

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Nhubu C. Chikaka
Staff Sergeant (E-6)
United States Marine Corps,

Appellant

BRIEF ON BEHALF OF
APPELLANT

Crim. App. Dkt. No. 201400251

USCA Dkt. No. 16-0586/MC

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

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Issue Presented

WHERE THE MILITARY JUDGE ADMITTED ON THE MERITS A CAMPAIGN PLAN TO "FULLY OPERATIONALIZE THE COMMANDANT'S GUIDANCE" FROM THE HERITAGE TOUR, AND THEN DURING SENTENCING ADMITTED A PICTURE OF THE COMMANDANT AND ALLOWED APPELLANT'S COMMANDING OFFICER TO TESTIFY THAT IT WAS IMPORTANT FOR THE MEMBERS TO ADJUDGE A HARSH SENTENCE, DID THE LOWER COURT ERR IN FAILING TO FIND EVIDENCE OF UNLAWFUL COMMAND INFLUENCE SUFFICIENT TO SHIFT THE BURDEN TO THE GOVERNMENT TO DISPROVE UNLAWFUL COMMAND INFLUENCE IN THIS CASE?

Statement of Statutory Jurisdiction

Appellant's approved general court-martial sentence included twelve years' confinement and a dishonorable discharge. Accordingly, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed the case under Article 66(b), Uniform Code of Military Justice ("UCMJ").¹ On April 12, 2016, the NMCCA affirmed the conviction. Appellant timely filed a Petition for a Grant of Review under Article 67(a)(3), UCMJ.²

Statement of the Case

A panel of officer and enlisted members, sitting as a general court-martial, convicted SSgt Chikaka, contrary to his pleas, of one specification of attempted

¹ 10 U.S.C. § 866(b).

² 10 U.S.C. § 867(a)(3).

abusive sexual contact as a lesser-included offense of abusive sexual contact, nine specifications of violating general orders, one specification of wrongful sexual contact, one specification of abusive sexual contact, four specifications of obstructing justice, one specification of indecent language, and one specification of adultery in violation of Articles 80,³ 92,⁴ 120,⁵ and 134, UCMJ.⁶ Consistent with his pleas, the members acquitted SSgt Chikaka of one specification of abusive sexual contact.⁷ The court-martial sentenced SSgt Chikaka to twelve years' confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge.⁸ The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.⁹

On June 24, 2015, the NMCCA set aside the CA's action and remanded for new post-trial processing. The CA granted clemency by disapproving confinement in excess of ten years. He approved the remaining sentence as adjudged.¹⁰ On April 12, 2016, the NMCCA consolidated three specifications of obstruction and approved the remaining findings. The court reassessed the sentence, affirming

³ 10 U.S.C. § 880 (2012).

⁴ 10 U.S.C. § 892 (2012).

⁵ 10 U.S.C. § 920 (2007), 10 U.S.C. § 920 (2012) (The specifications allege offenses under both 2007 and 2012 statutes).

⁶ 10 U.S.C. 934; J.A. at 194-95.

⁷ J.A. at 194-95.

⁸ J.A. at 205.

⁹ J.A. at 062-068.

¹⁰ *United States v. Chikaka*, No. 201400251, 2016 CCA LEXIS 223, *2 (N-M. Ct. Crim. App. April 12, 2016).

only so much of the sentence that includes five years' confinement, total forfeitures, reduction to E-1, and a dishonorable discharge.¹¹ SSgt Chikaka filed a Petition for a Grant of Review with this Court on June 10, 2016 and this Court granted review on December 12, 2016.

Statement of Facts

SSgt Chikaka worked as a recruiter in the Sixth Marine Corps District (6MCD) at Recruiting Substation (RSS) Douglasville, Georgia. At the end of July 2012, he became the Staff Noncommissioned Officer in Charge (SNCOIC) of that RSS. While a recruiter at RSS Douglasville, SSgt Chikaka had substantial contact with four female prospective recruit applicants or members of the delayed entry program.

SSgt Chikaka's relationship with each of these four applicants led to charges of ten specifications of general orders violations, four specifications under Article 120, four specifications of obstructing justice, one adultery specification, and one specification for indecent language.

1. The Commandant's "Heritage Tour."

Shortly before the investigation began in this case, the then-Commandant of the Marine Corps, General James F. Amos, launched a tour to personally deliver a

¹¹ *Chikaka*, 2016 CCA LEXIS 223 at *44-45.

brief at every major Marine Corps Installation.¹² The target audience was “every single staff NCO and officer in the Marine Corps.”¹³ Every member on SSgt Chikaka’s court-martial panel was either a staff NCO or officer at that time.

The Commandant visited Marine Corps Recruit Depot, Parris Island on April 19, 2012, and delivered what would become commonly known as the “Heritage Brief.”¹⁴ SSgt Chikaka’s unit—the 6MCD—is headquartered at Parris Island. The brief focused on sexual assaults in the Marine Corps and a perceived general lack of accountability for misconduct. At least two members of SSgt Chikaka’s court-martial panel were stationed at 6MCD or the Recruit Training Regiment on Parris Island when the Commandant delivered his speech at Parris Island.¹⁵

Much of the Commandant’s Heritage Brief concerned his disappointment with how soft he perceived courts-martial had become. The Commandant’s statements included:

- “I see this stuff in courts-martial, I see it in the behavior and just for the life of me I can’t figure out why we have become so ecumenical, why we have become so soft,”¹⁶

¹² For a detailed history of the brief, see *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014) (unpublished op.) (J.A. at 024-049).

¹³ *Howell*, 2014 CCA LEXIS 321 at *3.

¹⁴ *Id.*

¹⁵ J.A. at 208-09.

¹⁶ *Howell*, 2014 CCA LEXIS 321 at *8.

- “If you have a Marine that is not acting right, you've got a Marine that deserves to leave the Corps, then get rid of them; it is as simple as that.”¹⁷
- “We had 348 sexual assaults in 2011 and you go -- males in here, I know exactly what you are thinking, well . . . it's not true; it is buyer's remorse; they got a little liquored up and got in the rack with corporal, woke up the next morning, pants were down, what the hell happened; buyer's remorse. Bull shit. I know fact. I know fact from fiction. The fact of the matter is, 80 percent of those are legitimate sexual assault.”¹⁸
- “So let's do Math for Marines for a second. I said that we had 348 sexual assaults that were reported last year. Across the Nation, the experts — I am not talking about the experts that you don't care about, I am talking about experts that would have credibility with everybody in this auditorium — say that sexual assault is under reported by a factor of at least two, it could be three or four. I personally believe it is at least two . . . could very well be three times.”¹⁹
- “We have got a problem with accountability. I see it across the Marine Corps. I see it in the Boards of Inquiry, in their results and we have got an officer that has done something that is absolutely disgraceful and heinous and the board . . . he goes to a court-martial and he goes before a board of colonels and we elect to retain him. Why? Do I need this captain? Do I need this major? I don't. Why would I want to retain someone like that? I see the same thing with staff NCOs.”²⁰
- “I want the Staff NCOs in here and I want the officers in here, the commanding officers, and the sergeants major to take a hard look at how we are doing business. If you have a Marine that is not acting right, you've got a Marine that deserves to leave the Corps, then get rid of them; it is as simple as that.”²¹

¹⁷ *Id.* at *9.

¹⁸ *Id.* at *6.

¹⁹ *Id.* at *6-7.

²⁰ *Id.* at *7-8.

²¹ *Id.* at *8.

Bookending the brief at Parris Island, the Commandant issued two associated white letters. White Letter 1-12, addressing the Commandant's most senior officers and enlisted personnel on the subject of "Leadership and Conduct," referenced "a number of recent, widely-publicized incidents [that] have brought discredit on the Marine Corps and reverberated at the strategic level."²² After signing the letter, General Amos penned a hand-written directive, "Marines . . . I need your focused attention and personal fingerprints on this matter now!"²³ General Amos kicked off his "Heritage Tour" the following week.²⁴

After his brief at Parris Island, the Commandant issued White Letter 2-12. Entitled "Sexual Assault," this white letter focused on the Commandant's concern with the sexual assault issue and his desire to focus the Marine Corps on addressing it. Its language and tone echoed that of the Heritage Speech, and contained the following:

This White Letter represents a shot across the bow for all Marines on the issue of sexual assault - it is my intent to publish our Corps-wide Campaign Plan within the next 30 days. Additionally, I am bringing every General Officer back to Washington in early July for two days to ensure that our senior leaders are well-grounded in truth; each will depart D.C. on a clear heading of true north regarding this matter.²⁵

²² J.A. at 210-11.

²³ *Id.* at 2.

²⁴ *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321, *3 (N-M. Ct. Crim. App. May 22, 2014).

²⁵ J.A. at 212-14.

His personal tour continued through June 2012.²⁶

2. Staff Sergeant Chikaka’s commanding officer implements “Operation Restore Vigilance.”

On September 18, 2012, Colonel (Col) William Bowers, the Commanding Officer of 6MCD, signed and implemented the “6th MCD Operation ‘Restore Vigilance’ Campaign Plan.”²⁷ The plan applied to all members of 6MCD by “ensuring there is strict accountability at every level of the command up to and including myself.”²⁸ Col Bowers intended the plan to “fully *operationalize* the Commandant’s guidance” stemming from the Heritage Brief.²⁹ Although the campaign plan does not use the phrase “Heritage Brief,” it lists as references both White Letters 1-12 and 2-12, which bookended the Heritage Brief delivered at Parris Island—the location of this court-martial.

The very first page of “Operation Restore Vigilance” referenced the allegations against SSgt Chikaka:

This past fiscal year, the 6th MCD suffered 40 incidents of substantiated recruiter misconduct, with 19 of these incidents involving Marines engaging in inappropriate behavior with people of the opposite sex. This averages to more than three incidents per month in our communities, the end of a platoon’s worth of once-promising Marines’ careers, and immeasurable hurt and pain inflicted upon once-proud family members. Not only is this completely unacceptable, but it also threatens to undermine the broader trust,

²⁶ *Id.*

²⁷ J.A. at 215-24.

²⁸ J.A. at 216.

²⁹ *Id.* (emphasis in original).

confidence, and respect the American people have in their Marine Corps.³⁰

Additionally, “Operation Restore Vigilance” explicitly states the commander’s intent to “fully *operationalize*” the Commandant’s guidance from the Heritage Brief.³¹

3. The Trial Counsel inserts the Commandant into Staff Sergeant Chikaka’s trial.

At trial, Trial Counsel attempted to use a picture of the Commandant during her opening statement³²:



On Defense objection, the Military Judge recognized the obvious risk of

³⁰ J.A. at 215.

³¹ J.A. at 216.

³² J.A. at 084.

UCI and sustained the defense objection.³³ He would go on to admit the photograph later in trial, though.

During the merits portion of trial, the Government admitted, over Defense objection, “Operation Restore Vigilance.” When introducing “Operation Restore Vigilance” to the members, the Military Judge allowed the 6MCD Commanding Officer, Col Bowers, to testify.³⁴ Col Bowers was the author and implementer of “Operation Restore Vigilance.”³⁵ He testified that he *personally believed* that SSgt Chikaka’s conduct was prejudicial to good order and discipline and service discrediting.³⁶

Although, the Military Judge did not allow the Trial Counsel to use the photo of the Commandant in the Government’s opening, he admitted it in sentencing, over defense objection.³⁷ The Military Judge summarily overruled the objection without asking the Government to articulate any theory of relevance and did not properly conduct an M.R.E. 403 balancing test.³⁸ The Military Judge failed to address the disparity in his ruling, despite having obvious concerns that led him to keep the picture out during the earlier phase of the trial.

Finally, during sentencing, the Government asked Maj MacCutcheon, SSgt

³³ JA at 084.

³⁴ J.A. at 189.

³⁵ J.A. at 189, 191-92.

³⁶ J.A. at 192-93.

³⁷ J.A. at 196.

³⁸ J.A. at 197.

Chikaka's immediate commanding officer, several questions to solicit his testimony on why the members should adjudge a harsh sentence. His response echoed the Commandant's guidance from the Heritage Tour and "Operation Restore Vigilance":

Q. Now, are the Marines back at the RS -- are they aware of this court-martial --

A. Yes.

Q. -- proceeding? And they will be briefed on the outcome of what occurs here this week?

A. They will. Any time within the district there is an incident . . . we built a case study out of that. So here are the things that could have been done predominately on a prevention side so we would have never been here. But if you decide to still go down that road, here are some possible outcomes that can occur because of that, and we let the Marines kind of absorb that as a case study as to how to prevent; hopefully. And if you choose to still go away from that prevention, these are -- this is the window that's opened that you're going to pass through.

Q. So you brief your canvassing recruiters on the consequences, a.k.a the sentence of a case study like this one?

A. That is correct.

Q. Can you explain to the members how important it is to set a strong example for general deterrence in 6th Marine Corps District as a whole?

A. Yeah. Yes. . . . If you -- if this type of thing, any type of misconduct, fraudulent enlistment, some kind of crime out in town, driving under the influence, those are all bad. But if you have something that completely goes against what we stand for, preys upon a weaker group of people, younger, they're less experienced;

in many cases, they're juveniles, 17. You can consider 18 an adult. Sometimes they don't act that way. And it goes -- and we say, "Hey, if we're just going to treat that lightly." So you're going to get, you know, there's maybe be a precedent set that it's somewhat on par with someone that gets a DUI or that didn't listen when a parent said, "Well, he did have surgery when he was 12." "Well, I don't know if I want to bring that up because I'm afraid this kid won't be able to join." To me there's no parallel there.

So it needs to be something that says, "If you do this, everything around you, generally speaking, is going to stop." And Marines that are potentially in a vulnerable window -- for whatever reason -- that might be predisposed to go this way, would see that as a deterrent and say that, "There's no middle ground. There's no way to negotiate out of this. There's no way to lessen the blow. It's a significant blow. It's something I do not want to have happen to me."³⁹

Summary of Argument

The lower court's opinion failed to apply binding precedent from this Court. While the lower court acknowledged SSgt Chikaka raised the issue of UCI, it failed to shift the burden to the Government, as required by this Court's precedent, to prove beyond a reasonable doubt that there was no UCI or the UCI did not affect the findings and sentence. In fact, the NMCCA did not conduct a UCI analysis.

The failure to conduct this analysis was based on a clearly erroneous finding of fact. The lower court stated the record contained "no information indicating any

³⁹ J.A. at 203-04.

of the members were present or aware of the former Commandant's 'Heritage Brief' or the statements made therein."⁴⁰ This is false.

1. The Heritage Brief was specifically addressed to "every single staff NCO and officer" in the Marine Corps.
2. Every member of SSgt Chikaka's panel was a staff NCO or officer at the time of the Heritage Brief.
3. At least two members, including the senior member, on SSgt Chikaka's panel were staff NCOs or officers stationed at 6MCD (headquartered at Parris Island) or the Recruit Training Regiment on Parris Island at the time of the Heritage Brief at Parris Island; and
4. "Operation Restore Vigilance," which applied to all members of 6MCD, including some of SSgt Chikaka's court-martial members, referenced White Letters 1-12 and 2-12, both personal directives from the Commandant that bookended the Commandant's brief at Parris Island.

Despite SSgt Chikaka's demonstration of significant evidence of UCI, the lower court's erroneous finding of fact absolved the Government of their responsibility to demonstrate that the UCI either (1) did not occur or (2) did not affect the findings or sentence.

⁴⁰ *Chikaka*, 2016 CCA LEXIS 223 at *39 n.40.

Argument

THE LOWER COURT ERRED BECAUSE IT FAILED TO SHIFT THE BURDEN TO THE GOVERNMENT TO SHOW UCI DID NOT OCCUR OR DID NOT AFFECT THE OUTCOME.

Standard of Review

This Court reviews allegations of unlawful command influence *de novo*.⁴¹

Discussion

A. Staff Sergeant Chikaka demonstrated “some evidence” of Unlawful Command Influence.

At trial, the Defense meets its burden to establish unlawful command influence by showing “facts which, 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 proceedings.”⁴² Once the issue of unlawful command influence has been raised, the burden shifts to the Government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted.⁴³

This burden is high because “command influence tends to deprive servicemembers of their constitutional rights.”⁴⁴ “On appeal, an appellant must

⁴¹ *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006).

⁴² *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

⁴³ *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002).

⁴⁴ *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).

‘(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness.’⁴⁵

The 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.”⁴⁶ It does not matter, for purposes of shifting the burden to the Government, whether the UCI is apparent or actual. As this Court stated in *Salyer*, “This Court is concerned not only with eliminating actual unlawful influence, but also with ‘eliminating even the appearance of unlawful command influence at courts-martial.’”⁴⁷

The lower court found no evidence of UCI, instead noting in a footnote:

The appellant also argues that these actions amounted to unlawful command influence by bringing “the messaging related to the Heritage Tour into the courtroom and into [the appellant’s] trial.” However, the record contains no information indicating that any of the members were present or aware of the former Commandant’s “Heritage Brief” or the statements he made therein. Without such evidence, this argument (AOE 10) is without merit.⁴⁸

⁴⁵ *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003) (citing *Stombaugh*, 40 M.J. at 213).

⁴⁶ *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

⁴⁷ *United States v. Salyer*, 72 M.J. 415, 424 (C.A.A.F. 2013) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).

⁴⁸ *Chikaka*, 2016 CCA LEXIS 223, n.40.

This is error. This Court held that “some evidence” of UCI sufficient to trigger the burden shift to the Government is a low threshold.⁴⁹ In its dismissive footnote, the lower court ignores several data points, any one of which is sufficient to establish the low threshold to shift the burden. Cumulatively, though, the facts present a strong case of UCI.

The Commandant gave the Heritage Brief at Parris Island, where at least two members of SSgt Chikaka’s panel were stationed at the time. The target audience of the Heritage Brief was “every single staff NCO or Officer in the Marine Corps” (of which every single member of SSgt Chikaka’s panel was at the time of the Heritage Brief).

Second, the lower court placed a much higher burden on SSgt Chikaka than this Court requires. There is a litany of evidence in this case that Trial Counsel sought to put the Heritage Brief front and center in the members’ minds, including introducing a photo of the individual responsible for the Heritage Brief—the Commandant.

This is sufficient to meet the “low threshold of some evidence”⁵⁰ this Court requires. The lower court, though, seemingly places the burden on the Defense to show the members actually heard the speech, while also ignoring that the

⁴⁹ *Dugan*, 58 M.J. at 258.

⁵⁰ *Harvey*, 64 M.J. at 19.

introduction of Operation Restore Vigilance and the testimony of Col Bowers alone constitute UCI.

In *Harvey*, this Court held the presence of the convening authority sitting in the courtroom in his flight suit during closing argument was sufficient to shift the burden to the Government to disprove UCI.⁵¹ The Military Judge, *sua sponte*, asked about the convening authority's presence in a 39(a) session, during which the appellant moved for a mistrial. The Military Judge denied the appellant's motion and did not order any further inquiry into the impact, if any, the convening authority's presence may have had on the members.

Much like in this case, the lower court dismissed Harvey's claims, stating there was no evidence the members saw or recognized the convening authority, or that his presence influenced the members.⁵² This Court disagreed, though, citing the "some evidence" threshold with even less evidence of UCI than what was present in SSgt Chikaka's case. In *Harvey*, the Military Judge recognized the issue of the convening authority's presence, but ordered no further inquiry. Similarly, the Military Judge in SSgt Chikaka's court-martial originally denied admission of the photo of the Commandant and a putative victim's grandfather, before later admitting it.

⁵¹ *Harvey*, 64 M.J. 13 (C.A.A.F. 2006).

⁵² *United States v. Harvey*, 60 M.J. 611, 614 (N-M. Ct. Crim. App. 2004).

Here, the lower court ignored the sweeping nature of the Heritage Brief and the likelihood that Marine Corps NCO's and officers were aware of its contents. It does not matter that the Defense failed to demonstrate actual knowledge by the members of the contents of the Heritage Brief. Rather, the appropriate analysis is whether the defense raised some evidence of UCI.

In any event, Colonel Bowers' testimony that he *personally believed* that SSgt Chikaka's conduct was prejudicial to good order and discipline and service discrediting⁵³ and the admission of Operation Restore Vigilance establishes a prima facie case of UCI. Additionally, though, the Defense pointed to the Heritage Brief, that it was given to a wide-audience on Parris Island, that it was directed at ranks that comprised the entirety of the court-martial panel, and that the 6MCD commanding officer created a program to "operationalize" the Heritage Brief.

With these factors present, the Trial Counsel's introduction of the above-discussed photograph, the testimony of Col Bowers regarding Sgt Chikaka's service discrediting conduct, and the testimony of Maj MacCutcheon asking for a harsh sentence, SSgt Chikaka clearly demonstrated some evidence that should have shifted the burden to the Government to disprove UCI or its impact on the proceedings.

⁵³ J.A. at 192-93.

B. Staff Sergeant Chikaka was prejudiced from the wrongly admitted evidence and testimony.

1. OPERATION RESTORE VIGILANCE

In addition to having no relevance to the charged offenses, the introduction of “Operation Restore Vigilance” created tremendous risk of unfair prejudice to SSgt Chikaka. It increased the likelihood of conviction in several ways. First, it created the risk that members would find him guilty because his District Commanding Officer drafted the plan within weeks of poolees making allegations against SSgt Chikaka. The plan specifically references “40 incidents of substantiated recruiter misconduct with 19 of these instances” involving recruiter sexual misconduct like that on SSgt Chikaka’s charge sheet. The members are almost certain to conclude, or to at least be open to believing, that SSgt Chikaka’s case was one of the “substantiated” incidents.

Second, allowing the introduction of “Operation Restore Vigilance” during the merits phase of SSgt Chikaka’s trial created unfair prejudice by placing before the members evidence in aggravation, something only partially admissible for sentencing. Even as evidence in aggravation, Prosecution Exhibit 14 would not have been admissible without redaction of improper content.

Third, “Operation Restore Vigilance” explicitly states the commander’s intent to “fully operationalize” the Commandant’s guidance from the Heritage

Brief.⁵⁴ This created an increased likelihood that members would recall the Commandant's disappointment with how soft he perceived courts-martial had become. For example, when the Commandant said, "I see this stuff in courts-martial, I see it in the behavior and just for the life of me I can't figure out why we have become so ecumenical, why we have become so soft,"⁵⁵ and, "If you have a Marine that is not acting right, you've got a Marine that deserves to leave the Corps, then get rid of them; it is as simple as that."⁵⁶ Once recalled, this call to action would weigh heavily on any Marine.

Fourth, when introducing "Operation Restore Vigilance" to the members on the merits, the Military Judge allowed the 6MCD Commanding Officer, Col Bowers, to testify.⁵⁷ Col Bowers was the author and implementer of "Operation Restore Vigilance."⁵⁸ As part of his testimony, he was allowed to testify that he *personally believed* that SSgt Chikaka's conduct was prejudicial to good order and discipline and service discrediting.⁵⁹

Importantly, Col Bowers did not discuss any actual impact that SSgt Chikaka's actions had on the good order and discipline of any unit. He only stated his *personal opinion* that conduct like that on SSgt Chikaka's charge sheet is

⁵⁴ J.A. at 216.

⁵⁵ *Howell*, 2014 CCA LEXIS 321 at *8.

⁵⁶ *Id.* at *9.

⁵⁷ J.A. at 189.

⁵⁸ J.A. at 189, 191-92.

⁵⁹ J.A. at 192-93.

generally prejudicial to good order and discipline and service discrediting.⁶⁰ This testimony went to the ultimate issue for the members. And the risk of unfair prejudice is significant because members are likely to think that if the Commanding Officer of the entire Sixth Marine Corps District believes the SSgt Chikaka's conduct was prejudicial to good order and discipline and service discrediting, then it must be.

Lastly, at least one member, Master Sergeant (MSgt) Padilla, was a member of 6MCD at the time of trial.⁶¹ The risk of "Operation Restore Vigilance" having an unlawful command influence on MSgt Padilla is therefore increased even more.

2. PHOTOGRAPH OF GENERAL AMOS WITH THE GREAT GRAND FATHER OF A COMPLAINING WITNESS

The Military Judge admitted, over objection, page 1 of Prosecution Exhibit 38. This exhibit is a photograph. It is not a photo of SSgt Chikaka, or any alleged victim, or anyone even remotely connected to the case . . . except for General Amos who conducted the Heritage Briefs. This is quite literally the face of the Heritage Brief, the inspiration for "Operation Restore Vigilance," and the Commandant of the Marine Corps at the time of trial.

⁶⁰ *Id.*

⁶¹ J.A. at 209.

The defense objected under M.R.E. 403 because the photograph is wholly irrelevant. The Military Judge summarily overruled the objection without asking the Government to articulate any theory of relevance.

3. MAJOR MACCUTCHEON'S TESTIMONY

Finally, the Government asked Maj MacCutcheon, the RS Commanding Officer, several questions to solicit his testimony on why the members should adjudge a harsh sentence. Like "Operation Restore Vigilance," and Prosecution Exhibit 38, this testimony had no proper basis under R.C.M. 1001 as evidence in aggravation. Though this may be permissible *argument* if it were coming from the Trial Counsel during her sentencing argument, it is not permissible *evidence*. The danger of unfair prejudice is plain.

The members saw SSgt Chikaka's Commanding Officer testify that *he believes* there is no parallel to SSgt Chikaka's misconduct. SSgt Chikaka's Commanding Officer told the members they needed to give a harsh sentence to be used as an example to others. Maj MacCutcheon said, "There's no middle ground. There's no way to negotiate out of this. There's no way to lessen the blow. It's a significant blow."⁶²

Few things are as important to Marines as the commander's intent. Here, the commander's intent, from both Maj MacCutcheon and Col Bowers, could not have

⁶² J.A. at 197.

been clearer. This poses a particularly high risk of unfair prejudice because one of the members, Master Sergeant Padilla, knew SSgt Chikaka's immediate commanding officer, Maj MacCutcheon, as they were both senior members of the same command--6MCD. And as a member of 6MCD, MSgt Padilla was directly subordinate to Col Bowers.

REMEDY

A *Dubay*⁶³ hearing is inadequate to address the issues in this case. First, as in *Harvey*, the predicate facts that raise the issue of unlawful command influence are not in dispute. The Heritage Brief exists, Operation Restore Vigilance exists, and both Col Bowers and Maj MacCutcheon provided improper testimony at trial. The Government is left with two options: (1) prove these facts don't establish UCI or (2) demonstrate they have no impact on the proceedings.

Military Rule of Evidence 606(b) limits the Government's abilities to conduct an adequate fact-finding inquiry in this case.

The rule prohibits inquiry into two types of matters: (1) "any matter or statement occurring during the course of the deliberations," and (2) "the effect of anything upon [a] member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith[.]" The rule has three exceptions to the first prohibition, one of which permits testimony about "any matter or statement" occurring during the deliberations when there is a "question whether . . . there was unlawful command influence." The

⁶³ *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

exceptions, however, do not permit circumvention of the second prohibition (inquiry into the effect on a member).⁶⁴

Accordingly, any fact-finding inquiry could only delve into discussions the members had regarding the Heritage Brief, the photograph, or the testimony of Col Bowers and Maj MacCutcheon. No inquiry would be allowed into what impact these elements may have had on the members “mind, emotions, or mental processes.”⁶⁵

The appropriate remedy is a dismissal of all charges with a rehearing authorized. The inability to perform an effective *Dubay* hearing, both the Military Judge and the lower court failing to shift the burden to the Government to disprove UCI or its impact, and the overwhelming prejudice discussed above all necessitate a new trial for SSgt Chikaka free of the taint introduced at his first court-martial. The wrongly introduced evidence and testimony impacted both the merits and sentencing portion of the trial. There is no way to separate the UCI in this case from the outcome.

⁶⁴ *Dugan*, 58 M.J. at 259-60.

⁶⁵ Mil. R. Evid. 606(b).

Conclusion

Staff Sergeant Chikaka respectfully requests this Court dismiss all charges and authorize a rehearing.

A handwritten signature in black ink, appearing to read 'Doug Ottenwess', with a long horizontal flourish extending to the right.

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Certificate of Filing and Service

I certify that the foregoing was delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on January 11, 2017.

Certificate of Compliance

This supplement complies with the page limitations of Rule 21(b) because it contains fewer than 14,000 words. Using Microsoft Word version 2010 with 14-point Times-New-Roman font, this brief contains 5,564 words.



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