**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES**,
*Appellee*,

v.

**BRANDON M. HORNE**,
Staff Sergeant (E-5),
United States Air Force,
*Appellant*.

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USCA Dkt. No. 21-0360/AF

Crim. App. Dkt. No. ACM 39717

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# BRIEF ON BEHALF OF APPELLANT

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**WHETHER THE CONDUCT OF THE TRIAL COUNSEL AND SPECIAL VICTIM'S COUNSEL CREATED AN INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM.**

## Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter "Air Force Court") reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 866(c). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

## Statement of the Case

In December 2018, a five-member panel of officer and enlisted members found Appellant, contrary to his plea, guilty of a single Charge and Specification of sexual assault upon J.C. (hereinafter, "the named victim"), in violation of Article 120, UCMJ. JA at 295, 297. The panel sentenced him to a one-grade reduction and a mandatory dishonorable discharge. JA at 296. The convening authority approved the adjudged sentence and ordered the sentence, except for the dishonorable discharge, executed. JA at 66.

[1] All references in this brief to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

In a divided opinion, the Air Force Court approved the findings and sentence. JA at 58. Chief Judge Johnson dissented on factual sufficiency grounds. *Id*. On July 19, 2021, the Air Force Court denied Appellant's request to reconsider its decision. JA at 63.

## Statement of Facts

### *Background in the Legal Office*

Appellant's investigation was the fifth sexual assault investigation in two years to come through the legal office at Fort Meade, Maryland. JA at 352. Aside from Appellant's case, three of those investigations resulted in courts-martial and one was not prosecuted. *Id*. Not one of these cases resulted in a conviction. *Id*. Capt A.S. was Chief of Military Justice and trial counsel for each of the three acquittals. JA at 349, 353. Appellant's case, however, was the first one that Capt A.S. managed from its inception as Chief of Military Justice. JA at 353. In addition to overseeing Appellant's case in her capacity as Chief of Military Justice, Capt A.S. was also detailed to Appellant's case as trial counsel by the Staff Judge Advocate (SJA), Lt Col J.W. (hereinafter, "the SJA"). JA at 313.

The Air Force Judge Advocate General's Corps has established processing goals for the administration of judicial action. JA at 332. The legal offices maintain metrics and time goals with the objective of processing a case in a timely fashion. *Id*.

These metrics may be used on a judge advocate's officer evaluation report. *Id*. Capt A.S. was the top captain of ten officers that the SJA had ever supervised in her career. JA at 350. The SJA testified that she had "the most confidence in [Capt A.S.'s] ability in the courtroom and just of her knowledge of military justice." *Id*.

***The Investigative and Charging Timeline***

The charged event allegedly occurred at or near Wiesbaden, Germany, on or about July 11, 2017. JA at 64. The apparent unlawful influence[2] of Capt A.S. and the special victim's counsel (SVC), Capt J.P. (hereinafter, "the SVC"), occurred during the beginning stages of the investigation[3] and before preferral. *See*, *e.g*., JA at 106-164, 172-173, 215-220 (all communications between July-October 2017).

Before preferral, the legal office for the general court-martial convening authority requested Capt A.S. secure additional information from the named victim, which was accomplished in November 2017. JA at 326. Four months after the alleged sexual assault, and without a report of investigation (ROI) from the Air Force Office

[2] Given that this Court has not drawn an analytical distinction between "unlawful command influence" and "unlawful influence," reference to "unlawful command influence" or "UCI" in this brief is not meant to convey a different doctrine.

[3] This was a complicated international investigation, involving not only American military investigators stationed in Germany, but also German police officers, a local German investigation, evidence collected and tabbed by the German officers, and investigators who needed translators because of a "language barrier." JA at 11, 13, 14.

of Special Investigations (OSI), Appellant's commander preferred one Charge and Specification against him on November 27, 2017. *Compare* JA at 64 *with* JA at 169. The case proceeded to an Article 32, UCMJ, preliminary hearing on January 4, 2018—still without an ROI. *Compare* JA at 169 *with* JA at 433. The convening authority then referred the Charge and Specification to a general court-martial on February 6, 2018, also without the benefit of an ROI. *Compare* JA at 65 *with* JA at 169. The ROI was not completed until March 22, 2018—44 days after charges were referred to trial, 77 days after the Article 32, UCMJ, preliminary hearing occurred, and 115 days after charges were initially preferred.

***The Apparent Unlawful Influence of the Trial Counsel and Special Victim's Counsel***

Prior to arraignment, the Defense filed a motion to dismiss for unlawful influence committed by Capt A.S. and the SVC. JA at 69, 170. While initially raised as both actual and apparent UCI, the Defense refined its theory throughout motions practice to request dismissal of the Charge and Specification with prejudice for the appearance of unlawful influence. JA at 287, 418-419.

1. *The trial counsel and SVC's pre-coordination regarding the content of the named victim's sworn witness statement.*

   OSI did not record its July 2017 interview with the named victim conducted in

Germany.[4] JA at 314. The only documentation memorializing that interview was a three-page set of OSI agent notes. JA at 102-104, 314-315. The notes made it "very hard to put it all together." JA at 315. The legal office and the SVC agreed the named victim would provide a witness statement rather than accomplish a fresh video-recorded interview with OSI. JA at 316. Capt A.S. provided the SVC with his client's initial OSI interview notes before she authored her new witness statement. JA at 110. At that point, Capt A.S. sent the SVC another email regarding what they were "looking for." JA at 317.

In an email dated August 28, 2017, Capt A.S. wrote, "The attached slides may help when advising [the named victim] on her statement. If you look at Slide 18, we will need this information before we can determine how to charge."[5] JA at 113. The

[4] Capt. A.S. testified it was her understanding that this interview lasted somewhere between two and three hours in length. JA at 316.

[5] The 33-page slide deck is entitled "Charging Decisions in Sexual Assault Cases," and purports to be the Air Force's official guidance on charging decisions in Article 120, UCMJ, litigation. JA at 116. It was authored by Capt P.H., Senior Trial Counsel, Special Victims Unit, Chief of Policy & Coordination. *Id*. Slide 18 is entitled "Incapacitation v Bodily Harm" and states, "If she is so drunk that she does not know what is going on, we can make a credible argument that she does not have the cognitive ability to appreciate the sexual conduct in question and she does not have the mental ability to make a decision about the conduct." JA at 133. The slide concluded, "BLDL: THIS IS WHY EARLY AND THOROUGH VICTIM INTERVIEWS ARE SO DANG IMPORTANT!!!!!!!!" *Id*.

SVC responded a few hours later, "When I review [my client's] statement, I'll be sure to make sure she's clear regarding impairment vs. bodily harm. *I'm pretty sure bodily harm will be the charge*." *Id*. (emphasis added).

The named victim wrote a draft of a witness statement and sent it to her SVC via email on August 28, 2017. JA at 215. She wrote the following:

> Captain [J.P],
>
> Here is the *testimony* I have been working on. *I'm not sure if it's what the legal office is looking for* because I have never had to write something like this. Please review it and let me know your thoughts. *I am willing to take things out, reword things if you think it is best.* But please go through it with a fine tooth comb. . . .

*Id*. (emphasis added). The SVC proposed two edits over the phone and documented that advice by email. *Id*. One of the proposed edits dealt with whether the named victim remembered feeling the penetration of Appellant's penis, a fact of consequence in determining a bodily harm or incapacitation by alcohol theory of liability. *Id*. In her final version of the witness statement, the named victim included, "I felt his penis pushing through my vagina and started yelling . . . ." JA at 153. The Government ultimately charged sexual assault by bodily harm.[6] JA at 64.

[6] The issues of bodily harm vs. substantial incapacitation as distinct theories of criminal liability and the admission of evidence concerning intoxication were hotly contested at trial. *See* Supplement to the Petition for Grant of Review, dated September 13, 2021, at 5-10, 18-26; *see also* JA at 28-39.

2. *The trial counsel's efforts convinced OSI to cancel a witness interview with the named victim's husband, whom the trial counsel subjectively believed possessed exculpatory information and OSI determined to be necessary for investigative sufficiency.*

The named victim contacted her husband, TSgt B.C. (hereinafter, "the husband"), shortly before the alleged incident by text message and again after the alleged event by phone call. JA at 155, 330. Agent D.M., an OSI agent in Nevada, received a lead from the OSI detachment in Germany to interview the husband. JA at 388. Agent D.M. successfully scheduled an interview with the husband for the following week, who at that time was willing to speak with OSI. JA at 389.

In response, the SVC, "irate and upset," called Agent D.M. on the phone. JA at 389, 397. The SVC directed Agent D.M. to not have any further contact with the husband. JA at 389, 391-392. The SVC then proceeded to email Capt A.S. and the OSI detachment in Germany[7] that sent the lead to Nellis AFB, and informed them that the named victim was "very upset" and "thinking about dropping out of the process." JA at 319-320. Capt A.S. immediately conferred with her SJA and decided the named victim must be "very fragile." JA at 320-321. By that, Capt A.S. meant, "she was a

[7] Agent L.J. understood the SVC's email as purporting to represent *both* the named victim and her husband. JA at 372. The Air Force Court made clear this was not the case. JA at 26 ("[The SVC] represented [the named victim], but he did not represent her spouse, and he had no authority to attempt to restrict the AFOSI's access to [the husband].")

little bit upset with the OSI process and the whole event really impacted her and it impacted her life and she was very clearly emotional about that process . . . ." JA at 327. Capt A.S. testified she was concerned that "because OSI is going to be OSI," the named victim "may, due to her fragility, drop out of the process because of the actions of OSI." *Id*. However, at the same time this was taking place, OSI also *suspected* the named victim of committing a sexual offense against a different female victim arising out of the very same night in question. JA at 22, n. 23; 166-167; 357.

Capt A.S. subjectively believed that the husband possessed exculpatory evidence. JA at 322. At this point in time, Capt A.S. at least knew that the named victim sent her husband a text message on the night of the incident, wherein she said she was going to bed when other evidence indicated she was actually drinking large quantities of alcohol with her colleagues, despite being pregnant and having suffered a recent tragic miscarriage. JA at 4, 5, 59, 61, 294, 330. Capt A.S. was aware of this communication before she requested cancellation of the lead to interview the husband. JA at 330-331. Capt A.S. also believed there was "enough to proceed with the preferral of charges" before this interview had been conducted. JA at 208-209.

Despite this, Capt A.S. proceeded to email the OSI detachment in Germany the following:

> We received a call this week from the SVC . . . who expressed concern that [the named victim] may elect to no longer participate in the process

> due to her level of stress and frustration with the process thus far. One of the issues that upset her recently was that Nellis OSI (pursuant to a lead) had reached out to her husband directly and requested an interview with him. *From a prosecution standpoint, we do not believe that an OSI interview with the husband is necessary nor relevant enough to outweigh the risk of the Victim dropping out of the process entirely*. . . . We agree that the collection of the Victim's DNA is important to *our case*, but not the interview with the husband. Anything that could be done to minimize the Victim's stress at this stage will be helpful to the case going forward. . . .

JA at 174-75 (emphasis added).

> Capt A.S. continued:
>
> I am concerned about the extreme sensitivity of the victim in this case, at this point in the process. . . . *I completely understand why the husband is being interviewed*, but think it needs to be done with precautions after 4.5 months has gone by. . . . All I ask is that you consider this input as the investigation wraps up *since the actions of OSI now may impact our ability to prosecute the case down the line*.

JA at 173 (emphasis added).

Despite initially pushing back against the SVC and articulating that the named victim's active duty husband was "within our scoping purview of the investigation" and that OSI was "well within [its] right to ask for an interview," the agent relented and said, "[s]ure ma'am, no problem."[8] JA at 172-173. The lead was then cancelled

[8] Agent L.J. testified it would be "common practice" to interview a witness whom a victim had reached out to immediately preceding the alleged crime and agents would request that witness provide access to the electronic communications between themselves and the victim. JA at 373.

and the husband was never interviewed by OSI for *this* case.[9] JA at 323. The SVC later text-messaged Capt A.S. and said, "Wow, that is great news. Thank you for getting that done." JA at 164. Agent D.M. would have conducted the interview had the lead not been pulled by the Ramstein OSI detachment. JA at 393.

The husband later testified during motions practice, which occurred seven months after the interview was cancelled. JA at 355-369. His most frequent responses were "I cannot remember" and "I don't know." *See, e.g.*, JA at 356, 358, 359. The husband told the military judge that, in October 2017, he had not foreclosed the possibility of talking to OSI. JA at 360. And at the time of the motions hearings, the husband was not confident whether he would have willingly participated in an interview the previous October, but it was a possibility he would have provided a full interview. *Id*. The husband testified that he had never directly spoken with the SVC. JA at 356. However, OSI agent notes indicate that he acknowledged both he and his wife went to lunch with the SVC in December of 2017 during which time they discussed *both* cases (i.e., the case in which the named victim accused Appellant of a

[9] The husband *was* interviewed for the separate case where his wife was accused of a sex crime against a fellow female Airmen on the same night at issue. JA at 22, n. 3; 166-167; 323; 357. When speaking with OSI regarding *that* case where she was the accused, the husband stated his wife "would not drink alcohol while preg - not even a glass of wine," that she "has never concealed her alcohol consumption" to him, and "she "has never had sex with anybody else." JA at 166-167; *cf.* JA at 58-62.

sex crime, and the case in which she was the named suspect of a sex crime). JA at 167.

***The Military Judge's Ruling***

After multiple Article 39(a), UCMJ, sessions spanning across six months, the military judge provided a two-paragraph notice of ruling to the parties in the body of an email on November 10, 2018. JA at 283. In it, he concluded that the "defense ha[d] not shown some evidence that unlawful command influence occurred." *Id*. He also found that the Government proved beyond a reasonable doubt that the facts do not constitute unlawful command influence. *Id*. Finally, the military judge summarily concluded that, if he erred, the Government still proved beyond a reasonable doubt that there was no intolerable stain on the public's perception of the military justice system and a disinterested observer would not find both counsels' actions caused Appellant's court-martial to be unfair. *Id*.

After Appellant was convicted and automatic appellate review was triggered, the military judge decided to supplement the record just before authentication with a full written ruling on May 3, 2019—nearly five months after the sentence was announced and a year after the original motion was filed. JA at 287. In this post-conviction written ruling, the military judge recognized that, as refined through motions practice, "the remaining allegation was that an appearance of both unlawful

command influence (UCI) and unlawful influence (UI) existed due to the whole of pretrial interactions between [the SVC and Capt A.S.]." JA at 287-288, para. 3. The military judge further summarized the Defense's position: the consequence of the entirety of these interactions of counsel was that the husband was not interviewed until some seven months later, which may have preserved a better account of the events in question. JA at 288, para. 3.

The military judge found, as fact, that Capt A.S. took "an active role in accommodating [the named victim's] preference [to not have her husband interviewed] by contacting the necessary individuals and offices" and that she "was made part of this process by [the SVC]." JA at 288, para. 4(a). He further found the "overarching goal" of counsel and other members of the Government was to maintain the named victim as a willing participant in potential prosecution of Appellant and that it was "unlikely" that any military justice proceeding could occur without the named victim's participation. JA at 288, para. 4(b). The military judge found that an earlier witness interview would not have developed additional information from the husband.[10] JA at 288, para. 4(e).

[10] Previously in motions practice, Capt A.S. testified, "[M]emory fades over time, as most people know." JA at 315; *see also* R. at 289 (military judge setting a tight deadline for supplemental arguments and briefing for the UCI motion "so that I can have everything submitted to me, unvarnished by time or any way impeded by the fading of memory, further than what is necessary, earlier rather than later.").

The military judge reiterated his previous conclusions that the "defense ha[d] not shown some evidence that UCI or UI occurred," and, alternatively, "the government ha[d] demonstrated beyond a reasonable doubt that the facts as presented do not constitute UCI or UI." JA at 291, para. 20. He concluded that steps to "temporarily forestall" an interview so as to encourage continued participation of the accuser do not place "*any strain* upon the public's perception of the military justice system." *Id*. (emphasis added).

***The Air Force Court's Review of the Unlawful Influence Assignment of Error***

The Air Force Court first reviewed the military judge's ruling that the Defense had not produced "some evidence" that the SVC and Capt A.S. committed unlawful influence and expressed that it was "not so sure" the military judge's conclusion was correct. JA at 25. Instead, it noted that arguably both counsels' "actions show they overstepped the bounds of their authority, or attempted to do so." *Id*. The Air Force Court further noted that the SVC did not represent the husband, that he had no authority to attempt to restrict an investigator's access to the husband, but that he—through Capt A.S.—was successful in getting investigators to cancel their interview. *Id*. The Air Force Court then assumed—contrary to the military judge's conclusion—that this was "some evidence" of unlawful influence. *Id*.

In further contrast with the military judge, the Air Force Court concluded the

Government had not proven that the facts did not exist or that the facts did not constitute unlawful influence, and proceeded to the "intolerable strain" analysis. *Id*. It ultimately determined, however, that the Government proved beyond a reasonable doubt there was no intolerable strain on the public's perception of the military justice system and a disinterested observer would not find the SVC's and Capt A.S.'s actions caused Appellant's court-martial to be unfair. JA at 26-28. Even though the lower court did not "endorse the methods" used by counsel, its conclusion was principally grounded in the following: (1) there was no indication Appellant suffered "actual prejudice;" (2) Capt A.S. was removed as trial counsel and the SVC no longer represented the named victim at trial; (3) the "thoroughly litigated" motion itself would ease any strain; and, (4) although the actions of Capt A.S. and the SVC were improperly effectuated, their intentions were not "illegitimate." JA at 27-28.

***The Air Force Court's Conclusion on the Case at Large***

In affirming the findings and sentence, the majority stated that it would "not characterize the Government's case as 'strong,'" found the "evidence was not overwhelming to support a conviction," and acknowledged factual sufficiency was a "close call." JA at 54, 56. Nevertheless, by a vote of 2-1, the Air Force Court upheld Appellant's conviction. *Id*. at 1.

Chief Judge Johnson dissented. *See generally* JA at 58-62; JA at 58 ("[T]he

Government's case relied very heavily on [the named victim's] testimony, and in my view several factors significantly undermined the reliability of that testimony, leaving reasonable doubt as to Appellant's guilt."). The dissent first relayed concerns with the named victim's impairment and memory lapses, based largely on her significant alcohol consumption that night.

> [The named victim] testified that she did not remember telling L.C. in the elevator that she was going to sleep in L.C.'s room. She did not remember going to L.C.'s room twice with Appellant to ask for her access badge. She did not remember how the beer bottle came to be next to her bathroom sink. Yet, at a time when Dr. G.J. estimated that her blood alcohol content was still very high, she testified that she had a clear memory of being alone in her room preparing for bed *before* Appellant knocked on the door. There is no apparent explanation for this abrupt resumption of lucid memory, and other factors raise questions as to whether her memory was genuine.

JA at 59 (emphasis in original).

Next, the dissent analyzed the named victim's inconsistencies, contradictions, and motives. JA at 60 ("[The named victim's] testimony suggests she may have filled in information that she did not actually remember, but which she believed in line with her assumptions as to how she would or should have acted."). It then highlighted the named victim's reluctance to acknowledge her pregnancy in light of her behavior that others may view as irresponsible, like drinking to the point of extreme intoxication while pregnant. *Id*. Moreover, her extramarital affair provides "clear motive" to fabricate an allegation against Appellant and "the record does not significantly

corroborate [the named victim's] account." JA at 60-61.

The named victim had a "particularly strong incentive to deny activity that her spouse [ ] would disapprove of, beyond the typical lies of a marital relationship." JA at 61. This is because: (1) the husband's former spouse's infidelity to him caused him to be especially sensitive and raw to the topic of cheating; and (2) the named victim and her husband were actively trying to conceive again after their own recent miscarriage. *Id*. The dissent recognized the named victim's statement "it is better this way," which she told a squadron mate after she sent her husband the misleading text message that she was going to bed instead of truthfully acknowledging that she was drinking and socializing in Germany (JA at 294), "suggests [the named victim] may have had a particularly strong motive to reject a scenario in which excessive alcohol consumption led her into sexual activity with another man which had possibly harmed her pregnancy." JA at 61.

Chief Judge Johnson concluded, "I am simply not convinced [] beyond a reasonable doubt." JA at 62.

## Summary of Argument

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. *See* American Bar Association, *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, Prosecution Function Standard 3-1.2(b) (4th ed. 2017).[11] Indeed, a prosecutor does not represent "an ordinary party to a controversy, but . . . a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Stellato*, 74 M.J. 473, 491 (C.A.A.F. 2015) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Yet, in this case, Capt A.S.—at the bidding of the SVC—and while embracing the titles of trial counsel and Chief of Military Justice, focused on the expedient processing of Appellant's case and preserving the named victim's participation in a prospective court-martial at the expense of even attempting to ferret out the truth. Capt A.S. subjectively believed the husband possessed exculpatory information. Despite this and notwithstanding the husband's status an active servicemember, Capt

[11] *See also* Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, dated December 11, 2018, *Air Force Standards for Criminal Justice*, The Function of the Prosecutor Standard 3-1.2(b) ("As a trial counsel, the prosecutor represents both the United States and the interests of justice. The duty of the prosecutor is to seek justice, not merely to convict.").

A.S. determined that it was a foregone conclusion that the case was moving forward *without even trying* to uncover what the husband knew. In her own words, an interview with the husband was not "important to our case." *See* JA at 174-75.

By cancelling this interview with an eye towards accelerating the process, rather than conducting an evenhanded investigation, it guaranteed the preferring commander, the preliminary hearing officer, and even the general court-martial convening authority only knew what Capt A.S. and the SVC permitted them to know. Instead of being the guardian of justice as the Chief of Military Justice and trial counsel, Capt A.S. prevented any other check or balance in the military process from being able to effectively or meaningfully scrutinize this case. And for her successful efforts, the SVC thanked Capt A.S. "for getting that done." JA at 164.

The SVC dangled his client's participation in the court-martial process to shift the balance of power in this prosecution from the Government to his client as an individual. Instead of rejecting that construct and insisting on a strict adherence to investigative sufficiency and prosecutorial duties that naturally flow, the Government chose to prioritize the named victim's court-martial participation, rather than risk her non-participation and dismissal of the case; the loss of potentially exculpatory information was an acceptable consequence. This creates an intolerable strain. An objective, disinterested observer would harbor significant doubt as to the fairness of

Appellant's court-martial if that person learned the prosecutor representing the United States of America facilitated the Government's intentional abandonment of evidence believed to be exculpatory in nature and, moreover, that the prosecutor has authority and influence over an independent investigative agency such that she can apply sufficient pressure to shape an investigation with a desired end-state in mind.

The Government cannot meet its stringent burden in this case because such an observer, fully informed of all facts and circumstances, would further appreciate that the unlawful influence in this case concerns the conduct of two judge advocates—persons who should know better than anyone that this is the mortal enemy of military justice. A member of the public would also be cognizant of the fact that Capt A.S. and the SVC collaborated regarding the substance of the named victim's sworn witness statement before she wrote it, which poses an altogether independent concern. Finally, a member of the public may reasonably believe Appellant stands wrongfully convicted—particularly in light of the factual concerns addressed in dissent by the Chief Judge of the Air Force Court of Criminal Appeals. On this record, the Government cannot meet its burden of proving there is no *reasonable possibility* that a fully informed, disinterested member of the public would not harbor significant doubt about the fairness of Appellant's proceedings. That observer would—and should—harbor serious doubt.

## Argument

**THE CONDUCT OF THE TRIAL COUNSEL AND SPECIAL VICTIM'S COUNSEL CREATED AN INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM.**

### *Standard of Review*

"Allegations of unlawful command influence are reviewed *de novo*." *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)). "[T]he harmless beyond a reasonable doubt standard applies to all claims under Article 37(a), UCMJ." *Barry*, 78 M.J. at 77 n.4. "[I]t is solely the Government's burden to persuade the court that constitutional error is harmless beyond a reasonable doubt." *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009).

### *Law*

1. *The Unlawful Influence Framework*

This Court has long recognized that unlawful influence "is the mortal enemy of military justice." *United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017). It has also "repeatedly condemned unlawful command influence directed against prospective witnesses." *United States v. Gore,* 60 M.J. 178, 185 (C.A.A.F. 2004). As the applicable version of Article 37, UCMJ, states:

> *No person subject to this chapter* may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings and sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

(emphasis added).[12] Accordingly, the plain language of Article 37(a), UCMJ, provides: (1) that intentional action is not required in order to commit unlawful influence; and, (2) all persons subject to the UCMJ—including judge advocates—can commit unlawful influence. *Barry*, 78 M.J. at 76.

There are two types of unlawful influence: actual and apparent. *Boyce*, 76 M.J. at 247. Actual UCI "has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Id.* By contrast, apparent UCI "will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id*. at 248 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)). The appearance of UCI "is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002) (quoting

[12] The 2016 *MCM* applies to all aspects of this court-martial. This Court has taken "no stance as to what changes, if any, the 2019 amendments to Article 37, UCMJ, require with respect to our appearance of unlawful command influence jurisprudence." *United States v. Proctor*, 81 M.J. 250, 255 n. 3 (C.A.A.F. 2021).

*United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).

Unlike actual UCI, apparent UCI requires no showing of personal prejudice in order to merit relief. *Boyce*, 76 M.J. at 248-49. Instead, there is apparent UCI where: (1) there are facts which, if true, constitute UCI; and (2) this UCI places an intolerable strain on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *Id.* at 249. To succeed on a claim of apparent UCI, the appellant must show that, under the totality of the circumstances, there is "some evidence" that UCI occurred. *Id.* (citing *Stoneman*, 57 M.J. at 41; *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). The burden is low and the evidence presented must be more than mere allegation or speculation. *Boyce*, 76 M.J. at 249 (quoting *Salyer*, 72 M.J. at 423). Once an appellant presents some evidence of apparent UCI, the burden then shifts to the Government to prove beyond a reasonable doubt that either the predicate facts offered by the appellant do not exist, or the facts as presented do not constitute UCI. *Boyce*, 76 M.J. at 249 (citing *Salyer*, 72 M.J. at 423; *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999)).

If the Government meets its burden, then the appellant is not entitled to relief. *Boyce*, 76 M.J. at 250. If, however, the Government does not meet its burden, it can only prevail if it can prove beyond a reasonable doubt that the UCI did not place an

intolerable strain upon the public's perception of the fairness of the military justice system by demonstrating that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding. *Id.* at 249-50. If the Government does not meet this burden, the military appellate courts will fashion an appropriate remedy. *Id.* at 250 (citing *Lewis*, 63 M.J. at 416).

2. *Unlawful Influence's Intersection with Prosecutorial Duties and Misconduct*

Much like unlawful influence, "the prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent on behalf of the prosecutor." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014). "No showing of knowledge or intent on the part of government actors is required in order for an appellant to successfully demonstrate that an appearance of unlawful command influence arose in a specific case." *Boyce*, 76 M.J. at 251. In other words, "the key to our analysis is effect—not knowledge or intent." *Id*. Similarly, both doctrines fundamentally emanate from a criminally accused's right to constitutional right to due process. *See* VanLandingham, R., *Ordering Injustice*: *Congress, Command Corruption of Courts-Martial*, *and the Constitution*, 49 Hofstra L. Rev. 211, 214 (2021) (noting that the prohibition against unlawful influence is "firmly grounded in the Fifth Amendment's guarantee of due process"); *United States v. Edmond*, 63 M.J.

343, 345 (C.A.A.F. 2006) (describing the appropriate framework for considering prosecutorial misconduct from "a due process analysis"). This Court's predecessor explicitly recognized the interplay between these two doctrines. *See United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) ("A commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that use of command influence by him and his staff equates to 'prosecutorial misconduct.'"). This Court has also steadfastly renounced improper governmental interference with witnesses from *both* a prosecutorial misconduct frame and from an unlawful influence perspective. *See Edmond*, 63 M.J. at 350 (applying a prosecutorial misconduct rubric and concluding "that the trial counsel's actions substantially interfered with [a witness's] decision whether to testify"); *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009) (condemning unlawful command influence exerted against prospective witnesses).

A prosecutor's duties apply with added statutory force in the military justice system by operation of Article 46, UCMJ. "Discovery in the military justice system . . . is broader than in federal civilian criminal proceedings . . . ." *Stellato*, 74 M.J. at 481. "[A] trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness instead of the Government." *Id*. at 487. Indeed,

"[t]his prohibition against willful ignorance [by a prosecutor] has special force in the military justice system, which mandates that an accused be afforded the 'equal opportunity' to inspect evidence." *Id*. "It should never be the law that by maintaining ignorance, [trial counsel] can fulfill the government's [*Brady*] obligation when the facts known not only warrant disclosure but should prompt further investigation." *Id*. at 488 (citation omitted) (alteration in original).

This Court has interpreted Article 46, UCMJ, to mean that the 'Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused.'" *Id*. at 483 (quoting *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986)). This "duty to preserve includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute; (2) evidence that is of such central importance to the defense that is essential to a fair trial; and (3) statements of witnesses testifying at trial." *Stellato*, 74 M.J. at 483 (internal citations omitted).

***Analysis***

1. *Appellant sufficiently satisfied his low burden of producing "some evidence" of UCI, and the Air Force Court was correct to conclude that the Government failed to meet its burden of establishing that the predicate facts do not exist or do not constitute unlawful command influence*.

The granted issue questions whether conduct of the trial counsel and the SVC created an intolerable strain on the public's perception of the military justice system. *United States v. Horne*, __ M.J. __, 2021 CAAF LEXIS 1007 (C.A.A.F. Nov. 23,

2021) (order granting review). This unlawful influence analysis necessarily begins with the evidence offered by the Defense. *Boyce*, 76 M.J. at 249. Consistent with both the law of the case doctrine[13] and the evidence itself, Appellant has met his low burden to establish some evidence of unlawful influence. *Id*.

The evidence included motions testimony from Capt A.S., the SVC, the SJA, two OSI agents, and the named victim's husband. JA at 311-415. Additionally, the Defense submitted a 101-page motion (JA at 69) that contained 12 supporting documents, a 42-page supplementary motion (JA at 236) that contained 5 supporting documents, and 17 pages of additional evidence (JA at 170). The documentary

[13] "[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." *Lewis*, 63 M.J. at 413 (internal quotations omitted). Although the Air Force Court initially suggested that it *assumed*, rather than found, that Appellant met his initial burden to establish some evidence of UCI, it was much less equivocal elsewhere in the opinion. *See* JA at 26. In the very next paragraph, it recognized "[t]he material facts are not substantially in dispute" and then *found* that the Government failed to demonstrate that these undisputed facts do not rise to the level of UCI. *See id*. ("The next step in our analysis is to determine whether the Government has demonstrated beyond a reasonable doubt that the predicate facts do not exist or that the facts do not constitute unlawful influence. We *find* neither.") (emphasis added). Thus, under the law of the case doctrine, this Court would accept the *finding* that the Government had failed to prove beyond a reasonable doubt that the predicate facts do not constitute unlawful influence. Moreover, Appellant is unaware of any intention to certify any portion of the Air Force Court's decision in this case and no certification has been presented as of this filing.

evidence included, *inter alia*, emails and text messages between the SVC and Capt A.S., and emails between OSI and Capt A.S.

Although the SVC initially met resistance in cancelling the lead with OSI (who believed it necessary to interview the husband, particularly given his status as an immediate outcry witness)—as the Air Force Court put it—he "found a more receptive audience in Capt A.S." JA at 26. Thus, the SVC was "indirectly able to cancel the OSI's interview with [the husband] in October 2017." *Id*. Moreover, considering that Capt A.S. *herself* believed the husband possessed exculpatory information at the time she convinced OSI to cancel its interview, not only at the behest of the SVC but also to protect the not-yet-preferred charge, Appellant more than met his initial burden. The only question remaining is whether the *Government* met its much more stringent burden of proving beyond a reasonable doubt this conduct did not place an intolerable stain upon the public's perception of the military justice system. It did not.

2. *The Government failed to prove beyond a reasonable doubt that the unlawful influence of the trial counsel and SVC did not place an intolerable strain upon the public's perception of the military justice system.*

    a. <u>There is an intolerable strain on the military justice system when a trial counsel—in collusion with a victim or victim's counsel—is willing and able to convince an independent, criminal investigative agency to abandon the pursuit of exculpatory leads in order to secure victim participation for prosecution.</u>

As an initial matter, whether the husband *actually* possessed exculpatory

evidence is not determinative within the context of *apparent* unlawful influence. What matters is whether Capt A.S., in her capacity as trial counsel and Chief of Military Justice, *believed* the husband possessed exculpatory information when she caused OSI to cancel its interview; *that* is what she chose to abandon.[14] JA at 173, 322. Although a nefarious intent is not required, the improper reasons *why* she caused the interview to be cancelled exacerbate an already intolerable strain.

Unlike their civilian prosecutorial counterparts, judge advocates do not make the ultimate charging decisions as attorneys. "[I]n the military justice system, the commanding officer refers the charges to a court-martial . . . ." *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018). But by effectively canceling an interview she believed to be exculpatory in nature and objectively legitimate in the eyes of law enforcement, and with the asserted purpose of preserving a victim's continued participation in a case that had not been preferred, Capt A.S. deprived those who *were* tasked with charging decisions from a full aperture. The named victim,

[14] Although not raised as a discovery error, this case bears analogue to *United States v. Stellato*, where the Government was "was able to possess the box simply by asking for it, but that trial counsel . . . affirmatively and specifically declined to examine the contents of the box." 74 M.J. at 486. Here, Capt A.S. believed the husband possessed exculpatory information but chose to avoid obtaining that information because it "may impact our ability to prosecute the case down the line." JA at 173. Investigators would have interviewed the husband but for the interference of Capt A.S. and the SVC. JA at 393.

with assistance from both her counsel and the trial counsel, successfully prevented the preferring commander, the preliminary hearing officer, and the convening authority from obtaining potentially key evidence crucial to a preferral and referral decision.

A member of the general public, fully informed of the fact that judge advocates do not actually decide who goes to courts-martial, would have significant concern when these two attorneys, working in tandem, restricted the evidence that actually came before those whom Congress entrusted to make charging decisions. To have faith in the fairness of a unique system where charging decisions are made by non-lawyers, the public must be able to trust that the lawyers involved in the process are not depriving the actual decision-makers with a full-sight picture simply because a victim has communicated an intent to withdraw from cooperation if law enforcement does not tailor its investigation as she wishes. Trial counsel are not empowered or authorized—with or without substantial threats of nonparticipation from an alleged victim's counsel—to persuade investigative agencies to *not* pursue known, or potential, exculpatory information. "[A]s was perfectly clear to Congress when it enacted the Uniform Code of Military Justice and the Military Justice Act of 1968 -- and as the judges of this Court have always understood -- command influence 'involves 'a corruption of the *truth-seeking function* of the trial process.'" *Thomas*, 22 M.J. at 393-94 (emphasis added). Capt A.S. did not seek the truth. To her, the

case was ready to be preferred, regardless of what the husband had to offer. JA at 209.

On this foundation alone, it places an intolerable strain on the military justice system when: (1) prosecutors are willing to abandon potentially exculpatory evidence to keep a prosecution alive; (2) a prosecutor has sufficient influence over an independent investigative agency such that the prosecutor—not the investigator—gets to determine which evidence is collected and which is not; and, (3) a victim, or victim's counsel, has sufficient influence over the prosecutor's office such that the victim, or victim's counsel, now wields the authority of both the prosecutorial *and* investigatory arms of Government. In essence, an objective, disinterested member of the public would harbor significant doubt about the fairness of the military justice system if that individual were to learn that the person who is *least impartial*,[15] and not bound by any special duties of the prosecutor, can leverage nonparticipation to become the most influential decision maker in what is statutorily designed to be a commander-driven military justice system.

[15] Unique to this case, the named victim was actually the accused in a complaint arising out of that very same night, giving her a particular and weighty motive to fabricate. She had an altogether separate and significant motive in obstructing OSI's investigation into the events of that night. JA at 22, n. 3; 166-167; 323; 357; *cf*. JA at 58-62.

b. When an objective, disinterested member of the public is fully informed of all the facts and circumstances of this court-martial, the Government's burden is that much harder to satisfy.

The foregoing independently creates an intolerable strain upon the public's perception of the military justice system. That strain is made all the greater, though, when considered alongside the totality of the circumstances. Specifically, an objective and fully informed disinterested member of the public would appreciate the following.

First, the Air Force JAG Corps incentivizes speedy prosecutions and investigations tied to arbitrary processing metrics which can then be used to bolster officer performance reports. JA at 332. Despite the multinational nature of the investigation spanning across the globe and involving foreign law enforcement agents with language barriers, and without any statute of limitations concerns for this serious offense, this case was preferred approximately four months after the alleged event took place. *See* Article 43, UCMJ; JA at 14, 64. Yet, the ROI would not be complete for another 115 days after preferral and 44 days after referral. JA at 169. Thus, the preferring commander, the preliminary hearing officer, and the convening authority did not have a reliable, complete set of information at their disposal from which to make reasoned judgments at their respective stages of the military justice process. More importantly, their charging decisions and recommendations were made without the benefit of knowing what the husband had to say—or that he even mattered to the

case—despite the fact that OSI determined it necessary to speak with him for the sufficiency of its investigation.

But the preparation for prosecution charged on without OSI. Within weeks of the alleged criminal conduct, the SVC and trial counsel had already collaborated on charging decisions *before* the named victim composed her witness statement. *See* JA at 113 ("When I review [my client's] statement, I'll be sure to make sure she's clear regarding impairment vs. bodily harm. I'm pretty sure bodily harm will be the charge."). Then, still a mere three months after the alleged criminal conduct in October 2017, the SVC applied pressure on Capt A.S. who convinced OSI to drop its lead to interview a witness OSI had determined to be within the "scoping purview of the investigation." JA 172-173. At that point, Capt A.S. also believed there was "enough to proceed with the preferral of charges," notwithstanding the fact that the interview with someone believed to possess exculpatory information had not yet been conducted. JA at 208-209.

Second, Capt A.S. was regarded by her SJA as the most competent military justice practitioner of the ten captains she had supervised in her career. JA at 350. The actions of Capt A.S. cannot be chalked up to mere negligence on behalf of a junior prosecutor who simply did not know any better. She was an educated, experienced trial counsel and Chief of Military Justice who the SJA regarded as among the best of

her peers in her understanding of the UCMJ, R.C.M.s, and applicable law. A member of the public would recognize Capt A.S.'s military justice acumen, and harbor particular concern precisely because she should have known better.

Third, the Fort Meade legal office had not obtained a sexual assault conviction in the past two years, and Capt A.S. had overseen the last three acquittals as both trial counsel and Chief of Military Justice. JA at 349, 352, 353. A member of the public would not be blind to the highly politicized climate surrounding sexual assault in the military and how significant Article 120, UCMJ, litigation is within the Armed Forces.[16] An observer may well conclude that the political and practical realities regarding this issue played a role in the decision to forego potentially exculpatory evidence at the behest of the named victim, but at Appellant's expense.

Fourth, Capt A.S. jointly collaborated with the SVC to produce the named victim's witness statement in such a way that it would generate a specified charging theory. A fully informed, disinterested observer would know that charging decisions are typically made *after* review of the evidence, and that evidence is not generated to support a charging theory. It would spawn significant doubt in the military justice

[16] *See, e.g.*, Lisa Ferdinando, *DoD Releases Annual Report on Sexual Assault in Military*, Department of Defense News, May 1, 2018, available at https://www.defense.gov/News/News-Stories/Article/Article/1508127/dod-releases-annual-report-on-sexual-assault-in-military (last accessed December 23, 2021).

system if this was standard practice. Capt A.S. provided OSI agent notes from the named victim's initial interview to the SVC before she wrote her witness statement. JA at 110. At that point, Capt A.S. sent the SVC another email regarding what they were "looking for." JA at 317. Capt A.S. also sent the Air Force Special Victim's Unit Chief of Policy slides to the SVC. JA at 116. The Chief of Policy hammered home the point that early and thorough victim interviews are incredibly important in Article 120, UCMJ, prosecutions. JA at 133. Yet, in this case, upon finding out that the first interview was not recorded, no subsequent attempt was made to re-interview her. JA at 316. Instead, Capt A.S., through the SVC, advised the named victim on the nuances of the bodily harm and incapacitation theories of liability under Article 120, UCMJ, *before* she made her written statement. JA at 130-133. An alleged victim need not be "clear regarding impairment vs. bodily harm." JA at 113. That is the function of the prosecutor later in the process, after evidence has been collected to review for charging decisions. A witness, victim or otherwise, should only provide facts as they remember it; no more, no less.

The resulting witness statement—but maybe more importantly, the communication about it—would generate significant doubt about the fairness of the proceeding against Appellant in the mind of the disinterested observer. The named victim wrote the following:

> Captain [J.P],
>
> Here is the testimony I have been working on. *I'm not sure if it's what the legal office is looking for* because I have never had to write something like this. Please review it and let me know your thoughts. *I am willing to take things out, reword things if you think it is best.* But please go through it with a fine tooth comb. . . .

JA at 215 (emphasis added). Significant doubt would ensue when sworn witness statements are "work[ed] on" or edited. That doubt would intensify when the accuser says, "I'm not sure if it's what the legal office is looking for" and "I am willing to take things out, reword things if you think it is best." *Id*. But, moreover, the SVC's very suggestion that the named victim include in her statement that she felt penetration cemented the bodily harm charging theory. JA at 153. If she had no memory of the penetration, the alternate theory of liability regarding incapacitation would have been the practical charging decision. But instead, the fully informed, disinterested observer would know that: (1) the witness statement was generated for charging, rather than charging being done in response to a witness statement or other evidence in existence; (2) the named victim was willing to modify a sworn witness statement; (3) the SVC advised the client to make a change that aligned the statement with what he thought the specification would be (JA at 113); and, (4) the Government charged bodily harm accordingly.

Fifth, because Appellant was tried in the military justice system, he could not

avail himself to certain constitutional rights that would otherwise be fundamental in state or federal court and could have potentially counteracted or balanced out an improper manipulation of the criminal justice system. Specifically, Appellant's court-martial panel consisted of five members and was permitted to reach a guilty verdict based upon a mere two-thirds concurrence. JA at 297; Article 52(a)(2), UCMJ. Neither of these abnormalities would pass constitutional muster in any state or federal court where a serious offense is at issue. *See Ballew v. Georgia*, 435 U.S. 223 (1978); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Appellant also did not have the benefit of a grand jury, which "has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

These protections matter because they are systemic safeguards against corruption of the criminal process. They are thought to ensure a fundamentally fair criminal trial, consistent with constitutional due process. An accused facing trial by court-martial, however, does not have the luxury of falling back on certain procedural protections to counteract an improper manipulation of the justice system—even those even those checks which are "necessary to ensure fair criminal process" and "central

to the Nation's idea of a fair and reliable guilty verdict." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1574 & 1576 (2021) (Kagan, J., dissenting) (referring to the Supreme Court's holding in *Ramos* which incorporated, as a matter of due process, the right to a unanimous verdict in state criminal cases concerning serious offenses). In the military justice system, where these protections do not exist, and further concerns of unlawful influence eroding the potential for a fundamentally fair proceeding do exist, the public must be able to trust the central actors in the system, to include the trial counsel, the SJA,[17] and the military judge, to safeguard the due process rights of the accused.

A fully informed member of the public would recognize that given the lack of other protections to check prosecutorial overreach, our system is more susceptible to an improper manipulation exerted by attorneys involved in the process. That is why "[u]nlawful influence exerted on the military trial process corrupts and erodes the very legitimacy of the system. It is not simply a question of damaging adjacent outside

[17] The SJA is a legal professional who "act[s] in an independent and impartial capacity and does not represent only the Government." *United States v. Mallicote*, 32 C.M.R. 374, 377 (C.M.A. 1962). This Court has also warned SJAs to remain "constantly vigilant" in guarding against UCI. *United States v. Martinez*, 42 M.J. 327, 332 (C.A.A.F. 1995). Capt A.S. briefed the SJA on the developments with the case regarding the husband, the SVC, and OSI. JA at 340. The SJA did not intervene to thwart the named victim's and the SVC's desired outcome, but rather permitted her trial counsel to facilitate their request.

influence. The process itself is tainted." *United States v. Bergdahl*, 80 M.J. 230, 246 (C.A.A.F. 2020) (Sparks, J., concurring in part and dissenting in part).

Sixth, and finally, a fully informed observer would almost certainly take note of Chief Judge Johnson's dissent on factual sufficiency grounds. As he thoroughly explained, there is a very real and significant concern that Appellant was wrongfully convicted. Objectively legitimate factual concerns with Appellant's conviction remain, something a fully informed, disinterested observer would recognize. *See* JA at 58-62. With this as the backdrop, almost anything could have been the difference between an acquittal and a conviction. The husband's interview could have better-informed trial defense counsel's cross-examination of the named victim, or led to the discovery of additional helpful evidence. The interview may reasonably have permitted the Defense to impeach the husband on a prior inconsistent statement or offer his statement as a prior recollection recorded under Mil. R. Evid. 803(5); any of these could have turned the case.

The importance of the decision to knowingly sacrifice the attempt to acquire potentially exculpatory evidence is highlighted in a case as close as this. It means that the actors in the military justice system who were entrusted to safeguard Appellant's constitutional rights placed their priorities elsewhere.

c. The Air Force Court did not appropriately weigh the factors giving rise to the intolerable strain in this case and did not hold the Government to its burden to prove harmlessness beyond a reasonable doubt.

The Air Force Court correctly recognized that no personal prejudice was "necessary in order to find apparent unlawful influence, as opposed to actual unlawful influence." JA at 27 (citing *Boyce*, 76 M.J. at 248). Personal prejudice, however, may nevertheless be "[a] significant factor in determining whether the unlawful command influence created an intolerable strain on the public's perception of the military justice system" *Proctor*, 81 M.J. at 255. To this point, the Air Force Court misunderstood the true nature of the personal prejudice at issue in this case. It concluded that there was no personal prejudice to Appellant because the husband "was a peripheral witness with no direct knowledge of the charged offense" and "the Defense had ample opportunity to interview [him] before trial and see if production as a witness at trial if they believed he had materially helpful information." JA at 27.

This analysis is wrong on two fronts. First, it fails to appreciate that memory fades over time. The husband's recollection of the outcry phone call eight months closer in time would have had an impact on the Defense's ability to call him as a useful witness or incorporate that information into the cross-examination of the named victim. *Cf. United States v. Harrington*, 81 M.J. 184, 190-91 (C.A.A.F. 2021) (concluding, *inter alia*, the military judge did not err when he found witnesses lost

their memories during a delay and that the memory loss negatively affected the appellant's defense). Second, as this Court recognized in *Salyer*, "[a] sometime problem with an effects-based prejudice test is that one cannot ultimately know what would have happened differently . . . All change has some effect." 72 M.J. at 427.

And, just as the "selection of court members to secure a result in accordance with command policy is a well-recognized form of unlawful command influence,"[18] so too is prosecutorial interference with the objective prerogative of independent, trained federal law enforcement agents so as to select whom will be interviewed in order to secure a result in accordance with the prosecution's end goal. That is particularly true against this backdrop. Trial counsel *subjectively believed* that the witness at issue possessed exculpatory information and even acknowledged that she could "completely understand" why law enforcement wanted to interview him. Nevertheless, she still told OSI that "[f]rom a prosecution standpoint, we do not believe that an OSI interview with the husband is necessary nor relevant enough to outweigh the risk of the Victim dropping out of the process entirely . . . ." JA at 174-75. It is vexing that a prosecutor would even consider balancing the need to pursue exculpatory evidence against the risk of a victim declining to participate, let alone

[18] *United States v. Hillow*, 32 M.J. 439, 441 (C.M.A. 1991).

decide in favor of the latter. This strikes an intolerable, cavalier attitude towards not only investigations in general, but more importantly, the constitutional rights of the accused.

The Air Force Court additionally reasoned that Capt A.S.'s removal as trial counsel and severing the attorney/client relationship between the SVC and the named victim would tend "to remove any appearance of unfairness in the proceedings." JA at 27. To the contrary, their removal was a foregone conclusion. The counsel's conduct placed them in a situation where they were witnesses in a case dispositive motion such that their removal as counsel was required under the circumstances. And, the fact that the motion was "thoroughly litigated"[19] does not remove the strain on the justice system. *Id*. It may, actually, cement the strain because the result makes it

[19] An objective, disinterested observer would also be aware the military judge issued a two-paragraph conclusory notice of ruling in the body of an email to the parties months after the final evidence and argument on the motion had been lodged; a final written ruling was provided five months after the sentence was announced and almost a year after the motion to dismiss was filed. JA at 283, 287. This observer would harbor significant doubt in the military judge's process. The parties require this information at trial to fully understand the ruling and obtain an appropriate foundation from which it may determine whether a motion for reconsideration under R.C.M. 905(f) is warranted. There is no way for a party to seek meaningful reconsideration relief at trial if the military judge has not placed facts on the record to substantiate his or her ruling. Such a written ruling five months after trial does not benefit the trial litigation and only provides additional justification that trial rulings were correct based on hindsight. A member of the public could reasonably conclude the purpose and timing of the written ruling primarily served as insulation against appellate scrutiny. In total, the litigated motion would not dissipate the intolerable strain.

appear as if central actors in the criminal justice system—to include the prosecutor—can act with reckless disregard for the rights of an accused, yet the prosecution itself endures.

But, at the end of the day, even if the Air Force Court raised some factors that would indicate a member of the public could remain firm in their steadfast loyalty to the integrity of the military justice system, it failed—as did the military judge—to hold the Government to the highest burden under the law: beyond a reasonable doubt. The standard requires the error will be found prejudicial unless there is a no reasonable possibility that an objective, disinterested member of the public, fully informed of all the facts and circumstances, would harbor significant doubt about the fairness of Appellant's court-martial. But, for the aforementioned reasons, such a member of the public would—and should—harbor significant doubt in *this case* on *these facts*. As this Court's jurisprudence has reflected, that burden is particularly onerous in cases involving judge advocates.

Through its unlawful influence decisions, this Court has implicitly drawn a distinction between cases in which the relevant actors are not trained legal professionals who make comments or take actions apart from the court-martial or investigatory context and cases concerning the actions of attorneys which directly involve the court-martial itself. *Compare, e.g.*, *Proctor*, 81 M.J. at 258 (finding no

intolerable strain placed upon the public's perception of the military justice system based on comments made by a squadron commander at a regularly scheduled "all call" where appellant's presentencing proceedings took place over year later and the commander had since been reassigned to a different base) *with Lewis*, 63 M.J. at 414 (dismissing the charges and specifications with prejudice based upon the appearance of unlawful influence where "the record reflect[ed] that the SJA – a staff officer to and legal representative for the convening authority – was actively engaged in the effort to unseat [the] military judge.").

*Lewis* is hardly the only example supporting the dichotomy. In *Salyer*—another case that turned on the appearance of UCI following an improper manipulation of the military justice system by judge advocates—this Court determined that "[a]n objective, disinterested observed, fully informed of [the] 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" dependent upon "whether the military judge is viewed as favorable or unfavorable to the prosecution's case based on the Government's access to a military judge's personnel file and through access to the military judge's chain of command." 72 M.J. at 427. It then dismissed the case with prejudice because "any remedy short of dismissal at this stage would effectively validate the Government's actions" and "the actions at issue strike at the heart of what

it means to have an independent military judiciary and indeed a credible military justice system." *Id*. at 428. So too in this case, a member of the public might well be left with the impression that an SVC and the prosecutor have the power to dictate what evidence—even evidence thought to be exculpatory—will be collected by law enforcement agents such that they can then shape charging decisions in a manner that best befits the interests of the accuser and/or the prosecutor at the expense of the accused. Such a system would be inherently suspect.

Likewise, in *Barry*, this Court determined that "nothing short of dismissal with prejudice [would] provide meaningful relief" because "any appropriate remedy must serve to protect the court-martial process and foster public confidence in the fairness of our system." 78 M.J. at 79. As was the case in *Lewis* and *Salyer* before, the *Barry* decision also concerned unlawful influence exerted by a judge advocate. *See id*. at 78. Indeed, this Court fashioned this remedy *despite* the fact that it did "not question [the judge advocate's] motives or believe he acted intentionally . . . ." *Id*. Yet, dismissal with prejudice was necessary because "the nature of the unlawful conduct in this case, combined with the unavailability of any other remedy that will eradicate the unlawful…influence and ensure the public perception of fairness in the military justice system, compel this result." *Id*. at 79 (quoting *Lewis*, 63 M.J. at 416) (alteration in original).

Appellant's case, like *Lewis*, *Salyer*, and *Barry*, concerns the manipulation of the court-martial process itself by those who, more than anyone, should have known better—judge advocates. To be sure, Appellant is not suggesting that a different analytical framework applies in unlawful influence cases involving judge advocates. The point is, rather, that this Court's decisions have implicitly recognized that when judge advocates are involved in these types of cases, the strain upon the public's perception of the military justice system will be greater. Appellant's contention in this regard finds support in the fact that this Court dismissed the charges and specifications with prejudice in *Lewis*, *Salyer*, and *Barry* so as to overcome the intolerable strain and ensure that the public would continue to perceive our system as a legitimate one. To the extent this Court has not explicitly stated that which its decisions have inherently reflected, this case (and those before it) stand for the proposition that an intolerable strain will be much harder to disprove where the actors at issue are trained legal professionals who appear to step outside the bounds of their authority and manipulate the military justice process in an effort to achieve a certain result.

The unlawful influence here relates directly to the actions of Capt A.S. (working in tandem with the SVC), with the goal of maximizing the possibility of conviction before OSI had conducted its investigation or charges had ever been brought. The patent distinction between UCI which stems from a commander's well-intentioned but

poorly phrased remarks and UCI committed by a prosecutor who simultaneously bears the title "Chief of Military Justice" so as to maximize the "ability to prosecute the case down the line" would not be lost upon a disinterested member of the public. JA at 173. The conduct of these counsel, who should have known better, injected the mortal enemy of military justice into Appellant's court-martial, intolerably straining the public's perception of the military justice system.

## CONCLUSION

**WHEREFORE**, Appellant respectfully requests this Honorable Court reverse the judgment of the Air Force Court, set aside the findings and sentence, and dismiss the Charge and its Specification with prejudice.

Respectfully Submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on December 23, 2021.

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**CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37**

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 11,732 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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