and reliable witness. (J.A. 370.) The Judge also assessed the credibility of PFC Jodka's testimony, which Appellant presented in support of his motion to suppress: "Based on the clear deception on the part of Jodka, which appeared designed to advance the case of the accused without concern for the truthfulness of his testimony, the Court found his testimony to not be credible." (J.A. 377.) Nor did the Judge find that Appellant's affidavit was supported by the facts or credible. (J.A. 377.)

The lower court found that the Judge's findings of fact were not clearly erroneous and adopted them for its analysis of the suppression issue. (J.A. 15.) This Court should as well. *Pipkin*, 58 M.J. at 360. The resolution of this factual dispute essentially resolves the suppression issue. The NCIS agents "scrupulously honored" Appellant's first request to terminate the interview, and never tried to interview him again until he changed his mind and asked if he could tell his side of the story. Therefore, the statement is admissible unless this Court finds that NCIS acted improperly by asking Appellant for consent

to search his belongings after he had already invoked his right to counsel. They did not.

1. NCIS was permitted to ask Appellant for consent to search his belongings after he invoked his right to counsel.

A request for consent to search does not infringe upon Fifth Amendment safeguards against self-incrimination because such requests are not interrogations and the consent given is ordinarily not a statement. *United States v. Frazier,* 34 M.J. 135, 137 (C.M.A. 1992). The clear rule in the federal circuits is that a request for consent to search is not a custodial interrogation triggering a previously invoked *Miranda* right to counsel. *United States v. Shlater*, 85 F.3d 1251, 1255-56 (7th Cir. 1996)(citing *United States v. Smith*, 3 F.3d 1088, 1098 (7th Cir. 1993) ("We have held that a consent to search is not a self-incriminating statement, and therefore, a request to search does not amount to interrogation. This view comports with the view taken by every court of appeals to have addressed the issue."). In *Shlater*, after the suspect invoked his right to counsel, the police stopped the interrogation, but requested permission to search the suspect's home, which he granted, and incriminating evidence was found. 85 F.3d at 1255-56. The Court found no violation of the suspect's rights, and that the evidence was admissible. *Id.*

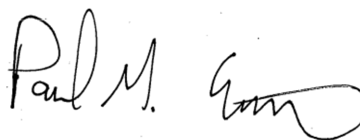
Similarly, in this case, there was nothing improper with NCIS asking for consent to search Appellant's belongings. Appellant argues that this case should be different, because he was still in pretrial confinement, the coercive effects of which had never dissipated. (Appellant's Br. at 60.) That fact is beside the point. The suspect in *Shlater* was still in custody when the police asked for consent. 85 F.3d at 1254. If Appellant had been released from confinement and the effects of that confinement had been dissipated, (i.e. Appellant was "returned to normalcy") then the *Edwards* rule would not apply, and the police would be free to initiate further communication with Appellant. *Shatzer*, 130 S. Ct. at 1222. That is, if Appellant *had* been released from confinement, then even under his version of the facts, where NCIS agents brought up the subject of providing another statement, his statement would still be admissible. Because he was not released from confinement, he still warrants the protection of the *Edwards* rule. Therefore, his statement was only admissible under the facts as found by the Military Judge——this was a factual issue.

Since NCIS agents were permitted to ask Appellant for consent to search, and anything found during the search would have been admissible, there is no reason to find that Appellant's decision to change his mind and provide a statement was not voluntary. Appellant's argument to the contrary would

prove unworkable and would prevent in-fact voluntary confessions from being admitted at trials. That is, if Appellant's theory is correct, then when Appellant asked SA Connelly if he could still provide his side of the story, SA Connelly would have no choice but to answer "no," and refuse to take Appellant's voluntary statement. But, voluntary confessions are not merely a proper element in law enforcement, they are an "unmitigated good." *Shatzer*, 130 S. Ct. at 1222 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991)). The *Edwards* rule is a prophylactic rule and there is no reason to extend it to the point where a police officer has to refuse to take a voluntary statement from an accused who wishes to give the statement.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.



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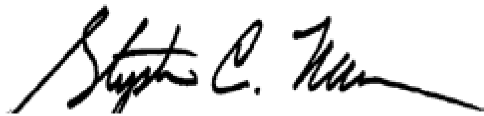

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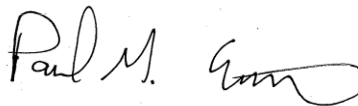

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