IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Nhubu C. Chikaka Staff Sergeant (E-6) United States Marine Corps, Appellant	REPLY ON BEHALF OF APPELLANT Crim. App. Dkt. No. 201400251 USCA Dkt. No. 16-0586/MC

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

Doug Ottenwess
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7390
Fax (202) 685-7426
douglas.ottenwess@navy.mil
Bar no. 36657

Index of Brief

TABLE OF AUTHORITIES

Argument

WHERE THE MILITARY JUDGE ADMITTED ON THE MERITS A CAMPAIGN PLAN TO "FULLY OPERATIONALIZE THE COMMANDANT'S GUIDANCE" FROM THE HERITAGE TOUR, AND THEN DURING SENTENCING ADMITTED A PICTURE OF THE COMMANDANT AND ALLOWED APPELLANT'S COMMANDING OFFICER TO TESTIFY THAT IT WAS IMPORTANT FOR THE MEMBERS TO ADJUDGE A HARSH SENTENCE, DID THE LOWER COURT ERR IN FAILING TO FIND EVIDENCE OF UNLAWFUL COMMAND INFLUENCE SUFFICIENT TO SHIFT THE BURDEN TO THE GOVERNMENT TO DISPROVE UNLAWFUL COMMAND INFLUENCE IN THIS CASE?

A. The Government's focus on the MRE 403 balancing test is misguided. This Court should instead focus on actual or apparent unlawful command influence.

The Government asks this Court to defer to the lower court's evidentiary rulings regarding Col Bowers' testimony, Maj MacCutcheon's testimony, and the admission of the Commandant's photograph.[1] It cites the "law of the case" doctrine in which a reviewing court will not review a lower court's ruling unless it is clearly erroneous.[2] The Government's argument continues to focus on MRE 403 factors instead of UCI factors. It argues:

> "Trial Counsel offered **relevant** evidence on the merits and in sentencing, the Military Judge ruled on Appellant's objections to that **relevant** evidence, and Appellant had the opportunity to challenge

[1] Appellee's Brief at 20.
[2] *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

> those rulings on appeal. Appellant offers no evidence that Trial Counsel's presentation of **relevant** evidence, or the Military Judge's review of it, was an attempt to coerce, by any unauthorized means the court-martial."[3]

The Government's arguments mix two tests that operate in parallel tracks to each other.

Whether or not evidence is relevant is wholly irrelevant to an appropriate analysis of UCI. Evidence can be relevant and still tainted by UCI. An MRE 403 balancing test, even if done correctly, may fail to weigh, or even acknowledge the presence of UCI. The Government is correct in that SSgt Chikaka has not challenged the evidentiary ruling of the lower court based on MRE 403 grounds, nor is SSgt Chikaka asking this Court to make a relevance determination as to the evidence in question. Rather, the appropriate analysis is the three-pronged UCI analysis articulated by this Court in *Dugan*[4] and *Stombaugh*.[5]

B. The lower court's sentence reassessment does not cure, or even address, the unlawful command influence.

The Government argues that SSgt Chikaka suffered no prejudice because the lower court reduced his sentence due to improper sentencing testimony from Maj

[3] Appellee's Brief at 22 (emphasis added) (internal citation and quotation marks omitted).
[4] *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003).
[5] *United States v. Stombaugh*, 40 M.J. 208, 213 (C.A.A.F. 1994).

MacCutcheon.[6] This is an incomplete analysis of the lower court's decision and does not address the issues before this Court.

This Court cannot be sure what portion of the sentence was changed due to Maj MacCutcheon's testimony for at least two reasons. First, the lower court consolidated three specifications of obstruction of justice.[7] Some of the reduced sentence may have been due to this. Second, of the myriad UCI issues before this Court, the lower court only addressed a portion of Maj MacCutcheon's testimony. In finding error, however, the lower court only addressed this testimony from an R.C.M. 1001 and MRE 403 analysis. The lower court did not conduct a UCI analysis for Maj MacCutcheon's testimony, nor did it conduct a UCI analysis for Col Bowers' testimony or the photograph of Gen Amos. Between this uncertainty and the lack of meaningful UCI analysis on the additional improper evidence, this Court owes no deference to the lower court that the findings and sentence in this case were unaffected by UCI.

C. The Government mischaracterizes the prejudicial impact of the wrongly admitted evidence and testimony.

The Government argued that there was no prejudicial impact from the testimony and evidence presented, whether or not it was rightly or wrongly admitted. In support of this flawed argument, it states why each of Col Bowers'

[6] Appellee's Brief at 9, 29.
[7] *United States v. Chikaka*, No. 201400251, 2016 CCA LEXIS 223 (N-M. Ct. Crim. App. Apr. 12, 2016).

testimony, Maj MacCutcheon's testimony, and the photograph all had no impact on the results of SSgt Chikaka's case. None of these arguments, however, withstand scrutiny.

First, the Government avers "[a]ppellant cites no case in support of his proposition that Major MacCutcheon's presentencing testimony . . . was improper, let alone 'some evidence' of unlawful command influence."[8] This directly contradicts the lower court's decision that found Maj MacCutcheon's presentencing testimony violates both RCM 1001 and MRE 403 and that the admission of this testimony prejudiced SSgt Chikaka.[9]

Regarding the photograph of Gen Amos, the Government contends that the photograph was "of limited weight" and "had no effect on the findings or sentence."[10] SSgt Chikaka's court-martial had members for both findings and sentencing. It is unclear how the Government can assert with such certainty that items that were considered entirely in the privacy of the deliberation room had no impact on the findings and sentence.

---

[8] Appellee's Brief at 26.

[9] *Chikaka*, 2016 CCA LEXIS 223 at *37-38 (relying on *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986); *United States v. Pearson*, 17 M.J. 149, 153 (C.M.A. 1984); *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005); *United States v. Cherry*, 31 M.J. 1, 5 (C.M.A. 1990); *United States v. Gordon*, 31 M.J. 30 (C.M.A. 1990); *United States v. Sanford*, 29 M.J. 413, 415 (C.M.A. 1990); *United States v. Reyes*, 63 M.J. 265, 267 (C.A.A.F. 2006)).

[10] Appellee's Brief at 28.

Moreover, the evidence does not support the Government's proposed theory of relevance—that the Commandant's photograph impacted one of the putative victim's decision to join the Marine Corps. The putative victim began her Marine Corps enlistment processing on June 6, 2012.[11] The photograph of her great-grandfather with Gen Amos was not until late June, possibly July of 2012.[12] The photograph is not probative of the witness' motivations for joining the Marine Corps. The photograph is nothing more than an attempt to put Gen Amos in front of the members for their deliberations, reminding them of his views that he delivered in the Heritage speech.

As to Col Bowers' testimony, the Government again incorrectly states that there is no support for the "proposition that Col Bowers' testimony regarding the prejudicial nature of Appellant's conduct was improper[.]"[13] Again, the lower court flatly contradicts this argument, when in regards to the campaign plan it found: "while the plan was perhaps minimally relevant . . . any such probative value was dwarfed by the risk of unfair prejudice."[14] The Government assumes that a military judge's instruction to "impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in

[11] R. at 455.
[12] R. at 858.
[13] Appellee's Brief at 25.
[14] *Chikaka*, 2016 CCA LEXIS 223, at *26.

court, and your own conscience" would be sufficient to cure UCI.[15] The Government fails to cite any case where generic findings instructions to members are sufficient to remove the taint of UCI. No limiting instruction is able to undo the damage of admitting Prosecution Exhibit 14 and the references it made to the White Letters and the Heritage Brief.

D. The cases the Government cites in their Answer support SSgt Chikaka.

In *Harvey*, this Court found "some evidence" of UCI when the convening authority sat in the gallery of the courtroom during the court-martial in his flight suit.[16] The Government avers that the facts of SSgt Chikaka's case do not rise to this level, and thus are not UCI. This is error.

The Government attempted to inject the Commandant into all aspects of the court-martial. From the introduction of his photograph to Prosecution Exhibit 14 and the campaign plan, the Commandant's presence permeated the court-martial. While Gen Amos did not personally sit in the gallery, the Government made sure his presence was felt at all stages, including via a photograph that had no bearing on victim impact. This was far more egregious than the convening authority passively sitting in the gallery as in *Harvey*; this was an effort to use the leader of the Marine Corps for tactical gain from the beginning to the end of the court-martial process.

---

[15] Appellee's Brief at 23.
[16] *United States v. Harvey*, 64 M.J. 13, 16, 21 (C.A.A.F. 2006).

In *Reed*, this Court analyzed the fairness of the proceedings in a UCI context when the convening authority sent an email to members indicating he was uncompromising about discipline in the leadership ranks and that BAH fraud would be handled more harshly than other crimes.[17] The Heritage Brief goes several steps beyond this email. First, the Commandant directed the Heritage Brief to every single staff NCO and officer in the Marine Corps. This includes every member of SSgt Chikaka's panel. In *Reed*, the convening authority's emails only stated cases were to be handled harshly, but didn't direct certain outcomes. Also, the email didn't demand any specific punishments, just a notice that BAH cases will be handled more harshly than other offenses.

Here, Gen Amos' speech not only encouraged the separation of individuals facing courts-martial or administrative boards, it also touched on the integrity of the findings portion of sexual assault courts-martial by vouching for the credibility of those who come forward to report sexual assaults.[18] The comments of the Heritage Brief, directly from the Commandant, touching on both findings and sentencing, arises to "some evidence" of UCI and the lower court erred when it dismissed SSgt Chikaka's claims of UCI.

---

[17] *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008).
[18] *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014).

E. The Government's refrain of SSgt Chikaka not asking for a *Dubay* hearing is irrelevant.

This Court should ignore the Government's repeated claims throughout their brief that SSgt Chikaka could have addressed this issue by requesting a *Dubay*[19] hearing. This is inaccurate. First, regardless of whether SSgt Chikaka requested a *Dubay* hearing for UCI related issues, the lower court did not find the "some evidence" threshold for UCI. This finding by the lower court, while inaccurate, forecloses any possibility of that court ordering a *Dubay* hearing, even if SSgt Chikaka had requested one.

Further, even if SSgt Chikaka requested a *Dubay* hearing, and the lower court found the "some evidence" threshold for UCI was established, MRE 606(b) would make a *Dubay* hearing impractical for the fact-finding sought in this case. As discussed in SSgt Chikaka's initial brief with this Court, any fact-finding inquiry could only look into discussions the members had regarding the Heritage Brief, the photograph, or the testimony of Col Bowers and Maj MacCutcheon. The *Dubay* judge could not inquire into what impact these elements may have had on the members' "minds, emotions, or mental processes."[20]

The Government caps off this misguided argument by stating that the public would see "bald opportunism—not unlawful command influence" if he received

---

[19] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).
[20] Mil. R. Evid. 606(b).

his desired relief.[21] The Government cites the lengthy period SSgt Chikaka waited between the NMCCA's decision in *Howell* and raising the UCI issue to the NMCCA as some sort of tactical decision. The Government essentially argues that SSgt Chikaka spending time in Fort Leavenworth is a tactical decision that will hopefully result in some sort of windfall and not as a result of punishment imposed by the United States Government. This argument is completely without a legal or factual basis. Staff Sergeant Chikaka does not ask this Court for some unjustified benefit or "complete relief," as the Government argues.[22] Rather, he asks for this Court to set aside his convictions and, should the United States choose, try this case again without the unlawful influence that so permeated his first court-martial.

Conclusion

The Government attempted to inject the Commandant of the Marine Corps into the entirety of the court-martial. Through the testimony of Col Bowers and Operation Restore Vigilance, to the testimony of Maj MacCutcheon, to the wrongly admitted photograph of Gen Amos and a complaining witness' great-grandfather, the strategy was clear: put the face of the Marine Corps and the Heritage Brief directly in front of the members. While the lower court ignored these facts in reaching its decision, the evidence in this case surpasses the "some

[21] Appellee's Brief at 29.
[22] *Id.*

evidence" threshold required to shift the burden to the United States to prove that UCI did not impact the trial process.

Due to the limits imposed on any post-trial fact-finding hearing in this case due to MRE 606(b), SSgt Chikaka asks this Honorable Court to set aside the findings and sentence and authorize a retrial.

Doug Ottenwess
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE Suite 100
Washington, D.C. 20374-5124
(202) 685-7390
Bar No. 36657

Certificate of Filing and Service

I certify that the foregoing was delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on February 21, 2017.

Certificate of Compliance

This brief complies with the page limitations of Rule 21(b) because it contains fewer than 7,000 words. Using Microsoft Word version 2010 with 14-point Times-New-Roman font, this brief contains 2,340 words.

Doug Ottenwess
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE Suite 100
Washington, D.C. 20374-5124
(202) 685-7390
Bar No. 36657