IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br>Appellee | ) | ANSWER ON BEHALF OF APPELLEE |
| v. | ) | Crim.App. Dkt. No. 201400251 |
| Nhubu C. CHIKAKA,<br>Staff Sergeant (E-6)<br>U.S. Marine Corps<br>Appellant | ) | 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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included one year or more of confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

## Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of nine specifications of orders violations, one specification of abusive sexual contact, one specification of wrongful sexual contact, one specification of attempted abusive sexual contact,

four specifications of obstructing justice, one specification of indecent language, and one specification of adultery, in violation of Articles 80, 92, 120, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 920, and 934 (2012). The Members sentenced Appellant to reduction to pay grade E-1, twelve years of confinement, forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On June 24, 2015, the Navy-Marine Corps Court of Criminal Appeals set aside the Convening Authority's action and remanded for new post-trial processing. The Convening Authority disapproved confinement in excess of ten years and approved the remaining sentence as adjudged.

On April 12, 2016, the Navy-Marine Corps Court of Criminal Appeals found three specifications under Charge III were an unreasonable multiplication of charges and found prejudice due to erroneously admitted sentencing evidence. The court merged the three unreasonably multiplied specifications, reassessed the sentence and affirmed a sentence of total forfeitures, reduction to pay grade E-1, confinement for five years, and a dishonorable discharge.

On June 10, 2016, Appellant filed a Petition for Review. On December 12, 2016, this Court granted the Petition.

## Statement of Facts

A. Appellant, a married recruiter, engaged in inappropriate sexual conduct with several teenage poolees and tried to cover up his misconduct.

Appellant, a married recruiter at Recruiting Station Atlanta, Georgia, Sixth Marine Corps District, Eastern Recruiting Region, made inappropriate sexual comments to LB, a seventeen-year-old high school student he was trying to recruit. (J.A. 136-37.)

He also made inappropriate sexual comments and engaged in unwanted sexual behavior with BJ, a nineteen-year-old female recruit, and sent inappropriate sexual messages to and groped the buttocks of BP, a member of the delayed entry program. (J.A. 085,-099, 101-19.)

Finally, Appellant made inappropriate sexual comments to LW, an eighteen-year-old recruit, and sent her naked pictures of himself, purchased and drank alcohol with her, and engaged in an adulterous sexual relationship with her. (J.A. 150-85.)

Appellant sought to conceal these illicit activities by encouraging his Victims to delete messages he sent them, and by discouraging his Victims, and another person who knew of his misconduct, from reporting it. (J.A. 97-98, 124, 134-35, 174-75; R. 425, 564; Pros. Ex. 8.)

Appellant was charged with and tried for general orders violations, multiple sexual contact offenses, obstruction of justice, indecent language, and adultery, in violation of Articles 80, 92, 120, and 134, UCMJ. (J.A. 52-58.)

B. The Military Judge admitted the Recruiting Region's Campaign Plan for Operation Restore Vigilance. Though Appellant objected, he did not mention unlawful command influence or cite the Commandant's "Heritage Tour" or White Letters as the basis for his objection.

Prior to trial, the United States moved to admit the Campaign Plan for Operation Restore Vigilance, the Recruiting Region's recruiter misconduct response plan that was issued in September 2012. (R. 311, 320; J.A. 075, 078, 215-24.) The Campaign Plan did not reference or discuss the former Commandant of the Marine Corps' "Heritage Tour," and it referenced the Commandant's "White Letters" only in passing as items (a) and (b) of the "references" section. (J.A. 215.)

Appellant objected, arguing that the evidence was irrelevant and violated Mil. R. Evid. 403. (J.A. 078.) He did not mention unlawful command influence or cite the Commandant's "Heritage Tour" or White Letters as the basis for his objection. (J.A. 078.)

The United States argued that the Campaign Plan was relevant to the charges related to Appellant's misconduct with LW, which continued through August 2013, nearly a year after the Campaign Plan was issued. (J.A. 079.) The United States also argued that the Campaign Plan explained why no other recruiters

observed Appellant's misconduct: because Appellant understood his conduct was prohibited and therefore kept it hidden from view. (J.A. 081.)

Though the Military Judge sustained Appellant's objection (J.A. 081-83), he later reconsidered his Ruling and admitted the Campaign Plan. (J.A. 188.) He instructed the Members that the Campaign Plan was relevant to the Article 134 charges involving LW, and any other Article 134 charges relating to misconduct that occurred after the Campaign Plan was issued, in order to demonstrate prejudice to good order and discipline. (J.A. 189.) He instructed the Members to consider it "within those constraints." (J.A. 189.)

Though the Campaign Plan was admitted, neither the "Heritage Brief" nor the Commandant's White Letters were presented at Trial. (J.A. 215-24; R. 1-910.)

C. Colonel Bowers testified that misconduct of the type Appellant was accused of was prejudicial to good order and discipline. Appellant did not object or raise the issue of unlawful command influence. The Military Judge *sua sponte* instructed the Members on the appropriate use of the testimony.

Colonel Bowers, the Commanding Officer of the Sixth Marine Corps Recruiting District, testified regarding his military experience and described how Appellant's conduct would be contrary to the rules and guidance of the command and would negatively impact trust between the recruiting command and the people in the command's area of operation. (J.A. 189-93.) Based on his experience, he

opined that the type of misconduct Appellant was accused of committing was prejudicial to good order and discipline. (J.A. 192.)

Appellant did not object to the testimony and did not raise the issue of unlawful command influence. (J.A. 192-93.)

Though Appellant did not object, the Military Judge interrupted during Colonel Bowers' testimony and instructed the Members:

> I want to make sure that the members understand. I know the Colonel is not the convening authority. The general is, but he didn't technically answer that question. No disprespect, sir. I don't need that information from the Colonel about what he thinks about the alleged crimes of the accused. We need to focus in on his opinion on how it affects good order and discipline in the unit; that's what's admissible. Okay. So no member can think, "Well the Colonel doesn't like what's happened here allegedly so I must convict."
>
> Is there any member who does not understand that?
>
> Negative response from members.

(J.A. 193.)

D. <u>During presentencing, the Military Judge admitted a photograph of BJ's grandfather and testimony from Appellant's immediate commander regarding the impact of Appellant's crimes. Once again, Appellant did not raise the issue of unlawful command influence</u>.

1. <u>The Military Judge admitted a photograph of BJ's grandfather. Appellant objected under Mil. R. Evid. 403 but did not raise the issue of unlawful command influence</u>.

During presentencing, BJ testified that she wanted to join the Marine Corps because she came from a family of Marines. (J.A. 196.) To demonstrate that fact,

the United States offered Prosecution Exhibit 38, page one of which was a photograph of BJ's grandfather after receiving the Congressional Gold Medal from the then-Commandant, General Amos. (J.A. 196, 225-28.)

Appellant objected to admission of the photograph under Mil. R. Evid. 403, but he did not allege that admission of the photograph constituted unlawful command influence. (J.A. 197.) Nor did he cite the Commandant's "Heritage Tour" or White Letters as the basis for his objection. (J.A. 197.)

The Military Judge overruled Appellant's evidentiary objection: "[The photograph] has probative value based on this witness' testimony about why she joined the Marine Corps. It has pictures of her great-grandfather with—looks like General Amos and some other people. So the members will give that the weight it deserves, but it's admissible into evidence." (J.A. 198.)

2. Appellant's immediate commander testified regarding the impact of Appellant's crimes and the need for deterrence. Appellant did not object or raise the issue of unlawful command influence.

Major McCutcheon, the Recruiting Station Commanding Officer, testified during presentencing about how Appellant's misconduct negatively impacted the Recruiting Station's mission. (J.A. 199.) He further explained that the other recruiters within the recruiting district were aware of Appellant's court-martial and would be informed of the results:

> 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."

(J.A. 204.)

Appellant did not object to this testimony nor did he allege that it constituted unlawful command influence. (J.A. 204.)

Before Findings, the Military Judge instructed the Members. (R. 755-80.) He instructed that "each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in the court and upon the instructions which I will give you." (R. 755.) Further, he instructed the Members, "Bear in mind that only matters properly before the court as a whole should be considered." (R. 779.) Finally, he stated, "Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience." (R. 780.)

E. On appeal before the lower court on November 4, 2014, Appellant raised the issue of unlawful command influence for the first time, arguing that Trial Counsel improperly sought to admit prejudicial evidence. The lower court found no evidence of unlawful command influence, but held the Military Judge abused his discretion in two evidentiary rulings and provided sentencing relief.

On appeal before the lower court, Appellant challenged the Military Judge's evidentiary rulings with respect to the Campaign Plan, the photograph of BJ's grandfather, and Major McCutchen's presentencing testimony. (J.A. 008.) The lower court held that: (1) the Military Judge abused his discretion in admitting the Campaign Plan, but that it was harmless due to the "overwhelming strength of the prosecution's case"; (2) the photograph of BJ's grandfather was properly admitted; and (3) Major McCutcheon's presentencing testimony was improper under R.C.M. 1001(b)(5). (J.A. 012-14, 020.) The lower court considered the last error when it reassessed Appellant's sentence, affirming only five years of Appellant's adjudged confinement. (J.A. at 020.)

Appellant also alleged, for the first time, unlawful command influence, which he claimed was inserted into Appellant's trial when:

> The Trial Counsel entered into evidence "Operation Restore Vigilance," a campaign plan to "fully operationalize the Commandant's Guidance" from the Heritage Tour; a photo of the Commandant posing with [BJ's] grandfather; and solicited testimony from [Major McCutcheon] that it was important for the Members to adjudge a harsh sentence in this case, thereby inserting unlawful command influence into the trial.

(J.A. 22.)

1. At the lower court, Appellant did not move to attach documents, nor did he allege ineffective assistance of counsel for the failure to address the "Heritage Tour" at trial or even ask for a *DuBay* hearing.

At the lower court, Appellant did not move to attach documents related to the "Heritage Tour" or that any of the Members were aware of it. Additionally, Appellant did not allege ineffective assistance of counsel based on Trial Defense Counsel's failure to inquire into the "Heritage Tour" or the Member's awareness of it at Trial. (J. A. 021-23.) Additionally, since Appellant's Trial, he has never requested a *DuBay* hearing to inquire into his allegations of apparent unlawful command influence resulting from the "Heritage Tour." (Appellant's Br., Jan., 15, 2015; Appellant's Br. Nov. 4, 2015; Appellant's Br. Jan. 11, 2017.)

2. The lower court found there was no evidence of unlawful command influence.

The lower court dismissed this Assignment of Error, finding "the record contains no information indicating any of the members were present or aware of the former Commandant's 'Heritage Brief' or the statements he made therein." (J.A. 18.) "Without such evidence," the lower court concluded, Appellant's unlawful command influence "argument . . . is without merit." (J.A. 18.)

F. Appellant does not appeal the lower court's holdings with respect to the Military Judge's evidentiary rulings. Instead, citing facts outside the Record, he argues that the lower court erred when it failed to find "some evidence" of unlawful command influence.

On appeal before this Court, Appellant does not claim the Military Judge plainly erred in allowing the testimony of Colonel Bowers, an error he did not allege at trial or below. (Appellant's Br. 1-24.) Nor does he renew his evidentiary challenges to the Military Judge's admission of the Campaign Plan, the photograph of BJ's grandfather, or Major McCutcheon's testimony. (*Id.*)

Instead, Appellant renews his unlawful command influence argument, citing to facts from the unrelated case of *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014), and to the Commandant's "Heritage Tour" and "White Letters." (Appellant's Br. at 4-7, 9-10, 19.) As noted *supra*, these facts are not in the Record.

G. Appellant included in his Brief and relies on three pages of facts, approximately 733 words never introduced at trial, at the lower court, or at this Court. Appellant inserted these documents in the Joint Appendix despite that they were not admitted into evidence and are not part of the Record of Trial.

Appellant's Brief contains approximately 733 words in his Statement of Facts that appear nowhere in the litigated and contested authenticated Record of Trial, that Appellant never moved to admit before any court. (R. 1-910; J.A. 001-

23.) Pages 3-8, 12, 15, 17, 19 and 22 of Appellant's Brief rely on facts never introduced at trial. (Appellant's Br. at 3-8, 12, 15, 17, 19, 22.)

Appellant included in the Joint Appendix thirty pages of documents that Appellant never moved to admit at this Court, at the Navy-Marine Court of Criminal Appeals, and that he never moved to admit in his contested court-martial, where they would have been subject to the Rules of Evidence and subject to objection and ruling by the Military Judge. (J.A. 024-049, 210-14.)

## Summary of Argument

Appellant failed to show some evidence of unlawful command influence in the Record. Appellant cites no authority to support his argument that the evidence admitted at trial constitutes unlawful command influence. Further, Appellant's Trial was not affected by unlawful command influence nor would an objective, disinterested observer fully informed of the facts harbor any doubt about the fairness of the proceedings.

## Argument

THE LOWER COURT DID NOT ERR: APPELLANT FAILED TO SHOW, AND HE CONTINUES TO FAIL TO SHOW, "SOME EVIDENCE" OF ACTUAL OR APPARENT UNLAWFUL COMMAND INFLUENCE IN THE RECORD. REGARDLESS, THE PROCEEDINGS WERE FAIR, AND NO OBJECTIVE, DISINTERESTED OBSERVER WOULD HARBOR A SIGNIFICANT DOUBT ABOUT THE FAIRNESS OF APPELLANT'S PROCEEDING.

A. The standard of review is *de novo*.

"Allegations of unlawful command influence are reviewed de novo." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citing *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)).

B. Appellant has the burden of demonstrating "some evidence" of unlawful command influence in the Record. The Members are presumed to follow the Military Judge's instructions, including those aimed at preventing unlawful influence.

Article 37, UCMJ, states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof . . . ." 10 U.S.C. § 837 (2012).

"On appeal, the accused bears the initial burden of raising unlawful command influence." *Salyer*, 72 M.J. at 423. To meet this burden, the 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." *Id.* (citing *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999) (quoting *United States v. Biagase*, 50 M.J. at 143, 150 (C.A.A.F. 1999)).

"The quantum of evidence required to raise unlawful command influence is 'some evidence.'" *Id.* (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). This standard "is low, but it is more than mere allegation or speculation." *Id*. (citing *Stoneman*, 57 M.J. at 41). "The test is some evidence of 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." *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *Biagase*, 50 M.J. at 150).

If an appellant demonstrates "some evidence" of unlawful command influence, the burden shifts to the United States to rebut an allegation of unlawful command influence. *Id.* (citing *Biagase*, 50 M.J. at 151). On appeal, the United States can rebut an allegation of unlawful command influence in one of three ways: (1) by disproving the predicate facts on which the allegation is based; (2) by persuading the appellate court that the facts do not constitute unlawful command influence; or (3) by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial. *Biagase*, 50 M.J. at 151.

"Allegations of unlawful command influence are reviewed for actual unlawful command influence as well as the appearance of unlawful command influence." *Salyer*, 72 M.J. at 423. The test for the appearance of unlawful influence is objective and is 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*.

"This Court has recognized that 'a military judge can intervene and protect a court-martial from the effects of unlawful command influence.'" *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) (quoting *Biagase*, 50 M.J. at 152 (internal citation omitted)). This Court "look[s] with favor on military judges taking proactive, curative steps to remove the taint of unlawful command influence and ensure a fair trial." *Id.* "Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014) (quoting *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (internal quotations omitted)).

C. Appellant fails to shoulder his burden: he improperly relies on (1) factual matters outside the Record, (2) evidence the admission of which is law of the case.

This Court has found evidence of unlawful command influence in situations where a government actor engages in conduct that improperly affects or appears to affect court-martial proceedings. *See e.g. United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013) (some evidence of apparent unlawful command influence where government searched military judge's personnel file for information to challenge military judge for bias, after ruling unfavorable to government, and government in *ex parte* manner expressed displeasure as to the ruling to judge's supervisor while judge still presiding); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010) (unlawful command influence where appellant's supervisor ordered appellant not to contact any witnesses and openly disparaged and expressed certainty of appellant's guilty to coworkers); *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008) (evidence of apparent unlawful command influence where convening authority sent email to members indicating he was uncompromising about discipline with respect to BAH fraud in a BAH fraud case); *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 199) (some evidence of unlawful command influence where command's pretrial condemnation of appellant's conduct potentially deterred members of command from coming forward and supporting appellant).

1. Despite numerous opportunities to properly inquire into the potential effects of the "Heritage Tour" and to supplement the Record, Appellant relies on factual matters outside the fully litigated and established Record of Trial. He claims no ineffective assistance in prior proceedings, and his attempt to unilaterally insert these matters now should be rejected.

"It is the normal rule of military appellate practice that review of the guilt of an accused is limited to evidence presented at trial." *United States v. Gray*, 51 M.J. 1, 15 (C.A.A.F. 1999) (citing *United States v. Bethea*, 22 C.M.A. 223 (1973)); *see United States v. Matthews*, 68 M.J. 29, 41 (C.A.A.F. 2008) ("It is inappropriate . . . to base an appellate opinion on assertions dehors the record.") (citation omitted).

This "Court will normally not consider any facts outside of the record established at the trial and the Court of Criminal Appeals." C.A.A.F. R. 30A(a); *see* Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2012) (providing that this Court "may act only with respect to the findings an sentence as approved by the convening authority and as affirmed or set aside as incorrect by the Court of Criminal Appeals"); *United States v. Sterling*, 75 M.J. 407, 421 (C.A.A.F. 2016) (Ohlson, J., dissenting) ("[T]his Court does not have . . . statutory fact-finding authority . . . .").

Because this Court reviews the litigated and established record of trial to decide the legal issues before it, once the lower court's review "become[s] final with the assumption of this Court's jurisdiction, the facts, as opposed to the

application of the law to those facts, are set." *United States v. Leak*, 61 M.J. 234, 245 (C.A.A.F. 2005).

Limited exceptions exist, including "in the context of post-trial claims of unlawful command interference with courts-martial." *United States v. Parker*, 36 M.J. 269, 271 (C.A.A.F. 1993). In such cases, this Court has considered post-trial affidavits to determine whether *DuBay* hearings are warranted "for the purpose of developing specific evidentiary backgrounds and making appropriate factual determinations." *Id.* at 271-72; *accord Gray*, 51 M.J. at 15. Where a party seeks this Court's consideration of "factual material that is not contained in the record," including matters relevant to claims of unlawful command influence, the party must present its request "by motion to supplement the record filed pursuant to Rule 30." C.A.A.F. R. 30A(a). Such motions "will be granted only for good cause shown." *Id*.

Appellant asks this Court to issue an opinion based on facts about the Commandant of the Marine Corps' "Heritage Brief" developed at trial in the *Howell* case, as well as on two "White Letters" issued by the Commandant. (Appellant's Br. at 3-6; J.A. at 024-049, 210-14.) But none of this evidence was introduced into the Record here. *See supra* at 4-9. Nor has Appellant filed a motion to supplement the Record with this information as required by Rule 30A.

Instead, Appellant simply inserted new matters into the Joint Appendix, cited new matters in his "Statement of Facts," and argues based on these extra-Record facts.

Appellant had the opportunity to inquire into the "Heritage Tour" and any potential impact at his Trial but failed to and he does not allege his Trial Defense Counsel was ineffective for that failure. (J.A.021-24; Appellant's Br. 1-20.) Additionally, Appellant has never requested a *DuBay* hearing to inquire into any potential impact the "Heritage Tour" had on his case nor has he even attempted to appropriately supplement the Record. (Appellant's Br., Jan., 15, 2015; Appellant's Br. Nov. 4, 2015; Appellant's Br. Jan. 11, 2017.)

Because the facts regarding the former Commandant's "Heritage Tour" and the White Letters are outside the Record, this Court's precedent firmly supports not considering them as to the granted issue, and supports rejecting Appellant's end-run attempt at inserting them into the Joint Appendix and briefing. *Gray*, 51 M.J. at 15; *Matthews*, 68 M.J. at 41; *Leak*, 61 M.J. at 245. Appellant fails to demonstrate "some evidence" of as to these non-Record items.

2. Appellant improperly relies on evidence, the admission of which is law of the case. Even ignoring the presumption that the lower court's decision with respect to the Military Judge's evidentiary rulings was correct, Appellant offers nothing but a "mere allegation or speculation" of improper influence.

"Where neither party appeals a ruling of the court below, that ruling will normally be regarded as law of the case and binding upon the parties." *Lewis*, 63

M.J. at 412 (citations omitted). "[U]nder the law of the case doctrine this court will not review the lower court's ruling unless 'the lower court's decision is clearly erroneous and would work a manifest injustice if the parties were bound by it.'" *Id.* at 413 (quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (internal citation and quotation marks omitted)). "That standard is difficult to achieve: a finding of manifest injustice requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong." *Id.* (quoting *Ellis v. United States*, 313 F.3d 636, 648-49 (1st Cir. 2002)).

Appellant has not appealed lower court's rulings regarding the Military Judge's evidentiary rulings regarding the testimony of Colonel Bowers or Major McCutcheon, the admission of the photograph or campaign plan. (Appellant's Br. 1-24.) Nor does he attempt to argue that those rulings were "unreasonable or obviously wrong." *Lewis*, 63 M.J. at 413. The lower court's decision with respect to those evidentiary rulings is "law of the case and binding on the parties." *Id.* at 412.

Instead of renewing his challenges to the Military Judge's evidentiary rulings, Appellant argues that the evidence admitted—the testimony of Colonel Bowers, Major McCutcheon, the photograph and campaign plan—*itself* constitutes "some evidence" of unlawful command influence. (Appellant's Br. at 14-17.) But even ignoring the strong presumption under the "law of the case" doctrine that the

lower court's decision with respect to those rulings was correct, Appellant offers nothing "more than mere allegation or speculation" that the evidence itself—in the context in which it was admitted—amounted to improper influence. *Salyer*, 72 M.J. at 423.

First, Appellant cites to no source of authority for the proposition that the admission of a piece of evidence at trial—erroneous or not—can amount to an "attempt to coerce or, by any unauthorized means, influence the action of a court martial," Article 37(a), UCMJ, or the appearance thereof. (Appellant's Br. 1-24.) Nor is the United States aware of any such authority.

Second, the primary cases Appellant relies on—*Salyer* and *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006) (Appellant's Br. at 14-17)—undermine his argument that "some evidence" of unlawful command influence is apparent here.

The *Salyer* court held that the appellant met his burden of demonstrating "some evidence" of apparent unlawful command influence where, after an adverse evidentiary ruling, the Government improperly accessed a military judge's personnel file in an attempt to discover information to disqualify him, and engaged in ex parte communications with the military judge's supervisor while the court-martial was still ongoing. *Salyer*, 72 M.J. at 426-27. As a result, the military judge disqualified himself. *Id*. at 427. In finding the appellant met his burden of establishing "some evidence," the court stated:

> An objective, disinterested observer, fully informed of these facts and circumstances, might well be left with the impression that the prosecution in a military trial has the power to manipulate which military judge presides in a given case depending on whether the military judge is viewed as favorable or unfavorable to the prosecution's cause based on the Government's access to a military judge's personnel file and through access to the military judge's chain of command. This, in our view, would foster the "intolerable strain on public perception" of the military justice system which the proscription against unlawful command influence and this Court guard against.

*Id*.

Here, in contrast, no evidence exists of bad faith by Trial Counsel or of any effort by government officials to impede or influence the Military Judge in the execution of his duties. Nor is there any evidence in the Record of improper, *ex parte* communications with the Military Judge or any of the Members.

Rather, Trial Counsel offered relevant evidence on the merits and in sentencing, the Military Judge ruled on Appellant's objections to that relevant evidence, and Appellant had the opportunity to challenge those rulings on appeal. Appellant offers no evidence that Trial Counsel's presentation of relevant evidence, or the Military Judge's review of it, was an attempt to "coerce, by any unauthorized means" the court-martial. Article, 37(a), UCMJ. Appellant's reliance on *Salyer* is misplaced.

In *Harvey*, a case involving safety in the aviation community, this Court found "some evidence" of unlawful command influence where the convening

authority appeared in the courtroom wearing his flight suit, and at least one of the members knew him. *Harvey*, 64 M.J. at 16, 21. The military judge noted all of this on the record. *Id.* at 16, 22. This Court found the failure of the military judge to then shift the burden to the government, as required in *Biagase*, was error and set aside the findings with a rehearing authorized. *Id.* at 22-23.

Here, by contrast, there is no evidence in the Record of any improper influence by the Convening Authority, and certainly no allegation that he inserted himself into Appellant's court-martial—literally or figuratively—in the manner of the convening authority in *Harvey*. (J.A. 052-58) Indeed, neither Colonel Bowers nor Major McCutcheon—the two witnesses whose testimony Appellant claims was improper—served as the Convening Authority in this case. (J.A. 052-58.) Thus Appellant's reliance on *Harvey*, like his reliance on *Salyer*, is misplaced.

Appellant presents no evidence that any of the Members connected the Campaign Plan to the Commandant's "Heritage Tour" or "White Letters"—neither of which was admitted or referenced at trial—or that they ignored the Military Judge's instruction to "impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience." (R. 780.)

Appellant had the opportunity to inquire into the "Heritage Tour" and any impact it had on the Members at Trial. He could have attached documents or

requested a *DuBay* hearing into the matter at the lower court. He did not. Nor does he allege his Trial Defense Counsel was ineffective for failing to do so. (J.A. 021-24; Appellant's Br. 1-24.) Instead, he waited 601 days after he was convicted and 532 days after *Howell* was decided by the lower court to even allege there was apparent unlawful command influence. (J.A. 194-95; Appellant's Br, Nov. 4, 2015.) Today, nearly three years after his conviction, Appellant provides no evidence of apparent unlawful command influence—only speculation.

Furthermore, even in cases where this information was presented at trial, all but one military court has found that this information, in itself, did not constitute unlawful command influence.[12]

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[1] *See e.g. United States v. Zimmerman*, No. 201300350, 2014 CCA LEXIS 884 (N-M. Ct. Crim. App. Dec. 11, 2014); *United States v. Russo*, No. 201300324, 2014 CCA LEXIS 851 (N-M. Ct. Crim. App. Nov. 18, 2014); *United States v. Olcott*, No. 201300228, 2014 CCA LEXIS 818 (N-M. Ct. Crim. App. Oct. 30, 2014); *United States v. Hernandez*, No. 201300313, 2014 CCA LEXIS 703 (N-M. Ct. Crim. App. Oct. 30, 2014) rev. denied No. 15-0178/MC, 2015 CAAF LEXIS (C.A.A.F. July 16, 2015); *United States v. Wilson*, No. 201300315, 2014 CCA LEXIS 640 (N-M. Ct. Crim. App. Aug. 28, 2014) rev denied No. 15-0137/MC, 2015 CAAF LEXIS 306 (C.A.A.F Mar. 23, 2015); *United States v. Torres*, No. 201300396, 2014 CCA LEXIS 641 (N-M. Ct. Crim. App. Aug. 28, 2014); *United States v. Pottmeyer*, No. 201300293, 2014 CCA LEXIS 615 (N-M. Ct. Crim. App. Aug. 26, 2014); *United States v. Kish*, No. 201100404, 2014 CCA LEXIS 358 (N-M. Ct. Crim. App. July 17, 2014); *United States v. Dunton*, No. 201300148, 2014 CCA LEXIS 333 (N-M. Ct. Crim. App. May 29, 2014); *United States v. Russell*, No. 201300208, 2014 CCA LEXIS 210 (N-M. Ct. Crim. App. March 31, 2014); *United States v. Black*, No. 201300292, 2014 CCA LEXIS 173 (N-M. Ct. Crim. App. March 20, 2014) rev denied No. 14-0599/MC, 2014 CAAF LEXIS 908 (C.A.A.F., Sept. 5, 2014); *United States v. Jiles*, No. 201200062, 2014 CCA LEXIS 151 (N-M. Ct. Crim. App. March 6, 2014); *United States v. Easterly*, No.

Appellant cites no case in support of his proposition that Colonel Bowers' testimony regarding the prejudicial nature of Appellant's misconduct was improper, let alone "some evidence" of unlawful command influence. (Appellant's Br. at 17, 19-20.) Not only did Appellant not object to this testimony at trial (J.A. 192), the Military Judge *sua sponte* and preemptively prohibited Colonel Bowers from testifying to matters that could even remotely be considered unlawful command influence, and he instructed the Members on the permissible use of Colonel Bowers' testimony. (J.A. 193.) Moreover, this Court has stated that lay opinion of whether conduct is prejudicial to good order and discipline is not improper if supported by reasoning or particular facts. *See, e.g.*, *United States v. Norman*, 74 M.J. 144, 149 (C.A.A.F. 2015) (lay opinion testimony improper where witness "essentially restated the terminal element" but offered "'no reasoning or particular facts' as to his understanding of the concept of service discrediting conduct, or how he understood this concept as applied to Appellant's actions") (quoting *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000)).

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201300067 2014 CCA LEXIS 40 (N-M. Ct. Crim. App. Jan. 31, 2014); *United States v. Lopez*, No. 201200457, 2013 CCA LEXIS 579 (N-M. Ct. Crim. App. Jul. 30, 2013)

[2] Indeed, even in *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014) the lone case where the lower court found apparent unlawful command influence, it was remanded and the appellant was retried and convicted. *See United States v. Jones*, No. 201200264, 2015 CCA LEXIS 573 at *3-*4 (N-M. Ct. Crim. App. Dec. 29, 2015).

Similarly, Appellant cites no case in support of his proposition that Major McCutcheon's presentencing testimony—also not objected to at trial (R. 199-204)—was improper, let alone "some evidence" of unlawful command influence. (Appellant's Br. at 17, 21-22.)

Finally, Appellant presents no source of authority to support that, without more, a victim-impact photograph admitted at sentencing that depicts the Victim's grandfather receiving an award from the Commandant—evidencing the Victim's hopes and dreams and motivation for joining the Marine Corps—amounts to unlawful command influence. An irrelevant picture of the Commandant alone might present a "closer case." The evidence is, as noted, relevant victim-impact evidence under R.C.M. 1001. (J.A. 198.) Yet Appellant now, referring to extra-Record evidence, asks this Court to view this evidence in a different light. This Court should reject that demand.

As Appellant merely speculates that the admitted evidence amounts to unlawful command influence, *Salyer*, 72 M.J. at 423, it was not error for the lower court to dismiss Appellant's claim without shifting the burden to the United States.

D. Regardless, the alleged unlawful command influence did not affect the findings or sentence. No objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of Appellant's court-martial.

In *Salyer*, this Court assessed prejudice by determining "whether the government has convinced us beyond a reasonable doubt that the disinterested

public would now believe that [the appellant] received a trial free from the effects of unlawful command influence." *Salyer*, 72 M.J. at 427 (quoting *Lewis*, 63 M.J. at 415) (internal quotation omitted). It held that the government had not met its burden because: (1) it was unclear if the government officials involved in the improper actions continued to participate in the case thereafter; and (2) some "defense friendly" motions ruled on by the original military judge were reversed by the newly detailed military judge. *Id*. at 428. "As a result, an objective member of the public would be left with the appearance and the impression that the government obtained advantage from its actions—a new military judge and a more favorable ruling on privilege." *Id.*

Here, no disinterested member of the public, fully informed of all the facts, would harbor significant doubt about the fairness of Appellant's court-martial.

First, though the lower court found admission of the Campaign Plan violated Mil. R. Evid. 403, it found this error harmless given the overwhelming evidence presented by the United States. (J.A. 012-13.) Appellant does not appeal the conclusion of the lower court, cites no case for the proposition that this evidence constitutes "some evidence" of unlawful command influence, and points to no evidence in the Record indicating that the Members connected the Campaign Plan to the Commandant's "Heritage Tour" or White Papers in a manner that undermined the fairness of the proceedings. (Appellant's Br. at 18-19.)

Second, the Military Judge prevented any possibility of unlawful command influence from Colonel Bowers' testimony when the Judge *sua sponte* limited that testimony and properly instructed the Members on appropriate consideration of the evidence. (J.A. 193.)

Appellant did not object to Colonel Bowers' testimony or to the Military Judge's curative instruction at trial, he cites no case in support of his proposition that such testimony amounts to "some evidence" of unlawful command influence, and he makes no attempt to address the Military Judge's instruction in his prejudice argument to this Court. (Appellant's Br. at 19-20.)

Third, any prejudice from Major McCutcheon's presentencing testimony was eliminated by the lower court's sentence reassessment, which reduced Appellant's confinement from ten years to five years. (J.A. 23).

Fourth, as indicated by the Military Judge, the photograph of the former-Commandant with BJ's grandfather was admissible but of limited weight. (J.A. 197.) Thus it had no effect on the findings and sentence.

Fifth, Appellant was acquitted of one of the specifications. (J.A. 194-95.)

Sixth, after the lower Court issued the *Howell* opinion in May 2014, Appellant waited 532 days before ever raising unlawful command influence based on these extra-Record facts. And Appellant, even now, does not allege ineffective assistance of counsel for his Trial Defense Counsel or Appellate Counsel not

raising the matter earlier or asking for a *DuBay* hearing. Now, he asks for Findings and Sentence to be fully set aside. He could have asked the Convening Authority immediately for an Article 39(a) to address the *Howell* decision after his sentencing in March 2014. He could have asked the lower court to address his concerns for immediate *voir dire* of the Members. Instead he waited—while his confinement ran, and the opportunities of reviewing authorities to address his concerns quickly diminished—and now Appellant asks this Court for complete relief. If anything, the public sees bald opportunism—not unlawful command influence.

Finally, although the Members adjudged more confinement than the United States asked for, the sentence was reduced by the Convening Authority and then further reduced by the lower court. (J.A. 002, 194-95, 205; R. 894.)

No objective, disinterested observer fully informed of all the facts in the Record would harbor a doubt about the fairness of the proceedings. Without providing any supporting authority, Appellant invites this Court to review baseless claims that evidence admitted at trial amount to apparent unlawful command influence in an attempt to circumvent the abuse of discretion standard of review of evidentiary rulings on appeal.

This Court should find Appellant's argument to be without merit and affirm the findings and sentence below.

## Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as affirmed and approved below.

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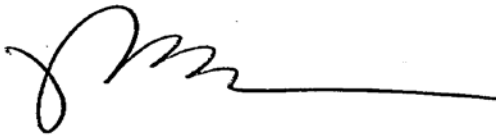

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