IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	BRIEF ON BEHALF OF APPELLANT
Appellee	)	
	)	
v.	)	
	)	
Specialist (E-4)	)	Crim. App. Dkt. No. 20190132
RONALD C. GIVENS	)	
United States Army	)	USCA Dkt. No. 21-0086/AR
Appellant	)	

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

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Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFECTIVE PREFERRAL/ UNLAWFUL COMMAND INFLUENCE MOTION ON PROCEDURAL GROUNDS

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

Between February 27 and March 1, 2019, a panel with enlisted representation, sitting as a general court-martial, tried appellant, Specialist (SPC) Ronald Givens, at Fort Stewart, Georgia. (JA008). Appellant pled guilty to one specification of battery (Specification 3 of Charge III) in violation of Article 128, UCMJ. (JA136-137). Appellant pled not guilty to one specification each of false official statement, larceny of military property, aggravated assault, battery, communicating a threat, child endangerment, and adultery. (JA136-137).

The panel acquitted appellant of aggravated assault, battery, and adultery. (JA262). The panel convicted appellant, contrary to his pleas, of false official statement, larceny of military property, battery (as a lesser included offense of

aggravated assault), communicating a threat, and child endangerment in violation of Articles 107, 121, 128, and 134, UCMJ. (JA262). The panel sentenced appellant to be reduced to the grade of E-1, forfeit $1,680 pay per month for one month, be confined for ninety days, and be discharged from the service with a bad-conduct discharge. (JA272). The convening authority approved the sentence as adjudged. (JA018).

On October 19, 2020, the Army Court issued its opinion in appellant's case. (JA002). The Army Court dismissed the child endangerment specification (Specification 2 of Charge IV), but affirmed the remaining findings and adjudged sentence.[1] (JA005). This Court granted appellant's petition for grant of review on February 16, 2021 on the issue above and ordered briefing under Rule 25. (JA001).

Statement of Facts

On April 23, 2018, appellant's company commander, Captain (CPT) CF, preferred charges against appellant, alleging violations of Articles 107, 121, 128, and 134, UCMJ. (JA042-043). The charges covered two separate series of events. First, the specifications in Charges I and II pertained to appellant's entitlement to basic allowance for housing (BAH). (JA042). The government charged appellant

[1] The Army Court also corrected the Promulgating Order in appellant's case. (JA006).

with stealing military property in the form of BAH for approximately four months. (JA042). Additionally, the government alleged appellant made false statements on a document certifying his entitlement to BAH. (JA042). Second, the specifications in Charges III and IV pertained to an altercation between appellant and his wife, SPC KN. (JA042-043). The government charged appellant with threatening and assaulting SPC KN, including strangling her with a means likely to produce death or grievous bodily harm. (JA042-043). Because the assault occurred "in close proximity" to appellant's and SPC KN's child, the government charged appellant with child endangerment. (JA042-043). Finally, the government alleged that appellant assaulted a different soldier who heard the commotion between appellant and SPC KN and tried to intervene. (JA043).

Appellant waived his right to an Article 32, UCMJ, preliminary hearing, and the charges were referred on June 6, 2018. (JA054, 347). However, on July 20, 2018, the defense filed a motion to dismiss for defective referral. (JA012, 363). The defense alleged the brigade trial counsel, CPT JE, improperly induced appellant to waive his original preliminary hearing by withholding exculpatory evidence. (JA012, 363). In response, the convening authority withdrew the charges and ordered a new Article 32, UCMJ, hearing. (JA054, 363). The

charges[2] were then re-referred to a general court-martial on November 7, 2018. (JA54). At some point during the withdrawal and re-referral process, CPT JE was replaced by a different trial counsel. (JA051, 330).

After the second referral, appellant was arraigned on November 29, 2018. (JA040-044). At the arraignment, defense did not raise any motions and appellant entered a plea of not guilty to all charges and specifications. (JA057). The military judge's pretrial order set trial for February 26, 2019, with a motions deadline of December 4, 2018. (JA322). The defense did not file any motions prior to the military judge's deadline.

On January 30, 2019, the defense filed a motion to disqualify CPT JE as trial counsel after learning that he had been reassigned to appellant's court-martial. (JA350-359)[3]. The defense alleged that not only had CPT JE withheld exculpatory information, he also improperly directed SPC KN not to speak with defense counsel. (JA357). However, at that point, defense was not aware of any unlawful command influence or defects in the preferral. (JA104).

[2] After the preliminary hearing, CPT CF preferred an additional charge against appellant for adultery. (JA040).
[3] This exhibit is incorrectly labeled as "Defense Exhibit IX for ID."

On February 24, 2019, defense submitted a motion[4] to dismiss[5] all charges and specifications, alleging that (1) the preferral of charges was defective and (2) CPT JE committed unlawful command influence. (JA324-340). Similar to the motion filed on January 30, 2019, defense also requested that CPT JE be disqualified as trial counsel. (JA340).

Although the motion was clearly past the military judge's deadline, defense counsel asserted they only discovered the main evidence underlying the motion two days prior. (JA104). There were two pieces of critical evidence. First, defense learned that in April of 2018, CPT JE directed an officer from appellant's unit, First Lieutenant (1LT) AM, to question appellant about information relevant to the charged offenses. (JA104-105). In a sworn statement attached to defense's motion, 1LT AM stated that CPT JE directed him to question appellant "on or around" April 23 or 24, 2018, which would have been either the day of or the day after preferral of charges. (JA344). Defense counsel asserted that by the time 1LT AM actually questioned appellant, he was represented by counsel. (JA105).

[4] Defense also submitted a motion for a continuance due to witness travel issues and late Military Rule of Evidence (Mil. R. Evid.) 404(b) notice. (JA064, 076).
[5] The motion is labeled as a motion for appropriate relief; however, defense requested the charges and specifications be dismissed due to defective preferral and unlawful command influence. (JA324-340). This filing will refer to that motion as a motion to dismiss.

Second, the defense learned that CPT CF felt pressured by CPT JE to prefer charges. (JA103-104). Although CPT CF had been on the defense witness list as early as December 4, 2018, he was only listed as a sentencing witness. (JA348). On February 24, 2019, the same day that defense filed the motion to dismiss, CPT CF wrote a sworn statement describing his interactions with CPT JE. (JA341).

In his sworn statement, CPT CF asserted that CPT JE told him that he "needed to prefer charges" against appellant. (JA341). Captain JE and CPT CF disagreed about the appropriate level of disposition. (JA341). Specifically, CPT CF believed only the "domestic violence charges" should be sent to a court-martial. (JA341). Captain CF "did not agree with the charges for BAH fraud, the false official statement, the assault on the other Soldier, and the child endangerment." (JA341). He wanted to handle those alleged offenses at "[his] level." (JA341). Captain JE told CPT CF that "this was going to [a] Court-Martial, this is a Court-Martial offense" and that if he "did not prefer charges, someone else would." (JA341).

At the time, CPT CF had only been in command for two to three months and placed a great deal of trust in his legal advisors. (JA341). Based on CPT JE's advice, CPT CF thought that a court-martial was a foregone conclusion. (JA341). Captain CF was "amazed" this was happening and only signed the charge sheet because he did not want someone else to inform appellant of the charges. (JA341).

Additionally, CPT JE did not present CPT CF with any evidence to support the charges. (JA341). In fact, CPT CF did not believe appellant actually committed BAH fraud. (JA341). However, on April 23, 2018, CPT CF ultimately signed the charge sheet because he "did not feel that [he had] any other option but prefer charges." (JA341).

When CPT CF preferred the additional charge of adultery, he was advised by a different trial counsel, CPT MY. (JA341). Although CPT CF did not feel pressured to sign the second charge sheet, he still thought "it was odd we would Court-Martial someone for adultery." (JA341). Additionally, CPT CF's decision to prefer the additional charge was influenced by the fact that appellant was already facing the charges from the first preferral. (JA341).

On February 25, 2019, the military judge held an Article 39(a) session to address the defense motions filed the day prior. (JA064). At the hearing, the military judge questioned defense counsel extensively about the defense motion for a continuance and several related issues. (JA064-095). However, the military judge did not ask a single question about appellant's claim of unlawful command influence or inquire into why the issue had not been raised earlier. (JA100-129). During argument, defense counsel appeared to suggest that CPT CF alerted them to the issue during a conversation involving CPT CF's expected testimony as a defense sentencing witness. (JA111). After learning about the issues involving

CPT CF and 1LT AM, defense counsel became concerned because it appeared "the only person driving [the] prosecution [was] the trial counsel." (JA112).

After hearing argument from government and defense, the military judge made the following findings of fact and conclusions of law:

> First, in reference to the defense's motion for specific relief regarding prosecutorial misconduct, defective referral [sic], and unlawful command influence; the court notes this motion was filed on Sunday, 24 February 2019; trial is scheduled for 26 February 2019; this motion was filed after the accused arraignment and entry of a plea which was on 29 November 2018. It was filed after the deadline for filing motions on 4 December 2018, established by this court and its pretrial order marked as Appellate Exhibit I, and after the motions hearing held on 11 January 2019. This motion is untimely, the facts upon which the defective preferral and unlawful command influence portions of the motion are based were discoverable by the defense beginning on 23 April 2018, the date of preferral. Good cause does not exist for filing this motion on the eve of trial.

(JA128-129).

Summary of the Argument

The military judge's decision to not even consider the substance of the defense motion to dismiss was an abuse of discretion for two primary reasons. First, under Rule for Courts-Martial (R.C.M.) 905(b)(1), defenses or objections based on defects in the preferral must be made prior to entry of pleas unless good cause is shown. Appellant concedes the portion of the motion specifically relating to defective preferral was untimely. However, appellant's claim of unlawful

command influence should not have been subject to the same deadline. Although this Court has characterized claims of accusatory unlawful command influence as a procedural defect, the focal point in those cases has been the accused's failure to raise the issue "at trial." *See, e.g., United States v. Hamilton*, 41 M.J. 32, 37 (C.A.A.F. 1994). Here, appellant raised the issue prior to trial.

Second, to the extent the defense motion was untimely, the military judge abused his discretion when he determined defense had not shown good cause. Defense was not aware of the factual basis for the motion until February 22, 2019. Furthermore, it is highly unlikely they could or should have been aware prior to their preparation immediately before trial. Upon discovering the relevant facts, defense counsel promptly filed the motion.

Standard of Review

This Court reviews a "military judge's evidentiary decision on whether good cause was shown for an abuse of discretion." *United States v. Jameson*, 65 M.J. 160, 162 (C.A.A.F. 2007).

Law

"It has long been a canon of this Court's jurisprudence that '[unlawful] [c]ommand influence is the mortal enemy of military justice.'" *United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). This Court has recognized two types of unlawful

command influence that can arise in the military justice system, "*actual* unlawful command influence and *the appearance* of unlawful command influence." *Id*. at 247 (emphasis in original).

Additionally, "this Court has sought to draw a distinction between the *accusatorial* process and the *adjudicative* stage, that is, the difference between preferral, forwarding, referral, and the adjudicative process, including interference with witnesses, judges, members, and counsel." *United States v. Weasler*, 43 M.J. 15, 17-18 (C.A.A.F. 1995) (emphasis added) (footnotes omitted). The distinction between accusatorial and adjudicative unlawful command influence is particularly relevant is assessing whether waiver applies. *Id*.

For example, in *United States v. Hamilton*, this Court held, in a divided opinion, that an accused waives any claim of unlawful command influence involving preferral of charges if not raised "at trial." 41 M.J. at 37. In contrast, "[u]nlawful command influence at the referral, trial, or review stage is not waived by failure to raise the issue at trial." *Hamilton*, 41 M.J. at 37 (citing *United States v. Blaylock*, 15 M.J. 190, 193 (C.M.A. 1983)).

The Court in *Hamilton* appeared to go further than simply holding that waiver applies to claims of accusatory unlawful command influence not raised "at trial." *Id*. Specifically, the majority opinion characterized accusatorial unlawful command influence as a mere "defect" in the preferral process, akin to "unsigned

or unsworn charges." *Id*. at 36-37. That characterization carries particular significance because Rule for Courts-Martial (R.C.M.) 905(b)(1)[6] provides that "objections based on defects (other than jurisdictional defects) in the preferral, forwarding, or referral of charges" must be made "before a plea is entered[.]" Therefore, if the entirety of *Hamilton* is to be read as precedent, an accused must not only raise an objection to accusatory unlawful command influence "at trial," she must do so prior to entry of pleas. *Hamilton*, 41 M.J. at 37. This issue was not lost upon the *Hamilton* minority. For example, Judge Wiss stated:

> On the merits, I am not prepared, in this case *in which it would be mere dicta*, to make such an equation that relegates the evil of unlawful command influence in this process to the same comparatively innocuous level as inadvertence and technical flaws such as whether the charges were sworn before someone authorized to administer oaths.

Id. at 40 (Wiss, J., concurring in the result) (emphasis added).

Nevertheless, in *United States v. Drayton*, this Court again characterized "the issue of a coerced preferral of charges" as a "defect" and held that failure to raise it "at trial" constitutes waiver. 45 M.J. 180, 182 (C.A.A.F. 1996) (emphasis added). Similar to *Hamilton*, the majority opinion in *Drayton* drew sharp criticism.

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[6] The charges in this case were referred prior to January 1, 2019. (JA044). Therefore, the amendments to the Rules for Courts-Martial within Exec. Order 13825 were not yet effective. 83 Fed. Reg. 9889, 9984-85 (Mar. 8, 2018). However, the text of R.C.M. 905(b)(1) did not change between the 2016 and 2019 versions of the Manual for Courts-Martial. (JA378, 380).

Drayton, 45 M.J. at 183 (Sullivan, J., dissenting) (the "trivialization" of unlawful command influence as a "mere procedural defect" is an "abdication of this Court's responsibility to ensure the integrity of the military justice system.").

If accusatory unlawful command influence is truly a procedural defect, then it must be raised prior to entry of pleas. R.C.M. 905(b)(1). However, the military judge has authority to consider untimely motions if the moving party shows "good cause[.]" R.C.M. 905(e)(1). This Court has not addressed what constitutes "good cause" in the context of an untimely motion alleging defective preferral or accusatory unlawful command influence; however, this Court has frequently addressed untimely motions to suppress.

For example, in *United States v. Coffin*, this Court stated the time limitations to file a motion to suppress should be "liberally construed[.]" 25 M.J. 32, 34 (C.M.A. 1987) ("While the rule announced in Mil. R. Evid. 311(d)(2)(A) is salutary and provides for efficient administration of justice, it should be liberally construed in favor of permitting an accused the right to be heard *fully* in his defense."). In *Coffin*, the Court found good cause because it appeared the government misled defense counsel into thinking the motion to suppress would not be necessary; however, the Court noted it was not able to determine who was actually at fault. *Id.* at 34 n.3 ("We cannot see from this record whether the failure

to make a timely objection was the product of misinformation given to counsel by her client, lack of diligent investigation, or prosecutorial sandbagging.").

Several service courts have interpreted *Coffin* broadly, reasoning that "rules of procedure and evidence" – not just Mil. R. Evid. 311(d)(2)(A) – should be liberally construed. *See*, *e.g.*, *United States v. Czekala*, 38 M.J. 566, 573 (A.C.M.R. 1993) ("rules of procedure and evidence should be liberally construed so an accused can be heard fully in his defense.").

On the other hand, when it is clear "the defense knew or could have known about the evidence in question" prior to the relevant deadlines, good cause does not exist. *Jameson*, 65 M.J. at 163. In contrast to *Coffin*, the military judge in *Jameson* "fully probed" defense counsel's reasons for failing to make a timely motion to suppress and it was apparent the evidence at issue was not a surprise. *Id*. The defense had known about the relevant evidence but waited until the government's case-in-chief to raise the motion. *Id*. Moreover, the government "did nothing to contribute to the defense decision not to file a timely motion to suppress." *Id*.

Argument

1. Appellant's claim of unlawful command influence was timely.

It is important to distinguish between the two related, but separate, errors raised by the defense motion to dismiss submitted on February 24, 2019. First, the

defense alleged the preferral was defective because (1) CPT JE coerced CPT CF into preferring charges that he did not believe were true, and (2) CPT CF did not have personal knowledge of all the matters set forth in the charges and specifications. (JA334). Second, the defense alleged that CPT JE's act of coercing CPT CF to prefer charges *also* constituted unlawful command influence. (JA335-336).

Notably, CPT JE went further than just pressuring CPT CF into preferring charges that he did not believe were true. Outside of the "domestic violence charges," CPT CF wanted to "deal with the rest of the charges at [his] level." (JA341). However, due to CPT JE's coercion, CPT CF believed his only option was to prefer charges. (JA341). Therefore, CPT JE also pressured CPT CF into sending a majority of the charges to a more serious forum than he felt was appropriate. (JA341).

Appellant concedes the portion of the defense motion related to defective preferral was untimely. Under R.C.M. 905(b)(1), motions alleging defects in the preferral must be raised before entry of pleas. However, the plain language of R.C.M. 905(b)(1) does not clearly establish that unlawful command influence qualifies as a "defect" in the preferral. Although this Court has characterized accusatory unlawful command influence as a procedural defect, the focal point in those cases has mainly been the accused's failure to raise the issue *at trial*. *See*

United States v. Richter, 51 M.J. 213 (C.A.A.F. 1999); *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996); *Drayton,* 45 M.J. at 182; *Hamilton*, 41 M.J. at 34. When an accused raises accusatory unlawful command influence for the first time on appeal, there is a concern "the accused would unfairly benefit because the remand may be a number of years after the trial, when the witnesses and victims have moved or their memory has faded." *United States v. Upshaw*, 49 M.J. 111, 114 (C.A.A.F. 1998) (Crawford, J., concurring). Such concerns are curtailed when, as in this case, defense raises the motion prior to trial. Therefore, appellant's motion to dismiss for unlawful command influence should have been subject to the ordinary deadline of adjournment. R.C.M. 905(e)(2).

Moreover, as the minority opinions in *Hamilton* and *Drayton* emphasized, this Court's characterization of accusatory unlawful influence as little more than a mere procedural "defect" is contradictory. Unlawful command influence simply cannot be "the mortal enemy of military justice" if, at the same time, it is equivalent to "technical flaws such as whether the charges were sworn before someone authorized to administer oaths." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *Hamilton*, 41 M.J. at 40 (Wiss, J., concurring in part).

Regardless, if the military judge relied upon this Court's decisions in *Hamilton* or *Drayton* to reach a conclusion that he need not address appellant's claim of unlawful command influence, that reliance was misplaced. In contrast to

Hamilton and *Drayton*, the military judge had an opportunity to address the issue prior to trial. The military judge is supposed to be "the last sentinel protecting an accused from unlawful command influence." *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998). Unfortunately, in this case, the military judge completely abdicated that responsibility. He abused his discretion and disposed of the defense motion by reflexively applying draconian procedural timing requirements.

2. To the extent the motion to dismiss was untimely, defense counsel had good cause because they were previously unaware of the factual basis.

After ruling the defense motion was untimely, the military judge determined that good cause did not exist because "the facts upon which the defective preferral and unlawful command influence portions of the motion are based were discoverable by the defense beginning on 23 April 2018, the date of preferral." (JA128-129). In *Jameson*, this Court held that good cause does not exist when "the defense knew or could have known about the evidence in question" prior to the relevant deadlines. 65 M.J. at 163.

However, the facts of this case differ from *Jameson* in two key respects. First, in *Jameson*, the military judge "*fully probed* defense counsel's reasons for not making a timely motion[.]" *Id.* (emphasis added). Here, the military judge failed to make any inquiry into why the claims of defective preferral or unlawful command influence were late. Therefore, he did not possess sufficient facts or evidence necessary to determine whether the defense knew or should have known

of the relevant facts. Second, the defense counsel in *Jameson* waited until the government's case-in-chief to raise a motion to suppress even though the defense "knew about the evidence at issue[.]" *Id*. Here, defense submitted the motion prior to trial and only two days after learning of the relevant evidence. (JA104).

Admittedly, it would have been *technically* possible for defense to learn about the factual basis for the defective preferral and unlawful command influence prior to entry of pleas. Captain CF had been on the defense witness list (for sentencing) since December 4, 2018. (JA348). That said, there was absolutely no reason for defense counsel to suspect that CPT JE improperly influenced CPT CF. This was not a situation where defense knew of the factual basis but waited to file the motion in an attempt to ambush the government. This was an extremely unique situation, and as the defense counsel argued, they only began to suspect CPT JE was "the only person driving [the] prosecution" just days before trial. (JA112).

Moreover, the government arguably contributed to the delay in defense discovering the factual basis for the defective preferral. During argument on the motion to dismiss, defense counsel alleged the government failed to turn over the information related to 1LT AM's questioning of appellant until they were "confronted." (JA110). While trial counsel disagreed that CPT JE's actions rose to the level of misconduct, he *acknowledged* the failure to disclose that information may have constituted "negligence." (JA114). Had defense known the government

was still investigating basic[7] facts about the alleged offenses at or near the date of preferral, that would have been an indication that CPT CF did not have personal knowledge of the matters set forth in the charges and specifications.

When defense first learned of the possibility of impropriety related to the preferral, they acted promptly. Nonetheless, despite the defense's swift action, the military judge simply concluded defense had not shown good cause because he thought it would have been possible to discover that information earlier. Again, he made this decision after conducting zero inquiry related to CPT JE's unlawful influence over CPT CF. As stated above, such a reflexive application of procedural timing requirements was an abuse of discretion. If the filing deadlines for a motion to suppress should be "liberally construed in favor of permitting an accused the right to be heard fully in his defense[,]" surely the same liberality is warranted to protect appellant against the "mortal enemy of military justice." *Coffin*, 25 M.J. at 34; *Thomas*, 22 M.J. at 393.

[7] For example, CPT JE instructed 1LT AM to ask appellant about the date of his marriage to SPC KN and why he didn't include that information on the application for BAH. (JA344).

Conclusion

Because the military judge abused his discretion by denying the defense motion to dismiss on procedural grounds, appellant respectfully requests this Court set aside his remaining convictions.

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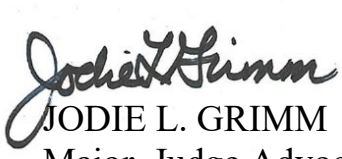

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 4,404 words.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Givens, Crim. App. Dkt. No. 20190132, USCA Dkt. No. 21-0086/AR, was electronically filed with the Court and Government Appellate Division on March 29, 2021.

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