IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

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

USCA Dkt. No. 21-0360/AF

Crim. App. Dkt. No. ACM 39717

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Brandon M. Horne, the Appellant, hereby replies to the Government's Answer (Gov. Ans.) concerning the granted issue, filed on January 24, 2022.

ARGUMENT

1. According to the Government, Capt A.S. and the SVC "were not influential; they were captains."

In its Answer, the Government twice claims that Capt A.S. and the Special Victim's Counsel (SVC) were not influential because they were captains. Gov. Ans. at 24, 42. This statement is incorrect in law and fact.

As active duty officers subject to the Uniform Code of Military Justice (UCMJ), Capt A.S. and the SVC were capable of committing unlawful influence as a matter of law. Article 37(a), UCMJ, prohibits unlawful influence by all persons subject to the UCMJ. *See United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018); *see also United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004). There is no O-3 exception in the statute or case law. Rather, "[e]very attorney in a court-martial has a duty to uphold the integrity of the military justice system." *United States v. Andrews*, 77 M.J. 393, 404 (C.A.A.F. 2018).

As a matter of fact, the Government's argument is even more difficult to square. It is common knowledge to this Court, in exercising its review function of

courts-martial across the armed forces, that officers in the grade of O-3 are intimately involved and implement many major functions in the military justice process. These officers customarily serve in the roles of Chief of Military Justice, trial counsel, defense counsel, and appellate counsel.[1] Appellant's case is no different.

There was also organizational influence at play. Adherence to authority is integral to the military performing its mission. *United States v. Sterling*, 75 M.J. 407, 419 (C.A.A.F. 2016). Upon Capt A.S.'s pressure to drop the interview, the agent responded, "[s]ure ma'am, no problem." JA at 172-173. This shows: (1) Capt A.S. influenced SA L.J. to abandon an investigative course of action she determined legitimate; and/or, (2) SA L.J. ceded to Capt A.S.'s actual or implied authority as the Chief of Military Justice. The custom and courtesy the agent showed by calling Capt A.S. "ma'am" is an indication of the obedience to orders coming from those of authority upon which the military construct is founded. *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

The influence Capt A.S. exerted achieved a tangible result. Capt A.S. communicated to the SVC her success in convincing the Office of Special

[1] The judge advocates who served as trial counsel in *Lewis* and *Salyer* were Marine officers in the grade of O-3. *See United States v. Lewis*, 61 M.J. 512, 514 (N.M.C.C.A. 2005) (Capt W.), *reversed by United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006); *United States v. Salyer*, 72 M.J. 415, 417 (C.A.A.F. 2013) (Capt S. and Capt M.).

Investigations (OSI) to drop the lead. JA at 164. She also told the SVC that OSI would "go through you for everything" and that her request had been sent up to "justify them dropping the lead." *Id*. In his own right, the SVC also influenced the Government's actions by insinuating that the named victim may drop out of the court-martial if the agents persisted with interviewing her husband. Capt A.S. then influenced the agent's actions by getting them to drop the lead. This resulted in OSI "go[ing] through" the personal attorney of the victim "for everything" and the lead being dropped. That is influence realized.

Instead of recognizing this influence, the Government attempts to redirect focus from these counsel and instead criticizes what trial defense counsel did and did not do in relation to the husband as a witness (i.e., whether they called him as a witness, when they interviewed him, etc.). *See, e.g.*, Gov. Ans. at 14, 22-23, 29. The Government also insinuates that OSI was somehow to blame, despite the fact this agency initially stood its ground on interviewing a relevant and necessary witness who fell within their scoping purview, up until the time the agent acquiesced to Capt A.S.'s influence. Specifically, the Government asserts, "Neither the government, nor the defense, nor a crime victim benefits when *OSI fails* to fully investigate a case." Gov. Ans. at 22 (emphasis added). Appellant agrees with this sentiment; OSI failed to fully investigate this case and that benefited no one—least of all Appellant. But the only reason OSI failed to fully investigate was because the Chief of Military Justice (at the behest of

the SVC) specifically requested them *not* to because she was concerned that "the actions of OSI now may impact our ability to prosecute this case down the line." JA at 173. And when Capt A.S. made this plea, OSI listened and complied.

Despite the Government's insistence, the fault does not lie with Appellant or his trial defense counsel. Neither should OSI be held solely accountable. Rather, the problem lies in the collective pressure exerted on OSI by Capt A.S. and the SVC, resulting in not only the abandonment of evidence thought to be exculpatory, but a clear violation of trial counsel's duties to obtain this information in accordance with her discovery obligations. *See* Section 2 *infra*. Under such facts, the Government has not and cannot meet its onerous burden of proving beyond a reasonable doubt that an objective, disinterested observer would not harbor significant doubts about the fairness of Appellant's court-martial.[2]

[2] At no point in its Answer does the Government claim Appellant failed to raise "some evidence" of unlawful influence. The Government, likewise, does not affirmatively argue it proved beyond a reasonable doubt the facts do not exist or the combined actions of these counsel does not constitute unlawful influence. The closest it came was "the United States does not concede that Capt JD [sic] and Capt A.S.'s actions constituted unlawful influence as defined by the plain language of Article 37 or that the Air Force Court's evaluation of the other prongs of the test for UCI constitutes the 'law of the case.'" Gov. Ans. at 28 n.9. Notwithstanding the potential applicability of the cross-appeal doctrine (*see United States v. Steen*, 81 MJ 261, 270 (C.A.A.F. 2021) (Maggs, J. dissenting)), which may have enabled the Government to argue these points, the Government elected not to argue any point other than intolerable strain. Thus, the only question before this Court is whether the Government can prove the lack of an intolerable strain beyond a reasonable doubt.

2. **Even after influencing OSI to drop its lead, the Government's failure to interview the husband itself, and disclose the contents of that interview to the Defense, violated discovery rules as articulated in *United States v. Stellato*.**

While the Government describes counsels' actions as "unwise and inadvisable" (Gov. Ans. at 22), these adjectives do not adequately capture the gravamen of their conduct. This course of action is troubling and demonstrated a "recklessly cavalier"[3] attitude toward Appellant's constitutional rights.

This Court's opinion in *Stellato* is relevant to the ultimate question of whether the Government has proven beyond a reasonable doubt the conduct at issue did not place an intolerable strain on the public's perception of the military justice system. *See* Brief on Behalf of Appellant (App. Br.), dated December 23, 2021, at 17, 24, 25, 28. In the context of apparent unlawful influence, discovery violations would affect a member of the public's confidence in the fairness of the proceeding because "[f]ull and timely compliance with discovery obligations is the lifeblood of a fair trial." *Stellato*, 74 M.J. at 491. These rules obligate more than just disclosure of the *existence* of exculpatory information; the duty extends to uncovering and disclosing the *contents* of exculpatory information. *Id*. at 488 (concluding the military judge did not abuse his discretion when he found the failure to disclose the existence of "the box" and its contents was a discovery violation under R.C.M. 701(a)(6)).

[3] *United States v. Stellato*, 74 M.J. 473, 476 (C.A.A.F. 2015).

Without referencing *Stellato*, the Government maintains it satisfied discovery obligations by disclosing the existence of the text message to the Defense. Gov. Ans. at 22, 29. However, this misses the point. Just as in *Stellato*, where the trial counsel did not examine the box or its contents, the prosecutors here did not interview the husband until months after discovery rights attached under R.C.M. 701, despite Capt A.S.'s subjective belief that the husband possessed exculpatory information. When discovery duties attached, a prosecutorial obligation ensued for trial counsel to interview the husband and disclose the contents of the interview to the Defense.

There is no dispute that Capt A.S. believed the husband possessed at least some exculpatory evidence, and she was also aware that the named victim spoke with him immediately after the alleged incident. JA at 155, 322. Prosecutorial duties demanded she probe further to determine whether there was *additional* exculpatory evidence in his possession.[4] Instead, the prosecution did not interview him until over three months after service of referral on Appellant (JA at 65); this interview occurred on May 16, 2018, *the eve* of motions practice when the very existence of the court-martial was put on the line with the Defense motion to dismiss. JA at 361. Independently concerning, the prosecution did not interview him until *after* it had already filed its response to the Defense's motion to dismiss for unlawful influence. JA at 188, 361. It is perplexing

[4] This evidence includes, but would not be limited to, other messages between them and the content of the post-allegation phone call.

that the trial counsel could be so confident there was no actual or apparent UCI when they had not yet spoken to this witness. Given this timing, a member of the public may reasonably conclude that the prosecution would *never* have interviewed the husband but for the Defense putting the very existence of the court-martial at stake with a potentially case-dispositive motion. This conduct creates doubt that the prosecution, entrusted to represent the sovereign, will do what the Constitution, Congress, the President, and ethics rules demand. *See Stellato*, 74 M.J. at 491 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). That is all the more true in a case where, as demonstrated by Chief Judge Johnson's dissent on factual sufficiency grounds, anything could have been the difference between a conviction and an acquittal. JA at 58-62.

3. **The Government's Answer did not address the totality of circumstances a fully informed member of the public would appreciate.**

Appellant devoted a significant portion of his Opening Brief discussing the attendant facts and circumstances a fully informed member of the public would consider in ascertaining whether the unlawful influence in this case intolerably strained their perception of the military justice system. *See* App. Br. at 31-38. In particular, he identified six specific matters: (1) the Air Force's use of arbitrary processing metrics which incentivize speedy prosecutions and are used to evaluate officer performance; (2) the fact that Capt A.S. was regarded as a very competent

attorney by her SJA; (3) the highly politicized nature surrounding Article 120, UCMJ, litigation, the prosecuting legal office's lack of a sexual assault conviction in the two years leading up to Appellant's case, and Capt A.S.'s involvement in those acquittals; (4) the collaboration between Capt A.S. and the SVC regarding the named victim's witness statement; (5) the lack of other constitutional protections afforded by the military justice system that can counteract or check improper manipulations by attorneys; and (6) the significant concern—highlighted by the Chief Judge of the Air Force Court of Criminal Appeals (Air Force Court)—that Appellant stands wrongfully convicted. *Id*.

The Government's Answer only comments on two of these concerns, arguing consideration of the altered sworn witness statement was waived at trial and factual insufficiency is irrelevant to this case. *See* Gov. Ans. at 31, 39-41; *but see* Sections 7-8 *infra* (responding to these points). It is, therefore, difficult to see how the Government can be said to have met its burden of proving beyond a reasonable doubt that a fully informed member of the public would not harbor significant doubt about the fairness of the proceeding when it declined to address two-thirds of the matters involved in reaching such a conclusion. A fully informed member of the public would not only take stock of these circumstances, but would further question why the Government declined the invitation to respond to them.

4. **The military judge's findings of fact generally support the conclusion that Appellant was personally prejudiced by the actions of counsel.**

The Government repeatedly argues the military judge's findings of fact were not clearly erroneous and, therefore, must be accepted by this Court. Gov. Ans. at 30-32, 42. In large part, Appellant agrees. The military judge found as follows:

> Due to a preference expressed by [the named victim] and primarily through the previous SVC, an earlier-issued lead by investigators to interview her husband in October 2017 was withdrawn. [Capt A.S.] was made part of this process by the previous SVC and she took an active role in accommodating [the named victim's] preference by contacting the necessary individuals and offices.
>
> The overarching goal of [Capt A.S.'s] efforts, and that of other representatives for the government, was to maintain [the named victim] as a willing participant in the potential prosecution of the accused. . . . Based on the evidence available to the government at the time, alongside governing policies and practices, it was unlikely any military justice proceeding would be possible without her willful participation.

JA at 288. These findings plainly demonstrate the military judge recognized OSI cancelled a lead pursuant to a request from Capt A.S., accommodating the SVC's insistence. They further acknowledge this was accomplished to keep the named victim satisfied, otherwise she may well have withdrawn participation and no court-martial would have occurred.[5]

[5] As additional rebuttal to the Government argument that the SVC, as a mere captain, had no influence (*see* Section 1 *supra*), this fact pattern demonstrates otherwise. The power the named victim always retained was her ability to participate or not. The SVC, as her agent, leveraged this power in an attempt to influence OSI. When that did not work, he tried again and found a "more receptive audience," succeeding in

This finding of fact is important because it directly undermines the Government's claim that Appellant was not personally prejudiced—a claim which failed to consider the named victim likely would not have participated in this court-martial if OSI did not adjust its investigation to accommodate her preferences. *See* JA at 28 (the Air Force Court labeling concerns of withdrawal "legitimate"). Such desires were likely driven, at least in part, by the fact she too was the suspect in a different sex crime investigation—investigated by the same OSI detachment—arising from the very night in question. Lost in the Government's analysis is the military judge's finding that *but for* the named victim's participation, there would likely have been no viable case. JA at 288. Thus, the Government cannot establish beyond a reasonable doubt that but for the judge advocates' interference with the investigation, a court-martial would have ever happened in the first place. That is palpable personal prejudice in and of itself—prejudice firmly rooted in the military judge's findings.[6]

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influencing Government representatives. JA at 26. That the Government can be so influenced by the prospect of non-participation in sexual assault litigation gives credence to the various theories offered by Appellant in his Opening Brief that a member of the public, fully informed of all the facts and circumstances, would have known. This includes, but is not limited to the lack of convictions Capt A.S. and the SJA previously obtained in sexual assault litigation and the climate of sexual assault response in the armed forces. App. Br. at 31-33.

[6] Accordingly, this case does not present the same concerns Judge Ryan raised in her *Salyer* dissent because the military judge's findings of fact in this case support the conclusion that these two counsel were engaged in an effort to improperly manipulate

5. **The military judge made one clearly erroneous finding of fact, a finding to which the Government hitches its case.**

Appellant does, however, contest one finding of fact made by the military judge—a finding the Government repeatedly emphasizes in its Answer. Specifically, the military judge found that an earlier interview of the husband would not have developed additional or contrary information than what was discovered in May 2018. JA at 288, para. 4(e). This finding is clearly erroneous for the following reasons.

Memory fades over time. No specific expert finding in the record would be necessary for this Court to recognize this fundamental and concrete lay principle. Moreover, the record contains at least two references to memory degradation caused by time; one from Capt A.S. and one from the military judge himself. JA at 315, Supp. JA at 451; *see also* App. Br. at 12 n.10.

Similarly, as 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. Applied to this scenario, no one—including the military judge—actually knew or was capable of determining what the husband knew, when he knew it, and potentially at which point in time he

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the military justice process to achieve a sought-after end. *See Salyer*, 72 M.J. at 432 (Ryan, J., dissenting). These findings thus establish there was an "orchestrated effort" between Capt A.S. and the SVC to achieve the named victim's investigatory preference. *Lewis*, 63 M.J. at 414.

forgot what he knew. To have concluded—as fact—that an earlier interview would not have changed anything is error. It is uncontroverted that the named victim called her husband on July 10, 2017, immediately after the alleged assault. JA at 155. Certainly the closer to this date he was interviewed, the more likely he would remember the contents of the phone call. Whereas only about three months elapsed between July 2017 (the phone call) and October 2017 (OSI interview scheduled), an *additional* seven months elapsed before May 2018 when he was finally interviewed. This additional time increased the likelihood of the husband failing to remember the contents of this phone call by motions practice.

The military judge's finding is further undermined by the fact that the husband *did recall* talking to his wife after the alleged assault against her as recently as March 2018. JA at 167 (OSI agent notes recording "Wife called [the husband] summer 17 and told him she was sexually assaulted. . . . [The husband] said that Brandon Horn [sic] was the subject of the sex assault."). But by motions practice in May 2018, the husband did not recall OSI asking him about any communication with his wife on July 10, 2017. JA at 358. This suggests—if he truly forgot anything—the loss of memory occurred between March 2018 and May 2018, directly undermining the military judge's finding that any earlier interview would not have been helpful. The military judge clearly erred by accepting the husband's repeated assertions that he did not

remember anything, when information before him attached to the Defense motion (JA at 167) indicated that, at least at one time, he did.

The military judge's finding did not take into account that the reason for delay between October 2017 and May 2018, and the memory loss that occurred sometime within that date range, seemingly between March and May 2018, is directly attributable to Capt A.S.'s and the SVC's actions. That the husband interviewed with OSI in March 2018 for a related case also undermines any post hoc spousal privilege justification (JA at 320-21) articulated as a basis for not pursuing the interview.[7]

Finally, other evidence before the military judge during the motions hearing demonstrated the truthfulness of the husband's testimony should have been seriously called into question, which is not altogether surprising due to his clear motive to fabricate on behalf of his wife. During his testimony, defense counsel asked the husband, "Did you ever talk to the SVC in this case, Capt [J.P.]?" JA at 356. The husband responded, "I have never directly talked with him." *Id*. That response is contradicted by the OSI agent notes from the March 2018 interview. JA at 167 ("[The husband] and wife went to lunch in Dec 17 and was told by [the SVC] that wife was

[7] It shows the husband was willing to talk notwithstanding any privilege considerations. Moreover, as a matter of fact and law, speculation as to whether a testimonial privilege *may* apply, or be *may* be invoked, at a future court-martial on a charge that had yet to be preferred, could not or should not have been a justification to abdicate the pursuit of potentially exculpatory information.

under investigation for sxa allegations."). It was similarly contradicted by the SVC's own testimony. *See* JA at 409.

Even if this Court does not conclude this finding was clearly erroneous, its inclusion is hardly dispositive. Personal prejudice is not required in an apparent UCI case (*United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017))[8] and the husband's faded memory and what information was lost during those months goes to personal prejudice alone. Therefore, and for other arguments presented, Appellant should prevail even if this Court accepts all of the military judge's findings of fact.

6. **Any remedial actions taken were nominal, required under the circumstances, or would not dissipate the public's concern in this case.**

The Government argues ameliorative measures "would assuage any public concerns about unfairness in Appellant's court-martial." Gov. Ans. at 34-38. However, the military judge concluded there was not "some evidence that UCI or UI occurred." JA at 291. Therefore, to him, there was nothing to remedy or ameliorate. This contrasts with cases like *United States v. Biagase*, where the military judge ordered extensive remedial measures *after he found* the actors in that case came

[8] Notwithstanding the Government's law section which acknowledges the prejudice in an apparent UCI case is "the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused" (Gov. Ans. at 27) (citing *Boyce*, 76 M.J. at 249), the Government focused the majority of its brief arguing the absence of personal prejudice, as opposed to the concerns which would damage the public's perception of the military justice system as a whole.

"carelessly close to compromising the judicial integrity of [the] proceedings, and [he] want[ed] to make sure that all of [them understood] that [it was] a Federal Court of the United States, and [he would] not under any circumstances tolerate anybody that even remotely attempt[ed] to compromise the integrity of [those] proceedings." 50 M.J. 143, 148 (C.A.A.F. 1999); *see also United States v. Douglas*, 68 M.J. 349, 353 (C.A.A.F. 2010) (where the military judge found UCI and crafted specific, tailored remedies to directly counteract the influence). This is not a case where the military judge carefully crafted a tailored remedy to combat unlawful influence because doing so would have been antithetical to his (incorrect) conclusion that there was nothing to cure in the first place.

a. Litigation of the UCI motion.

Echoing the military judge and the Air Force Court, the Government contends the mere litigation of this issue purged the court-martial of any lingering concern a member of the public may have. *See* Gov. Ans. at 34-35; JA at 27, 293. This fails on at least two fronts. First, the logical conclusion of this analysis would merely create a lose-lose situation for all appellants. On the one hand, defense counsel must raise the issue before the trial court or risk a later finding of waiver. But, under the Government's logic, if the Defense raises the issue and the trial court disagrees, an accused would not be entitled to appellate relief precisely because the issue was

litigated. The notion that this "heads I win, tails you lose" approach dissipates the taint of unlawful influence simply cannot be the state of the law.

Second, UCI issues were thoroughly litigated in *Lewis*, *Salyer*, and *Barry*, yet this Court still found dismissal with prejudice warranted under the circumstances. Therefore, mere litigation cannot, and should not, cure a court-martial of UCI's "potentially corrosive effect on the military criminal justice system." *United States v. Bergdahl*, 80 M.J. 230, 246 (C.A.A.F. 2020) (Sparks, J., concurring in part and dissenting in part).

b. Counsel were required as witnesses; consequently, they could no longer serve in their roles as counsel.

The Government also argues the removal of counsel from the process purged the taint of their unlawful influence. Gov. Ans. at 36. However, that consequence was a foregone conclusion and required under the circumstances because they could be called as witnesses at the court-martial. App. Br. at 41. Indeed, the SVC brought the rules of professional conduct from the American Bar Association, the Air Force Rules of Professional Conduct, and his state bar rules to the military judge's attention. JA at 221-22. One of those citations designated that a "lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness." ABA Model Rules of Prof'l Conduct, R. 3.7 (2018). This situation applied to both Capt A.S. and the SVC; their removal as counsel indicates nothing as far as ameliorating the unlawful

influence. It was a natural and foreseeable consequence of their actions—if not a legal requirement—that they were unable to continue as advocates in this proceeding. *See United States v. Birdman*, 602 F.2d 547, 553 (3d Cir. 1979) ("Where the prosecutor's appearance as witness is unavoidable, the courts have stated that, in general, the prosecutor should withdraw from participation in the trial."). Accordingly, the military judge's and the Air Force Court's reliance on this "status of counsel at trial" argument is misplaced. JA at 27, 293.

Finally, although the SVC and Capt A.S. no longer served in their respective roles as advocates, the rest of the trial counsel team remained intact and the military judge took no action to disqualify the SJA, the convening authority's legal office, or the convening authority. The conduct of the SVC and Capt A.S. infected all the participants associated with the Government's prosecution of Appellant, yet most remained on the case.

c. Discovery obligations existed despite the unlawful influence.

The Government reasons that disclosures of counsel and the military judge ordering discovery compliance ameliorated unlawful influence concerns. Gov. Ans. at 37-38. But compliance with constitutional, statutory, and regulatory requirements is not a remedy for unlawful influence. Put differently, the Government cannot point to its later compliance with Article 46, UCMJ—which it is was required to follow anyway—as proof that the unlawful influence was cured. Such compliance places the

parties in a position they ought to have been in regardless of any malfeasance or impropriety. It is surely not the case that an accused is only entitled to discovery if the Government actors have unlawfully influenced the proceeding.

d. No professional responsibility inquiries ensued.

In *Lewis*, this Court noted that, had there been any evidence the lawyers who committed UCI were the subject of any ethical or disciplinary investigations or sanctions, it could have impacted the public's perception and "perhaps restored some confidence in the military justice system." 63 M.J. at 416 n.4. There is no indication in this record, and the Government did not point to anything in its Answer, suggesting the counsel in this case were subject to ethical or disciplinary investigations or sanctions. If they had been, it may have restored some public confidence in the military justice system. Instead, the state of the record is Capt A.S. was rewarded with an overseas assignment as the Area Defense Counsel at Kunsan Air Base, Korea (JA at 349), and the SJA was selected for an assignment to the Air Staff Counsel working directly for the Judge Advocate General of the Air Force. JA at 351.

7. **Factual insufficiency—or whether the Government's case was fatally weak—is relevant to whether the Government has proven beyond a reasonable doubt that no intolerable strain exists.**

The Government argues "the question of whether Appellant's conviction was factually or legally sufficient is irrelevant to whether a member of the public would

deem the proceedings unfair based on the delayed interview of [the husband]." Gov. Ans. at 31-32. Case law does not support this proposition.

In *Bergdahl*, a majority of this Court concluded the remarks of former President Donald Trump and the late Senator John McCain did not place an intolerable strain on the public's perception of the military justice system. 80 M.J. at 239. In its reasoning, a majority of this Court first looked to the strength of the Government's case. *Id*. ("In light of both the severity of these offenses and the strength of the Government's evidence, an objective, disinterested observer clearly would have expected the Army to court-martial [Bergdahl] for this conduct regardless of any public comments by President Trump or Senator McCain."). In *United States v. Riesbeck*, an actual UCI case, this Court found actual prejudice by first identifying the frailty of the Government's case. 77 M.J. 154, 167 (C.A.A.F. 2018). This Court labeled the Government's case "weak," recognizing it was "primarily based on the testimony of [] the putative victim, who was unable to remember many of the events surrounding the crime due to alcohol use and whose testimony was controverted by other witnesses at trial." *Id*. Similar deficiencies plagued this case, with additional questions concerning the named victim's credibility and motives to fabricate. *See* JA at 58-62 (Chief Judge Johnson concluding the named victim's credibility was irreparably harmed by impairment and memory lapses, inconsistencies and

contradictions, motives to fabricate, and an absence of corroboration); *see also* App. Br. at 14-16.

If the strength of the Government's case was a significant factor for a majority of this Court to find no intolerable strain in *Bergdahl*, it stands to reason that a weak case would be a weighty factor to consider in favor of concluding the Government has failed to prove beyond a reasonable doubt there is no intolerable strain. Together, *Bergdahl* and *Riesbeck* stand for the proposition that strength or weakness of the Government's case will be a significant factor to consider in any UCI case.

8. **Waiver is inapplicable in this case; in fact, the consideration of the facts and circumstances surrounding the creation of the witness statement was specifically preserved.**

The Government maintains that Appellant seeks to broaden the scope of the granted issue by arguing matters that were waived at trial; specifically, that the named victim's witness statement was materially altered. Gov. Ans. at 39-41. This argument fails for at least two reasons.

First, Appellant specifically preserved consideration of the altered statement; trial defense counsel merely amended their request. The original motion to dismiss requested consideration of both actual and apparent UCI. JA 69-78. In that motion, the Defense argued, *inter alia*, that the witness statement had been materially altered (actual UCI) and the actions taken to cancel the interview with the husband constituted

apparent UCI. *Id*. Through motions practice, defense counsel refined the scope to allege only apparent UCI. R. at 418-419. The main thrust of the apparent UCI was still the cancelling of the interview of the husband—this is the allegation addressed by the military judge and the Air Force Court—but defense counsel specifically requested the statement "altered from the original" be considered. R. at 419. The military judge acknowledged this understanding in his written ruling. JA at 287-88 ("The remaining allegation was that an appearance of both [UCI] and [UI] existed due to the *whole of pretrial interactions between* [the SVC] and Capt [A.S.].") (emphasis added).

On appeal, this is exactly what Appellant has argued. Appellant did not contend the altered statement amounted to actual UCI. Instead, Appellant argued that the alteration was made to match a preferential charging theory. A member of the public would understand this, and it would contribute to that person harboring significant doubt and distrust about Appellant's court-martial. App. Br. at 33-35. From an optics perspective, this collaboration between the prosecution and its indispensable star witness on the content of a sworn statement before charges had ever been brought would cause significant concern to a reasonable member of the public. Evidence dictates how to charge an offense; it is not created to support a particular charging scheme. This statement ultimately mattered at trial in findings, as it was offered

substantively as a prior consistent statement to rehabilitate the named victim's credibility at trial.[9] JA at 18 n.20.

The public would also be concerned the prosecution ceded its sovereign authority to the SVC and the named victim to determine which witnesses to interview; this offends Appellant's due process rights. *Cf. Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1154 (10th Cir. 2001) (citing *East v. Scott*, 55 F.3d 996, 1000-01 (5th Cir. 1995); *Person v. Miller*, 854 F.2d 656, 663-64 (4th Cir. 1988) (concluding it offended due process for a non-elected prosecutor to control "critical prosecutorial decisions" including "whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant."). In *Miller*, the Fourth Circuit opined, "It is control over these critical prosecutorial decisions which determine the fairness of particular prosecutions that is the important consideration; operational conduct of the trial is actually of subordinate concern, except as it may actually impact upon the more fundamental prosecutorial decisions." 854 F.2d at 664. Here, the SVC and the named victim controlled what investigative powers to utilize, the operational conduct at trial is a "subordinate concern." *Id*.

[9] Her credibility, of course, was and remains a considerable point of contention. *See* JA at 58-62. The fact that her statement was used to attempt to revive her credibility lends credit to the argument that the public would harbor significant distrust when it learned that the prosecution—directly or indirectly—aided in its creation.

The second reason why there is no waiver is waiver extinguishes the right to challenge a *legal error* on appeal. *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019) ("When . . . an appellant intentionally waives a known right at trial it is extinguished and may not be raised on appeal.") (citations omitted). Legal issues can be waived; facts cannot. This Court's apparent UCI jurisprudence makes plain that an assessment of all pertinent facts and circumstances is necessary in determining the presence of an intolerable strain. *See Boyce*, 76 M.J. at 252 ("we deem the totality of the circumstances in this case to be particularly troubling and egregious"). The uncontroverted *fact and circumstance* that the named victim's sworn witness statement was altered upon suggestion of her counsel who had collaborated with the prosecutor and pre-identified "I'm pretty sure bodily harm will be the charge" (JA at 113), is something that a member of the public, fully informed of all the *facts and circumstances*, would be made aware of and contribute to such a member harboring significant doubt in the fairness of the proceeding.

9. **Conclusion.**

The lone offense at issue in this case was alleged to have occurred on or about July 11, 2017. At that time, this Court's decision in *United States v. Claxton*, 76 M.J. 356 (C.A.A.F. 2017) was less than a week-old. In *Claxton*, this Court noted that the Government's ability to "salvage this conviction" in the face of a discovery violation

committed by the judge advocates assigned to the United States Air Force Academy could not "erase the blot on the Air Force legal system that such conduct must cause." *Id*. at 362. Despite this Court's strong admonition in a case involving a base legal office and the attendant OSI detachment, the unlawful influence in this case—with its natural discovery implications—was committed by Air Force judge advocates a mere four months after *Claxton* was decided.

At the end of the day, this was not an attempt to "seek justice."[10] This was a successful effort to manipulate the military justice system and to keep the named victim content so that the case could be preferred, referred to court-martial, and a conviction obtained. Instead of recognizing "the accused is the most important participant [in a military trial] since he or she has the most at stake," these actors vectored their priorities towards the wrong objectives. *Bergdahl*, 80 M.J. at 247 (Sparks, J., concurring in part and dissenting in part).

This "damage[s] . . . the public's perception of the fairness of the military justice system as a whole." *Boyce*, 76 M.J. at 249. The Government cannot meet its burden to prove beyond a reasonable doubt there is no intolerable strain. When an objective,

[10] American Bar Association, *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, Prosecution Function Standard 3-1.2(b) (4th ed. 2017); 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).

disinterested member of the public, fully informed of all the circumstances, learns a prosecutor representing the United States of America is willing to—and does—turn a blind eye to potentially exculpatory information to keep a case alive, their trust in our system is irreparably damaged. At that point, the public is being represented by a prosecutor whose "interest . . . in a criminal prosecution is . . . to win a case" which is antithetical to the sovereign's mandate. *Stellato*, 74 M.J. at 491 (citing *Berger*, 295 U.S. at 88). Like other cases involving judge advocate manipulations upon the military justice system—*Lewis*, *Salyer*, and *Barry*—dismissal with prejudice is necessary to ensure the public can be left confident in the fairness and integrity of the military justice system—a system in which judge advocates exert significant influence. No other remedy can accomplish that goal.

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 February 3, 2022.

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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 6,423 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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