IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39717
Staff Sergeant (E-5), BRANDON M. HORNE, USAF, *Appellee.*	)	USCA Dkt. No. 21-0360/AF

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED:

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 (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C § 866(c) (2016). This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case. (App. Br. at 1.)

STATEMENT OF FACTS

Appellant's Offense

Appellant and SSgt JC met in mid-2016 when SSgt JC began working in the same office with Appellant, but they never had a relationship outside the office. (JA at 004.) Appellant and SSgt JC were both married. (Id.)

In July 2017, Appellant, SSgt JC, and a group of co-workers went on a temporary duty assignment to Germany. (JA at 006.) After work on 10 July 2017, Appellant, SSgt JC, and the group ate dinner and then went back to the hotel to drink alcohol. (Id.) While on the hotel patio, in front of SSgt LC, SSgt JC texted her husband, "falling asleep… I love you babe..[sic] text me in the morning[.]" (JA at 007.) Despite sending this text, SSgt JC continued to stay up and drink. (Id.)

After a night of heavy drinking, SSgt JC and the group went to their respective hotel rooms. (JA at 009.) SSgt JC recalled being in her room and hearing a knock on her door. (Id.) When SSgt JC opened the door, Appellant "pushed" her through the door, "back into" the room, and "onto [her] bed." (JA at 010.) Once on the bed, Appellant sexually assaulted SSgt JC. (JA at 011.) SSgt JC pleaded with Appellant to stop and told him she loved her husband, was

married, and could be pregnant, to which Appellant replied "I don't care." (Id.) When Appellant stopped, and realized how upset SSgt JC was, he told her, "sorry, [C], want me to get somebody?" (Id.) SSgt JC responded that she wanted him to get another co-worker. (Id.) When the co-worker came to SSgt JC's room, she asked SSgt JC if she wanted to call the police and go to the hospital; SSgt JC replied yes to both. (Id.)

On 11 July 2017, German law enforcement arrived. (JA at 013.) They collected evidence and interviewed SSgt JC. (JA at 013-14.) SSgt JC also went to the hospital to get a sexual assault forensic examination (SAFE). (JA at 015.) During the examination, SSgt JC was examined, interviewed, and asked to provide toxicology and DNA samples. (JA at 017.) After the SAFE, SSgt JC was examined by a physician. (Id.) The physician informed her that she was 10-days pregnant. (JA at 018.) When SSgt JC returned to the hotel later that day, a victim advocate from the Sexual Assault Response Coordinator (SARC) office was waiting for her. (JA at 155.) The victim advocate took her to the SARC office to go over her reporting options. (Id.) When they arrived, SSgt JC called her husband, TSgt BC. (Id.) When SSgt JC told TSgt BC "what had happened," he was "beside himself" and "started crying." (Id.) She then put him on speaker phone, and the victim advocate explained to them the reporting options. (Id.) They decided to file an unrestricted report. (Id.)

After this, SSgt JC returned to the hotel and was interviewed by AFOSI. (Id.) AFOSI did not record that interview. (JA at 018.)

The Background of the Alleged UCI

Before trial, Appellant moved to dismiss the Specification of the Charge with prejudice for unlawful command influence (UCI). (JA at 069, 236.) Relevant to this issue, Appellant alleged that Capt AS, who was detailed as trial counsel at the time, and Capt JP, SSgt JC's Special Victim's Counsel (SVC) at the time, "took affirmative steps in collusion to … limit the scope of the AFOSI investigation," which "at least raise[d] the appearance of adjudicative UCI." (JA at 076.) Specifically, Appellant alleged the former trial counsel and the SVC colluded to limit AFOSI's ability to interview SSgt JC's husband, TSgt BC, during its investigation of this case. (JA at 075-76.) In addition to this claim, Appellant also avowed that Capt AS and Capt JP colluded to improperly shape SSgt JC's written statement. (JA at 074-76.) There were two Article 39(a) hearings to explore Appellant's UCI motion; during those, the following facts were disclosed.

SSgt JC's Written Statement

A few weeks after the incident, Capt AS, then assistant trial counsel, was notified that SSgt JC's interview with AFOSI was not recorded. (JA at 314.) The only evidence of SSgt JC's interview with AFOSI were a few pages of agent notes. (Id.) Capt AS discussed with AFOSI whether they would be willing to re-interview SSgt JC to have a recorded version of her interview. AFOSI was

unwilling. (JA at 110; JA at 316.) Capt AS gave SSgt JC, through her counsel, the option to either provide a written statement or submit to a recorded interview; SSgt JC chose to provide a written statement. (JA at 110, 316.) Simultaneous to Capt AS's request for a written statement, Capt AS provided SSgt JC's SVC power point slides, which outlined the elements of sexual assault. (JA at 317; JA at 113-148.) Capt AS directed Capt JP toward page 18 of the slide deck that differentiated "bodily harm" from "incapable of consenting." (JA at 318.) Capt AS testified that her only intent was "that if the SVC were to review [SSgt JC's] statement and saw maybe that there was a gap somewhere, maybe he could have asked those questions that we would have ordinarily asked if we had been interviewing the victim directly." (Id.)

As soon as SSgt JC finished her written statement, she provided it to her counsel for review via email. (JA at 215.) In that email, she stated:

> 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. The last thing I want is for the defense council [sic] to twist my words and slander my account (which I know they will try to do regardless). Before sending this off to everyone that will receive it, please make sure to call me so we can talk about it and review anything you would like. Thank you for being patient with me as I know it took me some time to get everyone [sic] onto paper…

(JA at 215.)

Capt JP responded with two edits:

1. If you actually felt the penetration of his penis, please do your best to describe it as you detail the situation.
2. I would take out "without a hint of concern or apology"

(Id.) No other edits or correspondence was made on the subject. (Id.)

AFOSI's attempt to interview TSgt BC

Sometime in October 2017, SA DM, an AFOSI agent at the Nellis AFB detachment, received a lead from AFOSI agents at Ramstein AB to interview SSgt JC's husband, TSgt BC, in relation to the investigation of Appellant. (JA at 388.) To effectuate that lead, SA DM called SSgt JC to communicate with her husband, TSgt BC. (JA at 388-89.) SA DM claimed SSgt JC handed her phone to TSgt BC, and at which point, TSgt BC agreed to an interview with AFOSI. (JA at 392.) But TSgt BC later claimed he did not speak with AFOSI then,[1] and did not schedule an interview during that exchange. (JA at 356.) He testified that he had no intent to meet with or speak to AFOSI during that time since he had recently moved and wanted he and his wife to move on and "heal." (Id.) Later in his testimony, however, TSgt BC stated there was a possibility he may have agreed to interview with AFOSI. (JA at 360.)

[1] TSgt BC testified that in March 2018, he was interviewed by AFOSI for an investigation into SSgt JC for an incident that occurred at the same time as the incident involving Appellant. (JA at 357.)

Following SA DM's phone call to SSgt JC, Capt JP talked to SSgt JC, and during that conversation, he had a "6-second conversation" with TSgt BC. (JA at 409.) Although Capt JP could not recall the content of that conversation, he stated in his testimony that it was related to TSgt BC participating in an interview with AFOSI. (JA at 409-10.) TSgt BC claimed he never talked to Capt JP directly. (JA at 259.)

Sometime after, in October 2017, Capt JP called SA DM to instruct SA DM to not directly reach out to his client, SSgt JC, again.[2] (JA at 389.) Capt JP also directed SA DM to not contact TSgt BC "anymore" and to direct all further communication with TSgt BC through Capt JP. (Id.) Capt JP told SA DM to cancel the scheduled interview with TSgt BC. (Id.) SA DM testified that Capt JP mentioned he would call the AFOSI detachment about the lead to interview TSgt BC. (JA at 291.) SA DM said that sometime after, the lead was recalled, but he could not state when or why the lead was recalled. (JA at 391.) He also stated he never coordinated with the Ramstein AB AFOSI detachment on the status of the lead. (Id.)

Meanwhile, also in October 2017, Capt JP called Capt AS, the assistant trial counsel, to inform her that AFOSI had called SSgt JC directly to interview her

[2] Capt JP testified he was upset because AFOSI agents had directly contacted SSgt JC about two or three times before SA DM's phone call to SSgt JC without coordinating with him. (JA at 407.)

husband rather than coordinating through her counsel. (JA at 319.) Capt JP relayed that SSgt JC was "very upset" as a result of AFOSI's direct contact, but also because AFOSI had not recorded her initial interview and waited four and a half months after the incident to call her to collect her DNA. (JA at 319-20.) SSgt JC was considering whether to stop participating in the case because of her frustrations with AFOSI. (JA at 320.) Capt JP also relayed that TSgt BC, SSgt JC's husband, did not want to participate "at that time in the investigation." (JA at 319; JA at 409.)

In response, Capt AS told Lt Col JW, the staff judge advocate, that TSgt BC was "an outcry witness that wasn't in Germany," who did not want to participate in the process and could claim spousal privilege. (JA at 320-21.) The staff judge advocate directed Capt AS to tell AFOSI to:

> [C]ontinue with their investigation. In other words, don't wait for the husband to get in contact with them. Don't make that a stopping point in their investigation. They should continue to proceed because if he doesn't want to speak, that would be [] dealt with later, certainly something that defense could explore later . . .

(JA at 345.) After concluding that it did not make sense for AFOSI to continue to contact TSgt BC, Capt AS discussed the situation with AFOSI as shown in emails between Capt AS and SA LJ, the lead AFOSI agent at the Ramstein AB detachment. (JA at 321; *see* JA at 069.) On 25 October 2017, Capt AS wrote:

> We received a call this week from the SVC of [SSgt JC] (Victim in the Horne investigation), who expressed

> concern that [SSgt JC] 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 of the husband is necessary nor relevant enough to outweigh the risk of the Victim dropping out of the process entirely. . . .
>
> Anything that can be done to minimize the Victim's stress at this stage will be helpful to the case going forward.

(JA at 174 & 208-09.) SA LJ responded on 26 October 2017 as follows, in relevant part:

> [T]hem contacting her husband directly is acceptable because her SVC does not provide services for him. The interview of her husband is within our scoping purview for this investigation, now if he declines that is one thing but we have to make an attempt. We have information from a witness interview that she was messaging her husband prior to the incident and we also know from her that she disclosed to her husband what happened, so we are well within our right to ask for an interview.

(JA at 207.) That same day, Captain AS responded:

> 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 207.)

On 27 October 2017, SA LJ responded, in pertinent part, "Sure ma'am, no problem." (JA at 206.)

SA LJ testified at the UCI motions hearing that she did not consider "advice" from attorneys in the legal office as orders or commands. (JA at 380.) And she disregarded Capt JP's direction for AFOSI not to interview TSgt BC and did not view Capt JP as "being the position of a commander or someone with authority," or see it as "binding on [her] or a command to [her]." (JA at 372, 379.)

Simultaneously, Capt JP also contacted SA LJ to tell her that he did not want AFOSI to directly contact his client, SSgt JC, or her husband, TSgt BC.[3] (JA at 372.) But SA LJ disregarded the request in part – she directed all agents in her office to contact TSgt BC directly and to "still try to get the interview." (Id.) She testified that AFOSI ultimately could not complete the "lead"[4] to interview TSgt BC because they realized TSgt BC did not want to speak to AFOSI.[5] (JA at 376.) SA LJ could not recall when the "lead" to interview TSgt BC was created, and she provided no details on who recalled the lead or when it was recalled. (JA at 370-86.)

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[3] Capt JP also testified that he called SA LJ another time, but she was TDY, so he communicated with another individual from the Ramstein AB AFOSI detachment. (JA at 412.)

[4] SA DM described OSI using a computer system that tracks "leads," which is a prompt for future investigative steps. (JA at 391.)

[5] SA LJ admitted that AFOSI could not "force" TSgt BC to interview with a special agent. (JA at 375.)

SA TM, superintendent of the AFOSI detachment at Ramstein AB, Germany, identified himself as the agent responsible for recalling the lead to interview TSgt BC. (JA at 277.) Appellant chose not to call SA TM as a witness at the motions hearing, and instead offered a one-page affidavit describing a short interview trial defense counsel had with SA TM. (Id.) In that affidavit, trial defense counsel attested SA TM admitted that he recalled the lead. (Id.) SA TM stated he did this after both Capt JP and Capt AS represented that TSgt BC did not wish to be interviewed and after SA TM made personal contact with TSgt BC through email. (Id.) Despite trial defense counsel's request to view the email exchange between SA TM and TSgt BC, SA TM never provided it. (Id.)

On or about 25 October 2017, following Capt AS's and Capt JP's exchanges with SA LJ, the following exchange occurred between Capt AS and Capt JP about TSgt BC:

> [Capt AS]: Hey it's Capt [AS]. I spoke to one of the ramstein [sic] agents who should be reaching out to Nellis to make sure they go through you for everything. Asked about husband but the case agents were both out.
>
> [Capt JP]: Ok thank you so much Capt [AS].
>
> [Capt AS]: I also sent a request today to OSI that should be forwarded up their chain to justify them dropping the lead to interview her husband. Let me know if there are any other issues!

> [Capt JP]: Wow, that is great news. Thank you for getting that done.

(JA at 164.) Despite this exchange, TSgt BC was later interviewed on 19 March 2018 by AFOSI for a criminal investigation into his wife for an incident that occurred on the same night of the offense. (JA at 166-67.) In that interview, TSgt BC discussed his wife telling him she was sexually assaulted, and he described SSgt JC's drinking habits. (JA at 166-67.) This interview was captured by AFOSI's agent notes and was later disclosed to the defense and its contents were used in Appellant's UCI motion. (JA at 077.)

Discovery provided to the Defense

The government provided the defense with evidence that put them on notice of TSgt BC's involvement in the case. Sometime before the Article 32 hearing on 4 January 2018, the defense had access to the written statement of SSgt LC, which they provided at the preliminary hearing as Defense Exhibit E. (*See* Supp. JA at 446-47.) This statement described that SSgt JC lied to TSgt BC about her plans for the night in a text message she sent him shortly before the sexual assault.[6] At least as of the date of the Article 32 hearing, on 4 January 2018, the defense also had access to the written statement of SSgt JC, which was entered at the preliminary

[6] The defense had access to this information because they described SSgt LC's statement in their 16 January 2018 objections to the Article 32 hearing. *See* Supp. JA at 446. ("[SSgt JC] texted her husband to tell him she was going to bed (despite the fact that she remained and continued to drink with everyone.)").

hearing as PHO Exhibit 2. (Supp. JA at 434, 437.) In this statement, SSgt JC described calling her husband the day after the sexual assault and explaining to him what happened. In sum, no later than 4 January 2018, the defense was aware that SSgt JC texted her husband shortly before the sexual assault and reported the sexual assault to him soon after.

The defense was also provided with the agent notes from AFOSI's 19 March 2018 interview with TSgt BC, which they attached to their UCI motion, dated 8 May 2018.[7] (JA at 166.) Those agent notes revealed that SSgt JC reported the sexual assault to TSgt BC the day after it occurred. (Id.) As the defense noted in their UCI motion, dated 8 May 2018, those agent notes contained facts that supported the defense's theory about SSgt JC's motive to lie. (JA at 071, 166.) Also, by the time of the second UCI motions hearing on 12 July 2018, the government acquired and provided to the defense a copy of the misleading text message SSgt JC sent to TSgt BC before the sexual assault. (JA at 427.)

In response to Appellant's discovery request and UCI motion filed on 8 May 2018, Capt AS sent the defense these disclosures via email:

> SA [LJ], Ramstein OSI, told me that they received word from the lead sent to Nellis that TSgt [BC] declined to be interview [sic] or something to that effect.

[7] This was a separate investigation against SSgt JC, but it involved the same set of facts as this case. (JA at 323.)

> SA [DM], Nellis OSI, stated that he tried to interview TSgt [BC] in October and had an interview scheduled with him. However, he was contacted by Capt [JP] and informed that he should not be contacting his client and that TSgt [BC] did not want to speak with them at this time. Later, the lead was pulled and their office did not interview TSgt [BC] at that time.

(JA at 187; *see also* JA at 388-91.)

In conjunction with this disclosure, the defense was also provided with the text exchange between Capt AS and Capt JP, in which they discuss Capt AS requesting AFOSI dropping their lead to interview TSgt BC. (JA at 164.) The government trial team also sent the defense all of Capt AS's work product, which included all of her witness interview notes. (JA at 430.)

Pretrial Interview with TSgt BC

Despite knowing no later than 4 January 2018 that TSgt BC was an outcry witness, trial defense counsel chose not to contact him until May 2018. (JA at 362-63, 366.) At that time, trial defense counsel asked to telephonically interview TSgt BC. (Id.) TSgt BC initially declined to be interviewed telephonically and expressed a preference to be interviewed in-person in July 2018. (JA at 362-63, 366.) He later changed his mind and interviewed with the defense telephonically in May 2018, before he testified regarding the UCI motion. (JA at 364-65; JA at 225.) There is no evidence the defense requested to interview TSgt BC again. (JA at 362-63, JA at 366.) The first time TSgt BC spoke to a government trial counsel

was in May 2018 in a telephonic interview. (R. at 361.) Ultimately, TSgt BC was not called as a witness at trial on the merits. (JA at 289.)

Recusal of Capt AS and Capt JP

Before making appearances on the record in court, Capt AS withdrew as trial counsel, and Capt JP ended his attorney-client relationship with SSgt JC. (JA at 404.) The military judge noted that Capt AS withdrew on the morning of 17 May 2018, and never appeared "on the record as an advocate at any time." (JA at 289.)

Motion Litigation

As a result of Appellant's motion, an Article 39(a) hearing was held on 17-18 May 2018, and a supplemental hearing was held on 13 July 2018. (JA at 287.) During those hearings, except for SA TM, trial defense counsel called as witnesses everyone involved in the recall of the lead to interview TSgt BC. (JA at 288.) This included: TSgt BC, Lt Col JW, SA LJ, SA DM, Capt AS, and Capt JP. (Id.) In addition to the facts discussed above, witnesses also testified to the following:

Capt AS testified her intent in requesting AFOSI to not interview TSgt BC was that they wait to interview him in order to give him and SSgt JC some time to heal. (JA at 321.) She noted how fragile the victim was at that time and she stated that at no time did she impede the defense's access to TSgt BC. (JA at 321-22.) When asked whether she knew if TSgt BC had exculpatory evidence when AFOSI tried to interview TSgt BC, she stated that she believed TSgt BC did. (Id.)

However, she explained that the "exculpatory evidence" she was referring to was text messages and that "that evidence was already out there." (JA at 322.) Capt AS later clarified that she was aware of the text messages between SSgt JC and TSgt BC because that information was contained in SSgt LC's statement. (JA at 330.)

TSgt BC testified that in his pretrial interview with defense, he described the misleading text message his wife sent him on the night of the incident. (JA at 364.) He also testified he still had that message on his phone. (JA at 369.)

In her testimony, SA LJ could not remember how or when the "lead" to interview TSgt BC got recalled. (JA at 385.)

SA DM testified that when Capt JP called him and told him to drop AFOSI's lead to interview TSgt BC, he was well aware at that time that Capt JP lacked any authority over AFOSI's investigative process and did not represent TSgt BC. (JA at 393-94.) He also could not recall how or when the "lead" to interview TSgt BC got recalled. (JA at 385.)

Lastly, Capt JP testified he told Capt AS that AFOSI should wait to contact TSgt BC because TSgt BC and SSgt JC were having a baby and recently moved. (Id.) He said that he did not ask Capt AS to get AFOSI to permanently drop its lead to interview TSgt BC. (Id.) He was surprised when Capt AS texted that she requested OSI to drop its lead. (Id.) Capt JP also recalled telling SA LJ and

another AFOSI agent at Ramstein AB to give TSgt BC some time before interviewing him to allow TSgt BC and SSgt JC time to "settle in." (JA at 412.)

During the motions hearing, the defense requested several alternate forms of remedy: first, it requested that the charge be dismissed with prejudice; second, it requested a forensic extraction of SSgt JC's phone for the text she sent her husband on the night of the incident; and third, it requested an expanded cross-examination of SSgt JC to ask about her interference with AFOSI's investigation. (JA at 427.) The defense received the text message SSgt JC sent her husband, and the military judge granted the defense's request to expand its cross-examination of SSgt JC. (JA at 289, 428.) The defense also conceded during motions hearing that neither Capt AS nor Capt JP materially altered or improperly influenced SSgt JC's written statement. (JA at 419.) Appellant's trial defense counsel asked only that this information be considered to for its tendency to show collusion between Capt AS and Capt JP when they later requested that AFOSI not interview TSgt BC. (Id.)

The Military Judge's Ruling

After considering the documentary evidence and witness' testimony, the military judge denied Appellant's motion and supplemental motion to dismiss the charge with prejudice for apparent UCI. (JA at 293.) In his written ruling, which was issued after trial, the military judge specifically included in his findings of fact:

> The defense did not request J.C.'s husband, a military member himself, as a witness during the Art. 32, U.C.M.J., preliminary hearing held in January 2018, but could have. The defense did not attempt to conduct a pretrial interview with J.C.'s husband months earlier than May 2018, with or without scheduling assistance from the government.
>
> J.C.'s husband was initially interviewed by the parties, with an orientation toward the charged offense and his connection to matters relevant thereto, in the days immediately preceding pretrial motion practice on 17-18 May 2018.

(JA at 288.)

Additionally, the military judge made a finding of fact that the defense did not lose access to any evidence when AFOSI failed to interview TSgt BC in October 2017. He wrote:

> The evidence does not establish that an earlier pretrial interview of J.C.'s husband, by either a representative for the government or any member of the defense, would have developed additional information or information contrary to any made available through access to the witness in May 2018.

(Id.) The military judge also included in his ruling that the government provided "all derogatory information known to the government for the accused, the alleged victim and all potential witnesses." (JA at 289.) He also noted the defense's decision to not call TSgt BC as a witness during trial. (Id.)

The military judge stated Appellant failed to show "some evidence" of unlawful command influence, but even if Appellant had, the government demonstrated beyond a reasonable doubt that the facts as presented did not

constitute unlawful command influence. (JA at 291.) The military ultimately concluded:

> Steps to temporarily forestall the interview of [SSgt JC's] husband so as to encourage [SSgt JC's] continued participation, especially when taken in response to a stated preference against that potential stress to their relationship, do not suggest any representative for the government or the previous SVC placed any strain upon the public's perception of the military justice system.

(Id.) Despite not ruling for Appellant, the military judge ordered all "currently-detailed trial counsel [] review the entirety of [Capt AS's] work-product again and before trial commences to ensure the government's discovery obligations have been met." (JA at 293.) The military judge then required trial counsel to confirm when review was accomplished. (Id.)

The Air Force Court Opinion

Appellant raised the issue of apparent UCI before the Air Force Court of Criminal Appeals (AFCCA). The Court assumed for its analysis that the combined actions of Capt JP and Capt AS "may constitute some evidence of the appearance of unlawful influence." Specifically, it noted "it was proper for Capt JP, as SVC, to advocate for the interests of his client, to include her desires and emotional well-being," and it was not "improper for Capt AS, as trial counsel, to offer the AFOSI agents a view of what those who would prosecute the case needed or wanted from the independent investigation." (JA at 026.) But "arguably . . . their actions show they overstepped the bounds of their authority, or attempted to do so." (Id.) The

Court expressed concern (1) that Capt JP did not represent TSgt BC and had no authority to attempt to restrict AFOSI's access to him and (2) that as a judge advocate assigned to the Fort Meade legal office, Capt AS was not the legal advisor to the AFOSI detachments at Ramstein AB and Nellis AFB. (Id.) The Court then found that the government had not demonstrated beyond a reasonable doubt that the predicate facts did not exist or did not constitute unlawful influence.

Ultimately the Air Force Court found that the government had successfully rebutted the allegation of apparent unlawful influence by proving beyond a reasonable doubt that there was no intolerable strain upon the public's perception of the military justice system. (Id.) Most significantly, the Air Force Court noted that there was no evidence Appellant's trial was impacted by the combined actions of Capt JP and Capt AS, and "a fully informed observer would note that the unlawful influence motion itself was thoroughly litigated, including briefs, supplemental briefs, extensive documentary evidence and testimony, and multiple arguments." (JA at 027.) The Court concluded beyond a reasonable doubt that "the alleged unlawful influence did not place an intolerable strain upon the public's perception of the military justice system," and an "objective, disinterested, fully informed observer would not harbor a significant doubt about the fairness of Appellant's court-martial." (JA at 028.)

Timeline of Events

The following timeline summarizes the most relevant events to this appeal:

11 July 2017 – Offense occurs. (JA at 004.)

Sometime in October 2017 – AFOSI calls SSgt JC to schedule an interview with TSgt BC. (JA at 388-89.)

25-26 October 2017 – Capt AS communicates with AFOSI to drop lead to interview TSgt BC. (JA at 173-75.)

25 October 2017 – Capt AS sends Capt JP a text message that she requested AFOSI to drop its lead; AFOSI drops lead to interview TSgt BC sometime thereafter. (JA at 164.)

27 November 2017 – Preferral of Charge (JA at 433.)

4 January 2018 – Article 32 hearing held. The defense is in possession of information that SSgt JC texted her husband shortly before the sexual assault and reported the incident to him the day after. (Supp. JA at 446.)

6 February 2018 – Referral of Charge (JA at 287.)

19 March 2018 – AFOSI interviews TSgt BC regarding investigation against SSgt JC for an incident that occurred on the same night as the offense. In the interview, TSgt BC discussed how and when SSgt JC reported her sexual assault to him. (JA at 166.)

8 May 2018 – The defense includes interview notes from TSgt BC's 19 March AFOSI interview in its UCI motion. (JA at 166.)

16 May 2018 – The prosecution first interviews TSgt BC. (JA at 361.)

17 May 2018 – The defense first interviews TSgt BC. (JA at 362-63.)

17-18 May 2018 – UCI motion proceedings (JA at 287.)

12-13 July 2018 – Supplemental UCI motion proceedings (JA at 287.)

3-7 December 2018 – Trial (JA at 289.)

SUMMARY OF ARGUMENT

This Court should find that the combined actions of Capt AS and Capt JP did not create an intolerable strain on the public's perception of the military justice system. The actions of Capt AS and Capt JP to discourage law enforcement agents from interviewing TSgt BC – an outcry witness – were unwise and inadvisable. Neither the government, nor the defense, nor a crime victim benefits when OSI fails to fully investigate a case. But ultimately, the government provided the defense with notice of TSgt BC's potential relevance well before trial, and the government never impeded the defense from interviewing TSgt BC or calling him at trial. Even if Capt AS and Capt JP "overstepped" or "attempted" to overstep "the bounds of their authority," the circumstances were such that an "objective, disinterested observer . . . would [not] harbor a significant doubt about the fairness of the proceeding." United States v. Boyce, 76 M.J. 242, 249 (C.A.A.F. 2017).

Assuming that Capt AS and Capt JP were responsible for AFOSI turning off its lead to interview TSgt BC, there is no evidence that their actions had any impact on Appellant's court-martial proceeding. To begin with, the record shows Appellant was not prevented or precluded from interviewing TSgt BC. Trial defense counsel knew as early as the Article 32 hearing on 4 January 2018 that SSgt JC sent her husband, TSgt BC, a misleading text message, and that she reported the sexual assault to him the day after it occurred. Still, trial defense counsel waited until just days prior to the motions hearing to schedule a pretrial

interview with TSgt BC. And Appellant ultimately chose not to call TSgt BC as a witness at trial. And, most importantly, the military judge found as fact that an earlier interview of TSgt BC "would [not] have developed additional information or information contrary to any made available through access to the witness in May 2018." Any earlier interview of TSgt BC by AFOSI or government counsel would not have provided any additional benefit to Appellant. Thus, the actions of Capt AS and Capt JP had no impact on Appellant's defense or court-martial.

Second, extensive ameliorative measures were taken to alleviate any perception that there was an appearance of unlawful influence. Any perceived impropriety from Capt AS and Capt JP's combined actions were fully examined and remedied by a thoroughly litigated unlawful influence motion. Two motion hearings were conducted during which comprehensive documentary and testimonial evidence was examined. All witnesses relevant to the defense motion were called including: TSgt BC, SA LJ, SA DM, Capt AS, Capt JP, and Lt Col JW. Although Appellant did not prevail on his motion, the allegation of impropriety was fully examined, which lends confidence to the fairness of the process. Before ever making an appearance on the record, both Capt AS and Capt JP severed their respective roles and no longer had any participation in Appellant's court-martial. Additionally, the military judge fashioned an appropriate remedy to ensure there would be no taint of unlawful influence. Granting Appellant's request for an alternate remedy, the military judge allowed

the defense to expand its cross-examination of SSgt JC and to ask SSgt JC about her interference with AFOSI's interview of her husband. Further, the military judge ordered the trial team to review again all of Capt AS's work product and to ensure that it was provided to the defense.

Third, at trial, Appellant waived his claim that Capt AS and Capt JP improperly influenced SSgt JC's statement when his trial defense counsel conceded that the captains had not materially altered the statement. And even if Appellant did not waive the issue, the record does not support that Capt AS and Capt JP unlawfully influenced SSgt JC in preparing her statement, because they did not direct her to add anything that was untrue.

Lastly, although Appellant likens this case to Salyer, Lewis, and Barry, there are distinguishable characteristics. Unlike in Salyer and Lewis, the actions of Capt AS and Capt JP were not of a nature to be irreparable because Appellant lost nothing by the delayed interview of TSgt BC. *Cf.* United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013); United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006). And unlike Barry, Capt AS and Capt JP were not influential; they were captains. *Cf.* United States v. Barry, 78 M.J. 70, 79 (C.A.A.F. 2018).

In looking at the circumstances of this case, the record shows there was no intolerable strain placed on the public's perception of military justice system.

ARGUMENT

THE CONDUCT OF THE TRIAL COUNSEL AND SPECIAL VICTIM'S COUNSEL DID NOT PLACE AN INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM.

Standard of Review

Allegations of UCI are reviewed de novo. Barry, 78 M.J. at 77 (citing Salyer, 72 M.J. at 423. This Court "accept[s] as true the military judge's findings of fact on a motion to dismiss for unlawful command influence unless those findings are clearly erroneous." United States v. Proctor, 81 M.J. 250, 255 (C.A.A.F. 2021) (citing United States v. Stirewalt, 60 M.J. 297, 300 (C.A.A.F. 2004)).

Law

"Command influence is the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388 (C.M.A. 1986). Congress specifically prohibited the exercise of UCI in Article 37(a), UCMJ (2016):

> No authority convening a general, special, or summary court-martial, not any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to any other exercise of its or his function in the conduct of the proceedings. 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 or sentence in any case, or the action of any convening,

> approving, or reviewing authority with respect to his judicial acts.

Military courts recognize two types of UCI:[8] actual and apparent. Boyce, 76 M.J. at 247. "Actual unlawful command influence 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. at 247. Apparent unlawful influence is the appearance of UCI and "is as devastating to the military justice system as the actual manipulation of any given trial." Id.; United States v. Stoneman, 57 M.J. 35, 42 (C.A.A.F. 2002). To prevail on a claim for apparent UCI, an appellant must first show "some evidence" of UCI. Id. at 249 (quoting Stoneman, 57 at 41.) Although an appellant's initial burden is low, "the evidence presented must consist of more than 'mere allegation or speculation." Id. at 249 (quoting Salyer, 72 M.J. at 423.) If an appellant meets this threshold burden, the burden then shifts to the government to show beyond a reasonable doubt that: (1) the predicate facts do not exist; or (2) that the facts presented do not constitute UCI. Id. (citing Salyer, 72 M.J. at 423); *see also* United States v. Biagase, 50 M.J. 143, 151 (C.A.A.F. 2002) ("[T]he Government must persuade the military judge and the appellate courts beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not

[8] This Court has recognized that unlawful influence is a more generalized allegation that may involve a non-command actor. Barry, 78 M.J. at 76. It involves the same analysis as that of unlawful command influence. Id.

affect the findings and sentence.") If the government fails to meet this burden, then it may prevail if it proves beyond a reasonable doubt "the [UCI] did not place 'an intolerable strain' upon the public's perception of the military justice system and 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. (citing Salyer, 72 M.J. at 423; Biagase, 50 M.J. at 151). Although not dispositive:

> A determination that an appellant was not personally prejudiced by the unlawful command influence, or that the prejudice caused by the unlawful command influence was later cured, is a significant factor that must be given considerable weight when deciding whether the unlawful command influence placed an "intolerable strain" on the public's perception of the military justice system.

Id. at 248 n.5. If the government fails to meet this evidentiary burden, prejudice is presumed and courts will fashion an appropriate remedy. Id. at 248, 250 ("[T]he prejudice involved . . . 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.") If the government meets its burden, then an appellant is not entitled to relief. Id. at 250.

Analysis

As recently noted in Proctor, this Court can resolve allegations of unlawful command influence solely based on the whether the government has proven beyond a reasonable doubt that the conduct at issue did not place an intolerable

strain on the public's perception of the military justice system. 81 M.J. at 257. The granted issue focuses only this last part of the test for UCI. As it did in Proctor, this Court should affirm the opinion of the Air Force Court because the government has proven beyond a reasonable doubt that there was no intolerable strain on the public's perception of the military justice system.[9]

A. Appellant was not personally prejudiced by the actions of Capt AS and Capt JP.

The lack of personal prejudice from the actions of Capt AS and Capt JP is a significant factor in determining whether an intolerable strain has been placed upon the public's perception of the military justice system. *See* Boyce, 76 M.J. at 242, 248-249, n.7. In analyzing apparent UCI, this Court necessarily looks to the lack of personal prejudice. *See* Bergdahl, 80 M.J. 230 (C.A.A.F. 2020); Ayers, 54 M.J. 85; United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003).

As reflected in the Air Force Court of Criminal Appeal's opinion, there was no "indication that the AFOSI's failure to interview TSgt BC in October 2017 actually prejudiced the Defense during Appellant's court-martial." (JA at 027.)

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[9] Although not part of the granted issue, the United States does not concede that Capt JD and Capt AS'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." *See* United States v. Steen, 81 MJ 261 (C.A.A.F. 2021) (Maggs, J. dissenting). But, as in Proctor, this Court may resolve the allegations of unlawful influence in the government's favor by staying within the granted issue and without addressing the other parts of the test for UCI. The government believes that would be an appropriate resolution.

The Court correctly observed that TSgt BC was not a key witness in Appellant's trial. (Id.) In fact, neither the government nor defense sought production of TSgt BC as a witness at trial. TSgt BC was merely a "peripheral witness with no direct knowledge of the charged offense." (Id.)

Further, Appellant presented no evidence of personal prejudice. Instead, he suggests the eight-month period during which TSgt BC was not interviewed somehow adversely impacted the "[d]efense's ability to call him as a useful witness or incorporate that information into the cross-examination of the named victim." (App. Br. at 39.)

However, Appellant's trial defense counsel knew TSgt BC was potentially a "useful witness" since at least 4 January 2018, and still waited until days before the motions hearing in May 2018 to interview him. Appellant's trial defense counsel specifically mentioned SSgt JC's misleading text to TSgt BC in her objections to the Article 32 Report and noted that the contents of that text were included in SSgt LC's statement, which was an exhibit at the preliminary hearing. (JA at 433; Supp. JA at 446.) Assuming trial defense counsel learned of this evidence on 4 January 2018, they waited four more months to even attempt to interview TSgt BC. (JA at 066, JA at 433.) And there is no evidence that Capt AS or Capt JP obstructed the defense's access to TSgt BC. Thus, there is no evidence to support Appellant's claim that the government was responsible for an eight-month delay to interview TSgt BC.

Significantly, by 4 January 2018, the defense had the same evidence about TSgt BC that OSI had in October 2017. *See* (JA at 173) (showing that the expressed reasons for AFOSI's planned interview of TSgt BC in October 2017 included only possible outcry evidence and information about the misleading text message.) The defense's own four-month delay in interviewing TSgt BC – when they had the same information available to them as OSI did in October 2017 – severely undercuts Appellant's argument that the government willfully turned a blind eye toward collecting potentially exculpatory evidence by delaying its interview of TSgt BC. If TSgt BC had such apparently exculpatory information that it was essential OSI interview him immediately in October, then the defense would not have delayed its own interview of TSgt BC for four months.

Regardless, Appellant speculates that if TSgt BC was interviewed by AFOSI when it had the lead to interview him, additional information may have been discovered. (App. Br. at 38.) He alleges TSgt BC's memory likely faded between October 2017 and May 2018 when Appellant's counsel finally interviewed him. (App. Br. at 39-40.) Appellant relies on United States v. Harrington, in which this Court held the military judge did not err when he found witnesses lost their memories during a pretrial delay and that the memory loss impaired the appellant's defense. 81 M.J. 184, 190-91 (C.A.A.F. 2021); (App. Br. at 39-40.) But Harrington actually *supports* the government's case. In Harrington, this Court declined to find that the military judge's finding of fact about memory loss was

clearly erroneous. Id. Here, the military judge found as fact that an "earlier pretrial interview of J.C.'s husband, by either representative for the government or any member of the defense, would [not] have developed additional information contrary to any made available through access to the witness in May 2018." (JA at 288.) No evidence contradicts that finding, and Appellant has not articulated why this Court should conclude that the finding was clearly erroneous. Thus, this Court should follow the logic of its holding in Harrington and uphold the military judge's finding of fact.

Appellant further alleges that Capt AS and Capt JP's conduct "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." (App. Br. at 29; 31-32.) But this argument is also defeated by the military judge's finding of fact. Since an earlier interview of TSgt BC would not have revealed any new information, it would not have influenced the preferral and referral decisions in Appellant's case. Appellant was therefore not prejudiced at any stage of the court-martial process.

Appellant also suggests he was wrongfully convicted. (App. Br. at 19, 38.) He relies upon Chief Judge Johnson's dissent on the issue of factual and legal sufficiency. (App. Br. at 38.) However, 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

TSgt BC. While Appellant suggests AFOSI's interview of TSgt BC may have been the difference between a conviction and an acquittal, that premise is contradicted by the military judge's finding of fact that an earlier interview of TSgt BC would not have provided evidence unknown to AFOSI at that time or evidence contrary to his in-court testimony or pretrial interview with the defense. (JA at 288.) Since this military judge's finding of fact was not clearly erroneous and should be accepted by this Court, Appellant's argument is rendered unavailing. Therefore, this Court should disregard Appellant's claim that he was wrongfully convicted.

Despite Appellant's inability to show prejudice, Appellant suggests that to solidify a conviction, Capt AS intentionally impeded AFOSI's investigation in order to hide or willfully turn a blind eye toward exculpatory evidence. (App. Br. at 27, 28, 32, 33.) This suggestion permeates Appellant's brief, but is contradicted by the military judge's finding of fact that there was no "motive to gain some unfair advantage" on the part of Capt AS. (JA at 269.) Appellant makes no showing that this finding of fact is clearly erroneous.

Appellant also seems to support this contention with Capt AS's testimony that she believed TSgt BC had exculpatory evidence. (App. Br. at 27 & 28 n.14.) But when Capt AS stated that she believed TSgt BC had "exculpatory evidence," it is evident she was referring to the misleading text message that SSgt JC had sent to TSgt BC shortly before the incident. (*See* JA at 322.) ("Based on one of the

witness's statements. There appeared to be text messages.") As Capt AS testified, the fact that these text messages had been exchanged "was already out there." (Id.) Nothing in the record suggests Capt AS believed TSgt BC had any valuable evidence other than these text messages, whose supposedly exculpatory content she believed to already be known. The notion that Capt AS was trying to hide or willfully ignore exculpatory evidence when she encouraged AFOSI to turn off its lead to interview TSgt BC is unsupported by the record. And the government provided the evidence of the existence of the misleading text message to Appellant long before the first motions hearing, further demonstrating that Capt AS was not trying to hide the "exculpatory evidence" at issue from the defense. So again, Appellant suffered no prejudice, and the public would not perceive any unfairness in the proceedings.

At bottom, the record shows Appellant was provided notice no later than 4 January 2018 about TSgt BC's potential relevance as a witness and that the defense was never precluded from interviewing TSgt BC or calling him as a witness at trial. An earlier interview of TSgt BC would not have revealed any new information, and therefore Appellant suffered no prejudice from the delayed interview of TSgt BC. Under these circumstances, a disinterested, fully-informed member of the public would perceive nothing unfair about Appellant's court-martial proceedings.

B. Capt AS and Capt JP's actions did not place an intolerable strain upon the public's perception of the military justice system because ameliorative actions were taken to ensure their actions would not affect Appellant's court-martial.

The ameliorative actions taken by the government and military judge in this case would assuage any public concerns about unfairness in Appellant's court-martial. As this Court found in Simpson when it considered claims of both actual and apparent unlawful command influence, "depending on the nature of the alleged unlawful command influence and other pertinent circumstances, the Government may demonstrate that unlawful command influence will not affect the proceedings in a particular case as a result of ameliorative actions." 58 M.J. at 373; *See also*, Lewis, 63 M.J. at 416 (holding that the appropriate remedial actions must address the unique circumstances of each unlawful command influence issue individually and remedy the specific harm, taking care to also consider the damage to the public perception of fairness). This Court then noted that such actions might include "the use of discovery and pretrial hearings to delineate the scope and impact of alleged unlawful command influence." Id. *See also*, Biagase, 50 M.J. at 152; United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. 1998). Here, similar steps were taken to ensure that Capt AS and Capt JP's conduct would not affect Appellant's court-martial.

First, as the Air Force Court noted, a thorough unlawful influence motion was extensively explored and litigated. (JA at 027.) Appellant's trial defense

counsel submitted an unlawful influence motion that totaled 101 pages, including 12 pages of documentary evidence. (JA at 069.) The government responded with a motion totaling 26 pages, including 18 pages of documentary evidence. (JA at 188.) These initial filings were fully explored in a two-day hearing in May 2018. (JA at 287.) During that hearing, the parties called all witnesses believed to be relevant to the alleged unlawful influence. (JA at 288.) This included: TSgt BC; Capt JP; Capt AS; Lt Col JW; and SA DM and SA LJ.[10] (Id.) Following the hearing, Appellant's counsel filed a supplemental motion totaling 42 pages, including 32 pages of documentary evidence. (JA at 236.) In that motion, Appellant clarified his position on the alleged unlawful influence – alleging only the appearance of unlawful influence. (Id.) The government then responded to that supplemental motion with its own motion, which totaled 5 pages. (Id.) A later hearing on 13 July 2018 further explored Appellant's allegation of unlawful influence. (JA at 287.) Any relevant details about the alleged appearance of unlawful influence by Capt AS and Capt JP were fully examined in open court. Thus, any alleged impropriety became fully transparent, which would ensure the public's confidence in the fairness of the court-martial process.

[10] There was one other agent who was contacted by Capt JP, who was later identified at SA TM in Appellant's supplemental motion. (JA at 237.) Despite this, Appellant's counsel took no steps to call him as a witness in the supplemental motions hearing. (JA at 236-245.)

Second, Capt AS and Capt JP were separated from the process prior to making an in-court appearance and were replaced with untainted counsel. Both independently removed themselves from Appellant's proceedings. (JA at 404, 429.) This stands in stark contrast to Salyer, in which this Court noted that the counsel involved continued to participate. Salyer, 72 M.J. at 428. Capt AS and Capt JP's self-removal from the process would tend to show that public that they themselves recognized and took seriously the potential taint that their continued participation could have on the proceedings. And because they removed themselves from the process, the public was not left to wonder whether these same counsel might continue to engage in questionable conduct during the remainder of the trial proceedings.

Third, the government disclosed all written communications Capt AS had with Capt JP and AFOSI agents regarding the alleged unlawful influence. Not only did Capt AS provide to the defense all of her emails to AFOSI and the SVC, but the government team provided all of Capt AS's work product even before being ordered to do so by the military judge. (JA at 187, 293, 430.) Additionally, Capt JP disclosed emails exchanged between himself and his client, SSgt JC, relating to the alleged unlawful influence. (JA at 214.) There was no effort on the part of the government or SVC to hide or cover their actions. Thus, any allegedly sinister actions of Capt AS and Capt JP were thoroughly and promptly unveiled. A disinterested member of the public would not harbor any doubts about the fairness

of the military justice system when Appellant's court-martial publicly probed and adjudicated everything that occurred. Instead, the transparency with which the issue was handled would bolster the public's confidence in the fairness of the proceedings.

Fourth, in light of the nature of the alleged unlawful influence, which involved the interference with AFOSI's access to a witness, the natural remedy was to ensure that the witness was made available to defense and produced at trial.[11] *See* United States v. Douglas, 68 M.J. 349, 355 (C.A.A.F. 2010) (holding that the military judge's remedy to remove the roadblocks of a potential witness providing a character letter for appellant was a reasonable remedy to unlawful command influence discouraging the witness from providing a character letter). Here, TSgt BC was made available to defense, and was produced as a witness for the motions hearing. This would naturally ameliorate any possible concerns held by a disinterested member of the public viewing the military justice system, because it shows that any perceived action to impede the *government's* access to TSgt BC was promptly alleviated by his availability and production for the motions hearing.

Lastly, the military judge granted two of Appellant's requested remedies to further remove any taint of unfairness. First, he ordered all detailed government

[11] The military judge noted that TSgt BC was available for trial, but neither party called him as a witness. (JA at 289.)

counsel to re-review all of Capt AS's work product and ensure that all discovery obligations were met. (JA at 293.) Second, he allowed the defense to "cross-examine SSgt JC on her role in delaying the first interview of her husband" during findings. (JA at 289, 427.) This allowance not only exposed the actions of Capt AS and Capt JP to the factfinder, but also benefited Appellant by allowing his trial defense counsel to paint the victim in a negative light. Further, the fact that Appellant requested this remedy illustrates the judge's proactive, curative steps to remove any appearance of unlawful influence were sound and appropriate. *See* Douglas, 68 M.J. at 349 (factoring the appellant's active participation in the military judge's remedy in its ultimate holding that the military judge was within her bounds of discretion when she remedied unlawful command influence). Thus, any disinterested member of the public would not harbor doubts about the fairness of Appellant's proceedings.

For these reasons, this Court should look favorably on the military judge's "proactive, curative steps to remove the taint of unlawful command influence and ensure a fair trial." Id. at 354. The public would recognize that the military justice system did not sweep Capt AS and Capt JP's conduct under the rug. Their conduct was addressed openly and appropriate remedies were provided. As a result, their conduct did not ultimately create an intolerable strain on the public's perception of the military justice system.

C. Appellant waived his claim that Capt AS and Capt JP improperly influenced SSgt JC's written statement at trial.

Appellant broadens the scope of the granted issue to further his theory that a conspiracy took place between Capt AS and Capt JP "to produce the named victim's witness statement in such a way that it would generate a specified charging theory." (App. Br. at 33.) But any claim that Capt AS and Capt JP unlawfully influenced SSgt JC's written statement was waived at trial. On the record during the motions hearing, Appellant's trial defense counsel conceded Capt AS and Capt JP had not materially altered SSgt JC's statement. (JA at 419.) Appellant's trial defense counsel asked only that the military judge consider "the communication that was exchanged between [Capt AS] and [Capt JP] to the extent that [Capt AS] [was] essentially treating [Capt JP] as an extension of the prosecution's office." (Id.) This expressed withdrawal constitutes an intentional abandonment of the claim that Capt AS and Capt JP unlawfully influenced SSgt JC's statement. *See* United States v. Campos, 67 M.J. 330 (C.A.A.F. 2009) (finding waiver where counsel had an opportunity to object and affirmatively stated that he had no objection); *see also* United States v. Rodriguez, 311 F.3d 434, 437 (1st Cir. 2002) (finding waiver where counsel identified an issue by objecting to it at trial and then deliberately withdrew the objection); United States v. Cook, 406 F. 3d, 485, 487 (7th Cir. 2005) ("a waiver is a deliberate decision not to present a ground for relief that might be available in the law."). Because Appellant

waived this issue at trial, this Court should not consider whether Capt AS and Capt JP improperly influenced SSgt JC's written statement. *See* Campos, 67 M.J. at 332 ("[W]e cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal.").

Assuming this Court decides to entertain this issue, this Court should find that the actions of Capt AS and Capt JP to obtain a written statement from SSgt JC did not constitute unlawful influence. (Id.) There was no evidence that Capt AS directed Capt JP to pressure his client to provide false or exaggerated evidence. In fact, Capt AS did not equip Capt JP with anything beyond what was already accessible to him in his Manual for Courts-Martial. There is no evidence that Capt JP directed his client to embellish or provide untrue additional facts. To illustrate this point, Capt JP suggested only two edits to his client's statement -- that she tame her statement by taking out "without a hint of concern or apology," and that she "do her best" to "detail the situation" "if [she] actually felt the penetration of his penis." (JA at 215.) Neither of these edits suggests Capt JP was seeking to improperly modify SSgt JC's statement or to have her include facts that were not true. Thus, Appellant's suggestion that Capt JP and Capt AS worked in tandem to improperly shape SSgt JC's statement is simply unfounded.

Despite Appellant's best efforts to paint the actions of Capt JP and Capt AS as a plot to undermine Appellant's defense and improperly shape the evidence, the record simply does not support it. A disinterested member of the public looking at

the facts of this case would not believe that Capt JP and Capt AS worked in tandem to shape SSgt JC's statement in order to gain some advantage at trial and would not perceive any unfairness to Appellant.

D. This case is distinguishable from Lewis, Barry, and Salyer.

Appellant argues the only appropriate remedy is to dismiss his charge with prejudice. (App. Br. at 45.) Appellant supports this proposition by likening this case to Lewis, Barry, and Salyer, in which this Court found the only appropriate remedy to be dismissing their respective charges with prejudice. (App. Br. at 42-45.) Appellant suggests that because the actors involved in this case were judge advocates as in Lewis, Barry, and Salyer, the only remedy must be dismissal with prejudice. (App. Br. at 42-45.) But this obfuscates the holdings in Lewis, Barry, and Salyer.

Unlike this case, in both Lewis and Salyer, the actions of the judge advocates to remove a sitting military judge were of such a nature that they could not be cured simply by replacing the military judge. Lewis, 63 M.J. at 416-17; Salyer, 72 M.J. at 428. Those actors permanently impacted the proceedings by improperly effecting the removal of military judges they believed would disadvantage their position at trial. Id. Therefore, any taint of unfairness in the proceedings was irreparable. In Barry, the position of the Deputy Judge Advocate General was so influential that the pressure exerted upon the convening authority was of such a nature to bleed upon any replacement convening authorities. Barry,

78 M.J. at 79. Here, Capt AS and Capt JP were not influential. They had no actual or apparent authority over the AFOSI agent's actions. Both SA DM and SA LJ testified they did not view any advice from Capt AS or Capt JP as binding and the actions of Capt AS and Capt JP were not ultimately consequential because Appellant lost nothing by the delayed interview of TSgt BC. Any perceived effort to keep TSgt BC from participating as a witness was remedied by his availability for defense's pretrial interview and his production as a witness in the motions hearing.

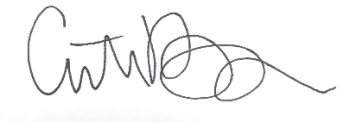
As this case is vastly different from Salyer, Barry, and Lewis, the drastic remedy of dismissal of the charge with prejudice would not be appropriate given the lack of prejudice to Appellant and the other ameliorative measures taken to ensure the public's confidence in the court-martial process.

CONCLUSION

This Court should find that any alleged unlawful influence in this case did not create an intolerable strain upon the public's perception of the military justice system. Appellant's court-martial was not impacted in any way by the actions of Capt AS and Capt JP. The military judge found as fact that an earlier interview of TSgt BC would not have developed additional or contrary evidence to what TSgt BC provided to the defense in May 2018, and Appellant has not explained how that finding was clearly erroneous. TSgt BC was made available to the defense for pretrial interviews, motion's hearings, and trial. Any and all evidence

TSgt BC could provide was provided to the defense long before Appellant's trial. Additionally, ameliorative steps were taken to remove any taint of the appearance of unlawful influence. This included the immediate removal of Capt AS and Capt JP from the process, an extensive and thorough motions hearing to examine any alleged unlawful influence, and the remedies fashioned by the military judge. In light of there being no impact upon Appellant's court-martial and the actions of Capt AS and JP being fully exposed before trial, a reasonable member of the public would not doubt the fairness of the proceedings. Thus, no intolerable strain was placed upon the public's perception of the military justice system.

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of Air Force Court of Criminal Appeals.



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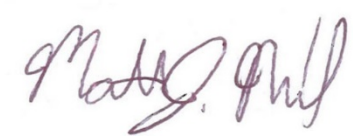

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 24 January 2022.

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/s/

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Date: 24 January 2022