IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201200145
Joseph B. SALYER, Corporal (E-4) U.S. Marine Corps Appellant	)	USCA Dkt. No. 13-0186/MC

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

SAMUEL C. MOORE
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8504, fax (202)685-7687
Bar no. 35101

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 28707

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

Table of Contents

Table of Authorities

COURTS OF CRIMINAL APPEALS CASES

STATUTES AND RULES

Granted Issue

UNDER *UNITED STATES V. LEWIS*, 63 M.J. 405 (C.A.A.F. 2006), A CASE IS DISMISSED WITH PREJUDICE WHEN UNLAWFUL COMMAND INFLUENCE RESULTS IN THE RECUSAL OF A MILITARY JUDGE. HERE, THE MILITARY JUDGE RECUSED HIMSELF BECAUSE HE FOUND THAT THE GOVERNMENT'S ACTIONS MADE IT IMPOSSIBLE FOR HIM TO REMAIN ON THE CASE. THE GOVERNMENT COMPLAINED TO HIS SUPERVISOR ABOUT A RULING, ACCESSED HIS SERVICE RECORD WITHOUT PERMISSION, AND WITH THIS INFORMATION, MOVED FOR HIS RECUSAL. SHOULD THIS CASE BE DISMISSED WITH PREJUDICE?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under 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 punitive discharge. This Court has jurisdiction in this case based on 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 plea, of possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006). Members sentenced Appellant to two years of confinement, reduction to E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. On October 23, 2012, the lower court

affirmed the findings and sentence. *United States v. Salyer*, No. 201200145, 2012 CCA LEXIS 407 (N-M. Ct. Crim. App. Oct. 23, 2012). Appellant filed a petition for grant of review, which this Court granted on January 17, 2013.

Statement of Facts

A. The issue: how to define "minor."

An issue in this child pornography case was whether the Military Judge would define "minor" as a child under the age of eighteen or under the age of sixteen. (J.A. 55-56.) The United States charged Appellant under all three Article 134, UCMJ, clauses——assimilating the federal statute, 18 U.S.C. § 2252A (2006), under clause three——but withdrew reference to this statute and to clause one in a pretrial hearing. (J.A. 9-11, 107-08.)

Though the specification alleged only a clause two offense after the amendment, the parties discussed using the federal statutory definitions for "child porn," with minimal modifications. (J.A. 14, 17, 118-21.) Trial Counsel asked the Military Judge to define minor as a child under the age of eighteen, as defined by 18 U.S.C. § 2256. (J.A. 14, 17, 118, 120, 140-41.) Focusing on other language in the statute, Trial Defense Counsel did not initially contest this definition. (J.A. 14, 118-21.)

Following *voir dire* of the Members, the Military Judge first raised the possibility of defining a minor as an individual under the age of sixteen. (J.A. 118-21.) Later that day——the afternoon before opening statements——Trial Counsel raised the issue again: "We still don't know about the definition of a minor, sir." (R. 269.) "I know you don't," the Military Judge replied, "I will tell you when I am ready." (R. 269.)

Minutes before opening statements, the Military Judge gave each side a copy of his proposed instructions, which defined minor as a person under the age of sixteen. (J.A. 140.) The Military Judge explained that he was "applying the age of consent in the military." (J.A. 140.) Trial Counsel pointed out, "consent in the military isn't at issue." (J.A. 140.) The Military Judge replied, "[t]his is what I am using. I'm using this." (J.A. 140.) And he stopped further discussion, "Okay. Very well. I have already ruled so stop arguing about it." (J.A. 141.) Prior to opening statements, the Military Judge instructed the Members that a "'minor' means any real person under the age of 16 years." (J.A. 142.)

B. <u>The OIC's phone call to the Circuit Judge</u>.

"I did not understand that decision. I was perplexed by it," the Legal Services Center Officer in Charge (OIC) later testified. (J.A. 174-75.) While trying to figure out why the

Military Judge ruled as he did, someone in the prosecution office mentioned that the Military Judge had married a very young woman and maybe that played a role, or at least caused an appearance of bias, in his decision. (J.A. 209.) Not content to rely on "rumor and innuendo," the Military Justice Officer accessed the Military Judge's information in an electronic database to confirm whether this was true. (J.A. 208, 211-12.) The data confirmed that the Military Judge's wife was seventeen when they wed. (J.A. 66, 208.) The Military Justice Officer believed that at "this time it seemed at least plausible that there was some source of implied bias inherent in the judge's decision to give this instruction." (J.A. 208.)

"It struck me that this was a vital issue for *voir dire*, and, likely, a motion for recusal," the OIC explained, and "there was probably a better than likely chance that the judge would recuse himself." (J.A. 176.) He further noted, "in the two-and-a-half years that I've been here, I have never seen a military judge——not this one, not any judge——*voir dired*, let alone moved to recuse himself." (J.A. 175.) And believing that he "owed the circuit judge a professional courtesy," the OIC called the Circuit Judge and told him, "I'm not asking for your input. I'm certainly not seeking any guidance. I just wanted to make you aware of what's going on in a courtroom within your circuit." (J.A. 176, 187.)

Moreover, the trial was in Hawaii where no replacement judges were readily available. (J.A. 186.) The OIC later explained, "I did think professionally he would appreciate the heads up because we had members sitting and witnesses from off the island. There was a trial that was already steaming down the tracks." (J.A. 188.)

"I did not ... tell the circuit judge I was complaining or I was dissatisfied with the performance," the OIC testified, "I was letting him know of what I thought was a significant event about to unfold in the courtroom." (J.A. 188.) The Circuit Judge did not seem upset; instead, he listened and thanked the OIC at the end of the call. (J.A. 188-89.)

C. Trial Counsel *voir dired* the Military Judge; the Military Judge recused himself.

After the lunch break, Trial Counsel *voir dired* the Military Judge regarding the age of his wife when they married. (J.A. 151.) The Military Judge confirmed his wife was seventeen-years-old when they married. (J.A. 151.) Trial Counsel then moved to disqualify the Military Judge based "on both actual and implied bias," due to his ruling on the definition of a minor. (J.A. 152.) The court then recessed until the next morning. (J.A. 153.)

The next morning the Military Judge first mentioned that during the lunch break the previous day the Circuit Judge had

asked him about the "age issue," and the Circuit Judge relayed that the OIC had called him about the potential *voir dire*. (J.A. 154.) The Military Judge then raised the issue of unlawful command influence and "direct[ed] the parties attention to *U.S. v. Lewis*," while he considered whether to recuse himself. (J.A. 155.) Early that afternoon, the Military Judge "disqualified" himself "due to the fact that the prosecution raised an issue involving a personal family matter of the military judge which was also raised with the military judge's supervisor as part of the complaint." (J.A. 70, 164.)

D. The Replacement Military Judge arrives.

The next morning, the Replacement Military Judge arrived. (J.A. 166.) The Defense moved to dismiss for unlawful command influence and Trial Counsel asked the Replacement Military Judge to reconsider some of the previous Military Judge's rulings. (J.A. 72, 85, 167.) After hearing testimony——from the OIC and the Military Justice Officer——and argument, the Replacement Military Judge denied Appellant's Motion to dismiss. (J.A. 213.)

He noted that the Military Judge's ruling on the definition of a minor was not irrefutable:

> I believe that [the Military Judge's] ruling on whether 16 or 18 is the appropriate age under the specification as you have alleged it is a flip of the coin. And with a different judge, you might have well have gotten a different result.

(J.A. 194.) The Replacement Military Judge found the OIC was in a "very odd awkward position as a Marine Officer," because it is usually advisable to give advance notice as a courtesy to one's supervisors. (J.A. 214.) But since this involved "the military judge chain of command, which is sacrosanct," he found that the OIC's decision to call the Circuit Judge was ill-advised, even if good-intentioned. (J.A. 62, 214.) He held that this amounted to apparent unlawful command influence:

> Despite the OIC's stated intentions to the contrary, the contents of the phone call were ultimately made known to the MJ, and due to his recusal, have the undeniable appearance of influencing the court proceedings.

(J.A. 63.)

He further explained that though such a "courtesy call is widely accepted practice in the military, especially when dealing with such a sensitive topic involving a high ranking officer," the facts created the appearance of unlawful command influence due to the "cascading results of the phone call," which ultimately resulted "in the military judge finding himself in a position where he does not feel like he can continue in the trial without being unfairly scrutinized by both sides ...." (J.A. 62, 64, 214.)

Conversely, he found Trial Counsel's *voir dire* valid:

> You have an unusual ruling——granted it may be a flip-of-the-coin kind of ruling, but you have a

> questionable ruling from a man who is in a statistically anomalous position as having perhaps a different life experience ....

(J.A. 196.) He asked Trial Defense Counsel, "[f]or an adult male ... let's call him 25 and up ... that would be an anomaly to have married a woman under the age of 18?" (J.A. 195.) Trial Defense Counsel agreed. (J.A. 195.) In his written ruling he further explained,

> The MJ's statistically anomalous personal situation in this regard, vis-a-vis his *sua sponte* raising the age issue and then ruling quickly and curtly in the defense's favor was a perfectly valid basis for the Government to *voir dire* and challenge the MJ.

(J.A. 63.)

To remedy the apparent unlawful command influence from the phone call, the Replacement Military Judge upheld and refused to reconsider the prior rulings:

> I will not reconsider any of [the Military Judge's] decisions which were, again, what I would——what would be characterized as "defense friendly." I will not give the government a second bite at the apple here.

(J.A. 64, 194, 216.) He convinced Trial Counsel not to seek reconsideration of the previous ruling on the age of a minor. (J.A. 194.) "In fact, and importantly," he found, "if anything the accused actually received a benefit from the replacement of the MJs in this regards, as the original MJ may well have reconsidered many issues mid-trial ...." (J.A. 64.) He also

barred the OIC from coming back into the courtroom for the remainder of the proceedings. (J.A. 189.)

Finally, he noted that Appellant could not demonstrate any possible prejudice from the phone call or the change in judges:

> [M]ilitary judges are interchangeable. [The Military Judge] was not the fact finder. The fact finders have not been made aware of this, and they will not be made aware of this.... And the defense has been unable to point to anything that would amount to actual prejudice in this case.

(J.A. 215-16.) Trial Defense Counsel assured the Replacement Military Judge: "Sir, in regards to the fairness and impartiality of the military judge, the defense doesn't have any concerns about whether it's you or [the original Military Judge]." (J.A. 203.)

Summary of Argument

After a perplexing ruling, Trial Counsel discovered a valid basis to *voir dire* the Military Judge. The OIC of the Law Center called the Circuit Judge to let him know that Trial Counsel planned to *voir dire* the Military Judge. The OIC made this call as a courtesy——due to the unique nature of the issue—— and due to the logistical challenges inherent in replacing a military judge in Hawaii on the day of trial. The Circuit Judge later asked the Military Judge about the situation. Trial Counsel *voir dired* the Military Judge. The Military Judge recused himself. Appellant claims that this must be unlawful

command influence. But the word for what happened is not unlawful. It is unwise.

The lower court held that these facts did not demonstrate actual unlawful command influence and apparent unlawful command influence was limited to the OIC's phone call to the Circuit Judge. Based on the remedial steps, moreover, the court held that beyond a reasonable doubt members of the public would not harbor significant doubts as to the fairness of the proceedings. The granted issue does not challenge the lower court's holding that the *voir dire* was not unlawful command influence and that the OIC's phone call to the Circuit Judge was limited to apparent unlawful command influence; instead, Appellant asks this Court whether the case should be dismissed with prejudice.

In deciding this issue, therefore, the Court need address only the following two questions: first, what was the nature and intent of the OIC's phone call to the Circuit Judge; and second, would a disinterested member of the public now believe that Appellant received a trial free from the effects of the apparent unlawful command influence in this phone call? Appellant was not prejudiced by the OIC's good-intentioned yet ill-advised phone call, because the Replacement Military Judge removed any possible taint of unlawful command influence, Appellant cannot show any concrete disadvantage, and fairness and impartiality were maintained.

Argument

THE LAW OF THE CASE DOCTRINE DICTATES THAT ONLY THE OIC'S PHONE CALL TO THE CIRCUIT JUDGE CONSTITUTES APPARENT UNLAWFUL COMMAND INFLUENCE. BEYOND A REASONABLE DOUBT A DISINTERESTED MEMBER OF THE PUBLIC WOULD NOT HARBOR DOUBT ABOUT THE FAIRNESS OF THESE PROCEEDINGS DUE TO THE OIC'S INNOCENT INTENT, THE REPLACEMENT MILITARY JUDGE'S REMEDIAL MEASURES, AND APPELLANT'S LACK OF PREJUDICE.

A. Law of the case.

The ruling of the lower court normally becomes the law of the case where neither party appeals the ruling. *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006) (citing *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)). Under the law of the case doctrine, the court will not review the lower court's ruling unless it is "clearly erroneous and would work a manifest injustice." *United States v. Williams*, 41 M.J. 134, 135 n.2 (C.M.A. 1994); *see also United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993) (requiring proponent to show controlling legal authority changed; significant new evidence, not earlier obtainable; or prior decision will result in a serious injustice). Short of this high hurdle, the law of the case doctrine dictates that all litigation must sometime come to an end. *See Arizona* v. *California*, 460 U.S. 605, 619 (1983). Here, much of the litigation has come to an end.

The lower court made three pertinent rulings.[1] First, the *voir dire* of the Military Judge amounted to neither actual nor apparent unlawful command influence. *Salyer*, 2012 CCA LEXIS 407, at *15. Second, the phone call to the Circuit Judge was not actual unlawful command influence but it did constitute apparent unlawful command influence. *Id.* at *14-15. Third, the Replacement Military Judge took sufficient steps to cure the apparent unlawful command influence. *Id.* at *19-20.

From these decisions, Appellant sought certification of and the Court granted a single issue:

> UNDER *UNITED STATES V. LEWIS*, 63 M.J. 405 (C.A.A.F. 2006), A CASE IS DISMISSED WITH PREJUDICE WHEN UNLAWFUL COMMAND INFLUENCE RESULTS IN THE RECUSAL OF A MILITARY JUDGE. HERE, THE MILITARY JUDGE RECUSED HIMSELF BECAUSE HE FOUND THAT THE GOVERNMENT'S ACTIONS MADE IT IMPOSSIBLE FOR HIM TO REMAIN ON THE CASE. THE GOVERNMENT COMPLAINED TO HIS SUPERVISOR ABOUT A RULING, ACCESSED HIS SERVICE RECORD WITHOUT PERMISSION, AND WITH THIS INFORMATION, MOVED FOR HIS RECUSAL. SHOULD THIS CASE BE DISMISSED WITH PREJUDICE?

This issue does not challenge the lower court's first two rulings——that the *voir dire* was not unlawful command influence, and that the phone call only constituted apparent unlawful command influence. *See United States v. Lewis*, 63 M.J. 405, 412-13 (C.A.A.F. 2006) (applying law of the case based on the

[1] Appellant has not challenged the Circuit Judge's phone call to the Military Judge as an independent source of unlawful command influence. (J.A. 62); *see, e.g., United States v. Mabe*, 33 M.J. 200, 205 (C.M.A. 1991) (discussing judge advocate command coercion of the military judge's decision). Therefore, this issue is not before the Court.

granted issue); *Mabe*, 33 M.J. at 203 ("Our starting point in this case is the granted issue."); *cf. United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) (reviewing granted issue).

Instead, the issue asks only whether the case should be dismissed with prejudice, which turns solely on the lower court's final ruling——that the Replacement Military Judge took sufficient steps to cure the apparent unlawful command influence from the OIC's phone call. It is not enough that Appellant argues other points in the brief; rather, the issue controls. *See Lewis*,[2] 63 M.J. at 412-13 (holding each side to the granted issue regardless of arguments raised in the briefs). Unless the lower court's decisions are clearly erroneous and would work a manifest injustice, therefore, the Court need not consider whether the *voir dire* constituted actual or apparent unlawful command influence or whether the phone call was actual unlawful command influence.

[2] The relevant granted issue in *Lewis* asked:

> WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT THE IN-COURT ACCUSATIONS BY THE STAFF JUDGE ADVOCATE AND TRIAL COUNSEL THAT THE MILITARY JUDGE WAS INVOLVED IN A HOMOSEXUAL RELATIONSHIP WITH THE CIVILIAN DEFENSE COUNSEL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE BUT WERE HARMLESS BEYOND A REASONABLE DOUBT.

63 M.J. at 407 n.1.

B. Unlawful command influence standard of review.

The Court reviews an allegation of unlawful command influence *de novo*. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). The Court reviews a military judge's findings of fact related to the unlawful command influence motion under a clearly erroneous standard. *Id*.

C. Unlawful command influence is prohibited, but proof of command influence in the air will not do.

Statute and regulation prohibit unlawful influence on a court-martial: "No person subject to this chapter may attempt to coerce or ... 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 ...." Article 37(a), UCMJ; *see also* R.C.M. 104(a)(1). Article 37(a) prohibits command coercion of the military judge's decision on findings and sentence. *Mabe*, 33 M.J. at 205. For example, in *United States v. Campos*, 42 M.J. 253, 260 (C.A.A.F. 1995), this Court condemned "the calculated carping to the judge's judicial superiors."

Yet "[i]t is not always easy to determine when a particular circumstance constitutes an improper influence." *United States v. Hawthorne*, 7 C.M.A. 293, 298 (C.M.A. 1956). "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). The Court of Military Appeals explained:

> There must be something more than an appearance of evil to justify action by an appellate court in a particular case. "Proof of [command influence] in the air, so to speak, will not do."

United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994) (citing *Untied States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986)).

The defense has the initial burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citation omitted). At trial, this burden is to show facts that, if true, "constitute unlawful command influence[] and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceeding." *Ashby*, 68 M.J. at 128 (citation omitted). On appeal, the defense must show: (1) facts that, 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. *Id*. (citations omitted).

If the defense meets this burden, then the burden shifts to the United States to "persuade the military judge and the appellate courts beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not affect the findings and sentence." *Biagase*,

50 M.J. at 151. The United States may carry this burden by proving beyond a reasonable doubt: "(1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence." *Id*.

The Court "must consider apparent as well as actual unlawful command influence." *United States v. Reed,* 65 M.J. 487, 488 (C.A.A.F. 2008). In considering an allegation of an appearance of unlawful command influence, the Court considers "objectively, 'the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public.'" *Ashby*, 68 M.J. at 129 (quoting *Lewis*, 63 M.J. at 415). The "appearance of unlawful command influence will exist 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.*

Here, Appellant's prolific arguments founder for two reasons. First, the lower court's rulings were not clearly erroneous; therefore the granted issue limits the Court's consideration to the apparent unlawful command influence from the OIC's call to the Circuit Judge. Second, the phone call to the Circuit Judge had no prejudicial impact on the court martial.

D. Because they are not clearly erroneous and will not work a manifest injustice, the lower court's rulings are the law of the case.

The lower court's rulings were not clearly erroneous and will not work a manifest injustice: (1) the *voir dire* of the Military Judge was neither actual nor apparent unlawful command influence; (2) the phone call to the Circuit Judge was not actual unlawful command influence, but it did create the appearance of unlawful command influence. These rulings are now the law of the case.

1. The lower court did not clearly err: the *voir dire* was permitted and it constituted neither actual nor apparent unlawful command influence.

The President protects the right to an impartial judge through R.C.M. 902(a), which governs the appearance of bias generally: "a military judge shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned." R.C.M. 902(b) governs specific disqualifying circumstances, which are not applicable here. *See United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001); *see also* Art. 26(d), UCMJ. R.C.M. 902(d)(2) provides that "[e]ach party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification ...."

An issue in this child pornography case was whether the Military Judge would define "minor" as a child under the age of

eighteen or under the age of sixteen. (J.A. 55-56.) Following *voir dire* of the Members——the afternoon before opening statements——Trial Counsel mentioned, "[w]e still don't know about the definition of a minor, sir." (R. 269.) "I know you don't," the Military Judge replied, "I will tell you when I am ready." (R. 269.)

He was ready just minutes before opening statements, when he told the parties for the first time that he would define a minor as a person under the age of sixteen. (J.A. 140.) The Military Judge explained that he was "applying the age of consent in the military." (J.A. 140.) Trial Counsel objected, "consent in the military isn't at issue." (J.A. 140.) The Military Judge demurred, "[t]his is what I am using. I'm using this." (J.A. 140.) And he stopped further discussion, "Okay. Very well. I have already ruled so stop arguing about it." (J.A. 141.) Without a further break in the proceedings, he instructed the Members on the definition of minor prior to opening statements accordingly. (J.A. 142.)

As the Replacement Military Judge later pointed out, this ruling was not irrefutable[3]:

[3] Though not applicable to this offense, just over a month after the trial the President signed an executive order listing child pornography as an Article 134 offense. The executive order defines "minor" as "any person under the age of 18 years." 2011 Amendments to the Manual for Courts-Martial, 76 Fed. Reg. 78451, 78461 (Dec. 16, 2011).

> I believe that [the Military Judge's] ruling on whether 16 or 18 is the appropriate age under the specification as you have alleged it is a flip of the coin. And with a different judge, you might have well have gotten a different result.

(J.A. 194.) The prosecution team was surprised by this ruling: "I did not understand that decision. I was perplexed by it," the OIC later testified. (J.A. 175.) While trying to figure out why the Military Judge ruled as he did, someone mentioned that the Military Judge had married a very young woman and maybe that played a role, or at least caused an appearance of bias, in his decision. (J.A. 209.) Not content to rely on "rumor and innuendo," the Military Justice Officer pulled up the Military Judge's data to confirm whether this was true. (J.A. 208, 211-12.) The data confirmed that the Military Judge's wife was seventeen when they wed. (J.A. 66, 208.) The Military Justice Officer believed that at "this time it seemed at least plausible that there was some source of implied bias inherent in the judge's decision to give this instruction." (J.A. 208.)

Accordingly, Trial Counsel *voir dired* the Military Judge regarding the age of his wife when they married. (J.A. 151.) The Military Judge confirmed his wife was seventeen-years-old when he married her. (J.A. 151.) The Replacement Military Judge summarized the *voir dire's* relevance:

> You have an unusual ruling——granted it may be a flip-of-the-coin kind of ruling, but you have a questionable ruling from a man who is in a

> statistically anomalous position as having perhaps a different life experience ....

(J.A. 196.) In his written ruling he further explained,

> The MJ's statistically anomalous personal situation in this regard, vis-a-vis his *sua sponte* raising the age issue and then ruling quickly and curtly in the defense's favor was a perfectly valid basis for the Government to *voir dire* and challenge the MJ.

(J.A. 63.)

The parties disagreed about how a minor should be defined, the Military Judge ruled suddenly that he would define a minor narrowly despite the federal definition, and Trial Counsel inquired——based on a good-faith-basis——into whether there was a potential bias or appearance of bias issue. All sides did their part.

Nonetheless, the Military Judge "disqualified" himself not based on Trial Counsel's request but "due to the fact that the prosecution raised an issue involving a personal family matter of the military judge which was also raised with the military judge's supervisor as part of the complaint." (J.A. 70.) Following the Military Judge's prompt——"I direct the parties attention to *U.S. v. Lewis*"——Appellant levels several broadside attacks. (J.A. 155.)

First, Appellant repeatedly claims that the United States accused the Military Judge of producing and possessing child pornography. (Appellant's Br. at 18-20.) This sensational

claim does not make sense and does not warrant a response. But, to be clear, the United States has not and is not alleging that the Military Judge violated any law. (J.A. 88, 152.)

Second, Appellant argues that Trial Counsel lacked a good-faith basis to question the Military Judge. (Appellant's Br. at 15.) The good-faith basis was not solely in the veracity of the allegations related to the Military Judge's wife's young age. It was instead contingent both on her age and his comparatively advanced years when viewed in light of the facts of his ruling, which seemed contrary to prevailing law. When exploring the veracity of such a sensitive topic the United States is well served to perfect its data. As such, the prosecution team confirmed the information before asking the Military Judge; thus they *voir dired* the Military Judge on a good-faith basis rather than mere innuendo or conjecture. (J.A. 87, 152.) As the Replacement Military Judge found,

> In this case the government had actual knowledge ... and did exercise the degree of caution that one would expect an officer of the court to exercise before one starts asking personal questions to ensure that they're not just rumor or innuendo.

(J.A. 215.)

Third, Appellant piles-on by repeatedly implying that this Court should exercise plenary supervision of counsel. (Appellant's Br. at 6, 12, 23, 35-36.) This argument is both irrelevant to the legal issue here and in contravention of law.

See R.C.M. 109 ("Each Judge Advocate General is responsible for the professional supervision and discipline of ... judge advocates ...."); *see also* Art. 6(a), 27.

Finally, Appellant argues that the *voir dire* caused the Military Judge to recuse himself and therefore this case is equivalent to *Lewis*. This leads to the paradox in the Military Judge's disqualification and Appellant's argument: neither the trial counsel nor the defense counsel could ever *voir dire* a military judge without creating a perception of impartiality. From such a perspective, every relevant and good-faith question could cause a military judge to quote *Lewis* and say,

> I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]

Lewis, 63 M.J. at 411; (J.A. 164). But this is not the standard, and this case is not *Lewis*. Each party is expressly permitted to question the military judge based on a good-faith and relevant basis. R.C.M. 902(d)(2).

In short, the lower court correctly held that the *voir dire* was not unlawful command influence. Because this decision is not clearly erroneous and will not work a manifest injustice, the lower court's ruling that this constituted neither actual nor apparent unlawful command influence is the law of the case.

2. The lower court did not clearly err: the OIC's phone call was not actual unlawful command influence; it constituted only apparent unlawful command influence.

a. The phone call did not amount to actual unlawful command influence.

"It struck me that this was a vital issue for *voir dire*, and, likely, a motion for recusal," the OIC explained, and "there was probably a better than likely chance that the judge would recuse himself." (J.A. 176.) This was unusual, "in the two-and-a-half years that I've been here, I have never seen a military judge——not this one, not any judge——*voir dired*, let alone moved to recuse himself." (J.A. 175.) And believing that he "owed the circuit judge a professional courtesy," the OIC called the Circuit Judge: "I'm not asking for your input. I'm certainly not seeking any guidance. I just wanted to make you aware of what's going on in a courtroom within your circuit." (J.A. 176, 187.)

Adding to the sensitive nature of the matter, the trial was in Hawaii where no replacement judges were readily available. (J.A. 186.) The OIC explained, "I did think professionally he would appreciate the heads up because we had members sitting and witnesses from off the island. There was a trial that was already steaming down the tracks." (J.A. 188.)

"I did not ... tell the circuit judge I was complaining or I was dissatisfied with the performance," the OIC testified, "I

was letting him know of what I thought was a significant event about to unfold in the courtroom." (J.A. 188.) And though Appellant eventually concedes that the OIC here "was not the SJA" for this case, (Appellant's Br. at 30), Appellant's Brief repeatedly implies otherwise——for example, by calling the OIC "an SJA" and by conflating the OIC's role as the base Staff Judge Advocate with his role in this case as the OIC of the Legal Services Center.[4] (Appellant's Br. at 5, 6, 12, 21-22; J.A. 174.) To be certain, however, the OIC was not the Staff Judge Advocate in this case, and the Staff Judge Advocate and the Convening Authority were not involved. (J.A. 57, 174.)

The OIC's phone call was not actual command influence; the Replacement Military Judge and the service court correctly found that the OIC was not attempting to influence or impact the proceeding. *Salyer*, 2012 CCA LEXIS 407, at *14; (J.A. 187); *see Mabe*, 33 M.J. at 205 (Article 37(a) prohibits command coercion of the military judge's decision on findings and sentence). Nor did the OIC or the Circuit Judge intend to influence the Military Judge's rulings. *Salyer*, 2012 CCA LEXIS 407, at *14; (J.A. 58, 63). This was not calculated carping. *Campos*, 42 M.J. at 260 (condemning the "calculated carping to the judge's judicial superiors"). Accordingly, neither the Replacement

[4] The "Staff Judge Advocate" performs a specific statutory and regulatory role in advising the convening authority. *See, e.g.*, Art. 6(b), 34, 60(d); R.C.M. 105(b), 103(17), 1106.

Military Judge nor the service court found actual command influence from the OIC's phone call. *Salyer*, 2012 CCA LEXIS 407, at *14; (J.A. 63).

The Replacement Military Judge did find, appropriately, that the OIC was in a "very odd awkward position as a Marine Officer," because it is usually advisable to give advance notice as a courtesy to one's supervisors. (J.A. 214.) But since this was not merely involving one's supervisor, but instead "the military judge chain of command, which is sacrosanct," he found that the OIC's decision to call the Circuit Judge was ill-advised, even if good-intentioned. (J.A. 62, 214.)

This claim, floating in the air by itself, cannot be actual unlawful command influence because it did not unlawfully influence the proceedings. *Stombaugh*, 40 M.J. at 213. Neither the Replacement Military Judge's finding nor the lower court's ruling is clearly erroneous. It is now the law of the case.

b. <u>The phone call did amount to apparent unlawful command influence</u>.

The Replacement Military Judge and the service court did find that the OIC's phone call to the Circuit Judge amounted to apparent unlawful command influence. *Salyer*, 2012 CCA LEXIS 407, at *15; (J.A. 215). The Replacement Military Judge explained his rationale:

> Despite the OIC's stated intentions to the contrary, the contents of the phone call were ultimately made

> known to the MJ, and due to his recusal, have the undeniable appearance of influencing the court proceedings.

(J.A. 63.) The Replacement Military Judge found that the facts created the appearance of unlawful command influence due to the "cascading results of the phone call," which ultimately resulted "in the military judge finding himself in a position where he does not feel like he can continue in the trial without being unfairly scrutinized by both sides ...." (J.A. 62, 64, 214.)

The service court agreed, "[n]otwithstanding the innocent purpose behind the call, the Government's actions created the appearance that the phone call was the sort of 'conduit for complaints' against a military judge prohibited by the UCMJ." *Salyer*, 2012 CCA LEXIS 407, at *15; *see Mabe*, 33 M.J. at 206. That is, the OIC's phone call was not an intentional complaint to the Circuit Judge and the United States was not involved in an on-going endeavor to unlawfully remove the Military Judge. The phone call simply was ill-advised and created the appearance of unlawful command influence.

Since Appellant cannot show that the Court should disregard the law of the case doctrine, the Court need only assess whether the United States met its burden to prove beyond a reasonable doubt that the apparent unlawful command influence from the good-intentioned but ill-advised phone call to the Circuit Judge did not prejudice Appellant.

E. The OIC's phone call to the Circuit Judge did not affect the findings and sentence.

The Court reviews a military judge's decision not to dismiss the charges for an abuse of discretion. *Douglas*, 68 M.J. at 354 (citation omitted). A military judge has broad discretion to craft a remedy to remove the taint of unlawful command influence. *Id.* "When an error can be rendered harmless, dismissal is not an appropriate remedy." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted). Regardless of the remedy, the court must ultimately be convinced beyond a reasonable doubt that the unlawful command influence had no prejudicial impact on the court-martial. *See id.* at 356 (discussing the tension between the standard of review concerning the remedy and the unlawful command influence).

The error in this case——that is, the apparent unlawful command influence——is confined to the OIC's phone call to the Circuit Judge. This case therefore turns on whether an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding based on this well-intentioned yet ill-advised phone call that, through a series of events, led to the Military Judge's recusal.

Beyond a reasonable doubt, the answer is no. There is no prejudice in this case and the Replacement Military Judge did

not abuse his discretion in crafting a remedy: (1) the Replacement Military Judge's remedies removed any possible taint of unlawful command influence; (2) Appellant cannot show any concrete disadvantage; (3) fairness and impartiality were maintained; and (4) this is not *Lewis*.

1. The Replacement Military Judge's remedies removed any possible taint of unlawful command influence.

To address the appearance of unlawful command influence that ultimately led to the Military Judge's recusal, the Replacement Military Judge took proactive and curative steps to remove the taint of unlawful command influence and ensure a fair trial. *See Douglas*, 68 M.J. at 354-55. To prevent any potential undue benefit to the United States, the Replacement Military Judge upheld and refused to reconsider the prior rulings:

> I will not reconsider any of [the original Military Judge's] decisions which were, again, what I would—— what would be characterized as "defense friendly." I will not give the government a second bite at the apple here.

(J.A. 64, 194, 216.) He convinced Trial Counsel not to seek reconsideration of the previous ruling on the age of a minor, which meant that he defined minor as under sixteen-years-old regardless of how he may have ruled otherwise. (J.A. 194.)

In fact, he found, "if anything the accused actually received a benefit from the replacement of the MJs in this

regards, as the original MJ may well have reconsidered many issues mid-trial ....” (J.A. 64.) The Replacement Military Judge also barred the OIC from coming back into the courtroom for the remainder of the proceedings. (J.A. 189.)

He took these steps specifically to blunt any possible prejudice under *Biagase's* third prong. (J.A. 216.) And based on the specific apparent unlawful command influence here——an innocent but ill-advised phone call that resulted in a change in the military judge——further remedies were unnecessary. The Military Judge did not abuse his discretion in crafting and implementing these remedies.

2. Appellant cannot show any concrete disadvantage from the phone call or the change in judges.

At trial, Trial Defense Counsel identified two areas of concern caused by the phone call and the subsequent change in judges. First, Trial Defense Counsel argued that the recusal and fallout caused a delay in the proceedings that allowed Trial Counsel an opportunity to procure a foundation witness. (J.A. 82, 202-03.) But “that would be a red herring,” the Replacement Military Judge asked, because, as Trial Defense Counsel conceded, Trial Counsel solved the issue prior to the *voir dire* and recusal. (J.A. 64, 202-03.) Second, but for the phone call, Trial Defense Counsel argued, the Military Judge would not have had to recuse himself——and this type of behavior should not be

rewarded. (J.A. 80-81, 204-05.) This identifies the error, however, and not the prejudice. *Cf. Puckett v. United States*, 129 S. Ct. 1423, 1433 (2009) (rejecting the attempt to equate error with prejudice).

On appeal, Appellant argues two additional speculative areas of prejudice. First, Appellant argues that he was prejudiced by the Replacement Military Judge's maximum confinement ruling. (Appellant's Br. at 25.) Yet the contention that the Military Judge "seemed inclined" to rule that the maximum confinement was four months is without factual support. (Appellant's Br. at 25.) The Military Judge did not rule on the maximum sentence in this case. (J.A. 125.) Therefore, the Replacement Military Judge appropriately did, as a matter within his discretion. (J.A. 230-31.) Appellant was not prejudiced based on his belief of what might have happened, particularly when such a possibility would have conflicted with this Court's precedent. *See United States v. Leonard*, 64 M.J. 381, 384 (C.A.A.F. 2007) (holding military judge did not err by referencing directly analogous federal statute to determine maximum punishment).

Second, Appellant argues that the United States must prove beyond a reasonable doubt how the original Military Judge would have ruled on the spousal communication privilege even though he did not rule on this issue. (Appellant's Br. at 28.) To follow

Appellant's logic, every error would be structural: the transfer of the case to a new convening authority in *Villareal*, for example, would not have cured the apparent unlawful command influence because the original convening authority might have granted clemency and there is no way to prove otherwise. 52 M.J. at 30. But, of course, it did. *Id.* The law does not require an absurdist result.

3. "[I]n regards to the fairness and impartiality of the military judge, the defense doesn't have any concerns about whether it's you or [the original Military Judge]."

In *Campos*, the military judge disclosed to counsel that his judicial superiors had "relieved" him of his responsibilities as the senior military judge possibly due to perceived leniency in his sentencing. 42 M.J. at 258. The military judge allowed multiple motion sessions and lengthy *voir dire* to explore the unlawful command influence claim. *Id.* at 258-59. Despite finding that the appearance of unlawful command influence was raised, the military judge assured counsel and the accused that he was not influenced by his superiors' actions and he was "more than satisfied that [the accused] has, in fact, received a fair and unbiased trial, both as to the findings and also as to the sentence, and he was not in any way affected by it." *Id.* at 260. This Court affirmed the judge-alone findings and sentence, finding that "there is no nexus at all between even a *claim* of

unlawful command influence, on the one hand, and the outcome of appellant's trial on the other." *Id.* at 261.

Here, any possible nexus between the OIC's phone call to the Circuit Judge and the outcome of Appellant's trial is even more attenuated for two reasons. First, unlike in *Campos* where the accused was tried and sentenced judge alone, this was a members' trial and any possible prejudice from the OIC's phone call was even farther removed. Moreover, Appellant was not entitled to a specific military judge, as the Replacement Military Judge noted at trial:

> [M]ilitary judges are interchangeable. [The Military Judge] was not the fact finder. The fact finders have not been made aware of this, and they will not be made aware of this.... And the defense has been unable to point to anything that would amount to actual prejudice in this case.

(J.A. 215-16.)

Second, Trial Defense Counsel expressly disavowed any concern over fairness and impartiality based on the military judge: "Sir, in regards to the fairness and impartiality of the military judge, the defense doesn't have any concerns about whether it's you or [the original Military Judge]." (J.A. 203.) As in *Campos*, there is no nexus between the apparent unlawful command influence and the outcome of this trial. Fairness and impartiality, the hallmarks of military justice, were maintained.

4. Quoting *Lewis* does not make this case *Lewis*.

Appellant's primary claim, woven throughout, is that this case is *Lewis*. (Appellant's Br. at 18-21.) But quoting *Lewis* does not make it *Lewis*. The innuendo and personal attacks levied in *Lewis* are dissimilar to anything in this case.

Lewis was a unique case that involved a particularly pernicious attack on a military judge's character, which the Staff Judge Advocate orchestrated and implemented through the trial counsel. *Lewis*, 63 M.J. at 414-15. It was part of a larger "ongoing effort to remove [the military judge] from any case in which [the defense counsel] served as civilian" counsel of record. *Id.* at 414. Ultimately, the military judge recused herself "because [her] emotional reaction to the slanderous conduct of the SJA has invaded [her] deliberative process on the motions." *Id*. at 411. She further commented, "I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]" *Id*.

The replacement military judge was so troubled by the trial counsel's *voir dire* and the staff judge advocate's "crass, sarcastic, and scurrilous characterization" of the military judge's social interactions, which "bespeaks an ignorance, prejudice, and paranoia on the part of the government," that he disqualified himself. *Id*. This Court found that the effort to

unseat the military judge "exceeded any legitimate exercise of the right conferred upon the Government to question or challenge a military judge," because, among other reasons, "it appears unlikely that there existed grounds for disqualification." *Id*. at 414. *Lewis's* analysis was necessarily limited to its "unique facts." *Id.* at 415 n.3.

Here, the military judge made an unexpected and seemingly perplexing ruling. After discovering a relevant basis for *voir dire*, the OIC informed the Circuit Judge, even if unadvisedly, that they were going to *voir dire* the Military Judge, and then Trial Counsel conducted a relevant and professional *voir dire*. "This case," the Replacement Military Judge correctly found, "is easily distinguished from the *Lewis* case." (J.A. 215.)

Nonetheless, the original Military Judge, (J.A. 70-71, 164), and Appellant (Appellant's Br. at 17, 20-25, 32-35), repeatedly quote *Lewis's* language to suggest that the United States impermissibly forced the Military Judge off of this case. Yet despite "direct[ing] the parties['] attention to *U.S. v. Lewis*," (J.A. 155), the Record reflects that the Military Judge recused himself as a protest against the OIC's "tattl[ing]" and because Trial Counsel "brought up a personal matter." (J.A. 70, 164.) Regardless of the validity of this recusal, which is now irrelevant, a recusal and a quote to *Lewis* does not make this

case *Lewis*. This case, as in *Lewis*, must be analyzed under its own unique facts.

In spite of——or because of——the facts in this case, Appellant levels several irrelevant allegations of intentional or negligent malfeasance against various members of the judge advocate community in an effort to persuade this Court to overturn the findings and sentence in this case. These claims lack merit. More importantly, they are irrelevant.

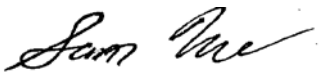
Unlawful command influence, is not an appellate tool for vindictive retribution. Instead, the legal standard applied to this case asks whether an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding based on the OIC's innocent yet ill-advised phone call that, through a series of events, led to the Military Judge's recusal.

An objective, disinterested observer would be aware that though the OIC called the Circuit Judge, he had good intentions and did not intentionally complain about the Military Judge or attempt to unduly influence the proceedings. An observer would be aware that the Replacement Military Judge took several preventative and remedial measures——including upholding all of the previous Military Judge's defense-friendly rulings. An observer would be aware that Appellant cannot point to any concrete prejudice. An objective observer would be aware that,

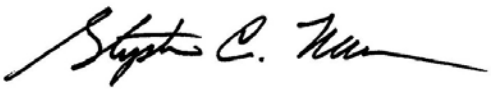
Appellant was convicted and sentenced by Members and not a military judge. An observer would be aware that Trial Defense Counsel expressly disclaimed any concern over the fairness and impartiality of the Replacement Military Judge. And advised of all of these facts, an objective observer would not harbor a significant doubt about the fairness of the proceeding because Members convicted and sentenced Appellant, not for what the United States did, but for what he did.

Conclusion

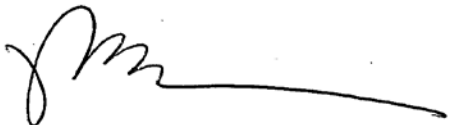
Proof of command influence in the air will not do. Because the call to the Circuit Judge did not prejudice Appellant——and an objective, disinterested observer, fully informed of all of the facts and circumstances, would not harbor a doubt about the fairness of these proceedings——the United States respectfully requests that this Court affirm the decision of the lower court.



SAMUEL C. MOORE
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8504
Bar no. 35101



STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 28707



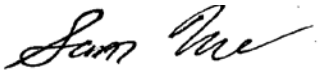
BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

Certificate of Compliance with Rule 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it does not exceed 14,000 words. This brief contains 8,075 words.

Certificate of Filing and Service

I certify that the United States electronically filed a copy of the foregoing with the Court at efiling@armfor.uscourts.gov and electronically served Appellate Defense Counsel, Lieutenant David C. DZIENGOWSKI, JAGC, USN, at david.dziengowski@navy.mil on March 21, 2013.



SAMUEL C. MOORE
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8504, fax (202) 685-7687
Bar no. 35101