IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Private (E-1) TYLER WASHINGTON, United States Army, *Appellant*.	REPLY BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 19-0252/AR Crim. App. Dkt. No. 20170329

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

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY PERMITTING THE UNIT'S SHARP REPRESENTATIVE TO TESTIFY THAT "WHEN A PERSON SAYS 'NO' IT MEANS STOP, WALK AWAY."

STATEMENT OF THE CASE

On May 20, 2019 appellant, Private (PVT) Washington, petitioned this Court for a grant of review. On September 16, this Court granted that petition. (JA 1). Appellant filed his brief on October 23 and the Government responded on November 22. Appellant's reply follows.

SUMMARY OF THE ARGUMENT

The government brief ultimately makes the same mistake that the military judge did at trial—it fails to recognize that even when "no" means "no," the more complicated question is "as to what?" (Gov't Br. 14) (Private Washington "attempted to feign ignorance of the notion that 'no' might actually mean 'no.'") The harm lies in the fact that the Sexual Harassment and Assault Response Prevention ("SHARP") testimony—voiced directly from the command's representative—answered this more nuanced question for the members. According to the command and prosecution, when Private First Class (PFC) AF, or anyone for that matter, said "stop" or "no," it meant stop *everything* and no to *anything*, *i.e.*, "walk away." (JA 149). By allowing the prosecution to introduce this evidence, the military judge permitted the Army to deny the possibility that PVT Washington had a reasonable mistake of fact and turned his trial into a referendum on whether PFC AF said the word "stop" in any context. If she did, anything other than *walking away* was unreasonable and PVT Washington was guilty. While this alone was error, cloaking it in the mantle of command authority, makes it harmful by any standard.

More specifically, four issues warrant specific response. First, the complexity of the testimony makes a neat summation of the facts difficult and several aspects of the government brief warrant further explication in order to give

this Court the factual context necessary to resolve this case. Second, neither the military judge nor the prosecutor maintained at trial that the SHARP testimony was relevant to subjective reasonableness and, even if they had, they would have been wrong. Similarly, the government brief fails to explain why testimony introducing a policy opinion that is not the actual legal standard is relevant to objective reasonableness. Third, nothing in the government brief supports its assertion that other aspects of the trial ameliorated the confusion wrought by the admission of SHARP testimony; to the contrary, the instructions and voir dire questions cited by the government increased the likelihood of confusion. Finally, the government brief misunderstands this Court's Unlawful Command Influence (UCI) jurisprudence and suggests novel distinctions unsupported by the law.

FACTUAL CLARIFICATIONS

1. Issues with PFC AF's Testimony

As an initial matter, several factual issues warrant clarification in order to adequately reflect the circumstances surrounding the night in question. The government brief correctly observes that PFC AF testified that she said "stop" or "I'm uncomfortable with this" three times. (JA 67). It glosses over, however, the fact this was indisputably contextualized by her initial statement that she would be "loud" or "noisy" if PVT Washington performed oral sex on her. (JA 95–97) (Appellant's Br. 5) (Gov't Br. 3). Moreover, confusion whether PFC AF said

"stop" *and* "I'm uncomfortable with this," or whether she was using these terms interchangeably, was exacerbated by her seeming conflation of the two. At times, PFC AF was asked about a time when she said "stop" and testified specifically that she said "I wasn't comfortable with that." (JA 67). At other times, the prosecution collapsed these into one phrase, "Stop. I'm uncomfortable with that" and she affirmed this. (JA 68). And during cross examination, PFC AF initially told defense counsel she said "I was uncomfortable with that" when asked about her "loud" or "noisy" remarks, but later admitted that she told PVT Washington she would be "loud" or "noisy" on two occasions. (JA 95, 97). The one consistency here is that all of these statements were preceded by her expressed concerns about being "loud" or "noisy."

PFC AF's testimony was made even more ambiguous when she admitted that PVT Washington placed his hand over her mouth after she said she was "uncomfortable," but specifically testified that although she continued to say "stop," PVT Washington would not have been able to hear her. (JA 96–98). While the government brief emphasizes that PFC AF "wiggled her body to try and get away from him," (Gov't Br. 3–4), it fails to mention that PFC AF admitted that after PVT Washington responded to her concerns about being loud by placing his hand over her mouth, she never actually tried to remove his hand. (JA 97).

2. Issues with SPC Thomson's Testimony

The government brief also relies on Specialist (SPC) Thomson's testimony as "corroboration" of PFC AF's recounting of events. (Gov't Br. 4–5, 8, 20). Setting aside, for the moment, that SPC Thomson admitted literally "carrying" PFC AF back to the bed with PVT Washington and turning off the lights in the moments leading up to the incident, (JA 89, 134–35), there are other reasons to question the weight of SPC Thompson's testimony.

The government brief focuses on SPC Thompson's testimony that PVT Washington opened the door and said, "Shit went down, stuff definitely happened, but nothing bad" and that he said this "repeatedly" after answering the door. (JA 117–18) (Gov't Br. at 4). This recollection, however, was directly contradicted by PFC AF who said that when SPC Thomson came to door to ask if everything was alright, she remembered that PVT Washington "said it was fine." (JA 71–72). Similarly, SPC Thomson was the only witness who ever described PVT Washington as "nervous" after the incident and although PFC AF did not directly contradict this statement, neither did she confirm it. According to PFC AF, in the wake of the "incident" PVT Washington simply answered a phone call and then the three drove back to his barracks. (JA 72).

The government brief also states that SPC Thomson came into the room to find PFC AF crying. (Gov't Br. 4). In fact, after SPC Thomson came into the

room, PFC AF behaved as though everything was "fine" and asked if the two wanted to "take a roadtrip" to drop PVT Washington off at his barracks. (JA 108–09). While PFC AF did end up crying, this was not until after they had dropped PVT Washington off. (JA 124).

Finally, SPC Thomson testified that when he knocked on the door PVT Washington said, "Shut up. Stop talking." (Gov't Br. 4). When confronted with his original sworn statement, however, he was forced to admit that he had told law enforcement that he heard *someone* say, "Shush, don't say anything" and could not identify PVT Washington as the speaker. (JA 519–520). Accordingly, the government brief's reliance on SPC Thomson to attempt to cure what would otherwise be prejudicial error is dubious at best.

ARGUMENT

1. An Inaccurate Statement of the Law Should Not, and Does Not, Go to Subjective Honesty or Objective Reasonableness

The government brief posits that because PVT Washington's defense availed itself of an instruction on mistake of fact as to consent, "it was proper for the military judge to admit testimony that appellant received training specific to consent … and what to do when someone says 'no'…." (Gov't Br. 12). The problem left unaddressed by the government brief is *what* the SHARP

representative told members the Army expected Soldiers to do under these circumstances, *i.e.*, walk away.

a. Neither the military judge, nor the prosecution, considered or asserted this evidence as relevant to PVT Washington's subjective, *i.e.*, actual belief.

As an initial matter, the government brief asserts that both the military judge and prosecution agreed that the SHARP testimony went to both "subjective and objective components of the mistake of fact instruction…." (Gov't Br. 11). The record, however, reflects that the military judge's reference to a "subjective" component was rooted, not in PVT Washington's actual (honest) belief, but rather in the aspect of objective reasonableness that takes into account "the accused's age, education, [and] experience." (JA 141, 144). The prosecution shared the military judge's belief that the SHARP training was meant to go solely to the objective reasonableness of PVT Washington's belief. During argument, the prosecution asserted six times that the SHARP testimony went to objective reasonableness. (JA 139–40). Not once did the prosecutor argue it informed PVT Washington's actual honest belief.[1] To the contrary, the prosecutor seems to admit PVT

[1] On appeal, appellate counsel are stuck with the arguments submitted and may not advance new theories not raised to the military judge. *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018). And while the prosecution's motion originally identified this evidence as potentially relevant to PVT Washington's subjective belief, the issue was—as argued by the government—not ripe for resolution. (JA 17–18). What is sauce for the goose ought to be sauce for the gander.

Washington "may have had that belief" that PFC AF did not fully revoke consent. (JA 182) (Appellant's Br. 12, 17).

Nevertheless, even if the prosecution had asserted, or the military judge considered, this evidence as relevant to PVT Washington's honest belief, it was irrelevant. The testimony introduced a training standard that says nothing about the actual legal standard. The reality is, sometimes "stop" or "no" means to fully disengage from all intimate acts; other times, it means someone does not want to engage in one sexual activity, in a certain way, but may wish to continue others. The suggestion that this gross oversimplification would be relevant to PVT Washington's actual belief is no less fatuous than suggesting that a Soldier who is instructed that after one drink someone cannot consent *should know* subjectively that he commits sexual assault after sharing a bottle of wine with his partner.

Finally, the suggestion the Soldiers who sat in on this briefing would, or should, have taken it to heart is belied by the fact the training was so transparently used as punishment. As the SHARP representative candidly admitted, the training came only on the heels of the unit's having been "smoked for three hours" after a Soldier in the unit was arrested for driving under the influence. (JA 149–52). Whether or not the command intended the training as punishment is irrelevant. Any member of the troop, to include PVT Washington, would have quite reasonably *perceived* this SHARP training as yet more punishment when it came

on the heels of three hours of intense exercise at 8:00 am on a Sunday morning. (JA 151). If the command wanted to impart the importance of this training and mold its Soldiers' subjective understanding of intimate relations, it could hardly have chosen a less appropriate time. When combined with the fact that just "*one slide was on consent*," any suggestion this was relevant to PVT Washington's actual belief—shaped by nearly twenty years of life experience as opposed to a single slide—is simply wrong.[2] (JA 153) (emphasis added).

b. The SHARP testimony was similarly irrelevant to the objective reasonableness of PVT Washington's belief.

The government brief asserts that the training was "directly correlated to the objective component of appellant's education, training, and experience…." (Gov't Br. 12). Unfortunately, beyond this conclusory assertion, the brief declines to spell out why an inaccurate statement of the legal standard should be allowed to inform the members' determination of PVT Washington's objective reasonableness.

The government's position would lead to absurd results. If the prosecution can introduce evidence of SHARP training to inform the objective reasonableness of Soldiers' actions—and this training instructs Soldiers that if someone says the words "no" or "stop" the only (reasonable) thing to do is desist from all intimate contact, in perpetuity—the Army can write out the mistake of fact defense anytime

[2] Private Washington was just 19 years old at the time of the offense.

that anyone says these words.[3] Nor can the government cabin this principle to this case.

For example, the Army could—as it has misguidedly done in the past—train Soldiers that one drink means someone cannot consent. (Appellant's Br. 25). Should the government's current position prevail, the prosecution could then call the SHARP representative to testify that this is what Soldiers are taught and, if there was any doubt as to whether an accused reasonably believed the putative victim could consent, this belief would similarly be unreasonable because even with knowledge of just one drink, Soldiers are instructed not to engage in sexual contact. While the military judge's specific instruction on the definition of capacity might serve to countermand this evidence at the outer-margins, the inevitable result would be that those close cases—cases in which reasonable doubt remains—are now resolved in favor of guilt.

Even more untenably, the government brief's position leads to the situation where two Soldiers, the same age, both of whom grew up together, went to

[3] The mistake of fact defense, and the ability of an accused to avail himself of it, has been critical to understanding Congress's intent in amending statutes dealing with sexual acts and contacts. *See United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019). If the Army, contrary to the President's duly promulgated rules, can effectively eliminate this defense by instructing Soldiers that this defense does not exist under some circumstances, it would upend this Court's jurisprudence; surely congressional intent is not contingent on the whims of the Army's SHARP program.

grammar school together, high school together, attended basic training together, and were otherwise similarly situated would, if assigned to different infantry divisions, be held to different standards based on the vagaries and whims of the SHARP training at their units.

2. The Government Brief is Unpersuasive as to Prejudicial Effect of the SHARP Representative's Testimony

Even *if* the SHARP representative's testimony was marginally probative, the government brief is unpersuasive in its argument that any probative value was not substantially outweighed by its prejudicial effect. Its sole argument is that the evidence was not likely to confuse the members in light of the pattern instructions from the military judge "not to regard SHARP as the legal standard...." (Gov't Br. 13–14). Setting aside, for the moment, the fact the military judge never said as much, this Court need only look to the government brief's citations to the joint appendix to understand why this argument fails.

Before voir dire, the military judge instructed the members: "You are required to follow my instructions on the law and may not consult any other source of law pertaining to this case unless it is admitted into evidence." (JA 19). By permitting this testimony into evidence, this instruction exacerbated the error by seemingly allowing an exception for the SHARP instruction because it was "admitted into evidence." Private Washington's brief similarly noted that the

military judge's instructions preceding deliberation on findings also exacerbated this error by confusing members and "allow[ing] SHARP training to dictate reasonableness." (JA 159) (Appellant's Br. 29). Rather than respond on the merits, the government claims "[a]ppellant's complaint" was waived "*in toto*." (Gov't Br. 18). Private Washington, however, raised this not as error itself, but as evidence of the prejudice in both the Mil. R. Evid. 403 context and to the overall result of his trial. Beyond waiver, the government brief makes no response, and waiver simply does not apply here. Accordingly, the panel was left with instructions bookending the proceedings that made it more likely members would improperly use SHARP training to shape the reasonableness of PVT Washington's actions because the military judge, herself, permitted it to be introduced into evidence.

The remainder of the government brief's citations involve voir dire questions or the argument, in the absence of the members, over the admissibility of the SHARP representative's testimony. (JA 31, 36–37, 40–45, 136–144). These voir dire questions do nothing to ameliorate the likelihood that the members would improperly use the SHARP testimony. Most do not directly discuss SHARP at all. (JA 36–37, 40–45). And the lone one that does—the prosecution's voir dire question ensuring SHARP would not "interfere" with the members' application of the law—only confused matters when the military judge nevertheless allowed the

prosecution to call a SHARP representative to testify as to what SHARP training teaches our Soldiers. (JA 31). In light of the military judge's instructions not to "consult any other source of law…*unless it is admitted into evidence*[,]" the government cannot claim that the command's SHARP program did not infect deliberations. (JA 19) (emphasis added).

3. The Government Brief Misunderstands this Court's UCI Jurisprudence.

The government brief's attempts to distinguish this from other UCI cases is unavailing. As a preliminary matter, to the extent the government brief suggests a proper claim of UCI is not raised because "mere mention of a command policy is insufficient to raise the issue," this case goes well beyond "mere mention." (Gov't Br. 14). In fact, it also goes well beyond prior precedent where this Court found UCI on the basis of command policies, *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983), because here, the policy was not only referenced by the prosecution, it was introduced into evidence, over defense counsel's objection, in the form of testimony from the command's representative.[4] The introduction of an executive branch policy opinion in a form that confuses the legal standard

[4] While the government brief is technically correct that *Grady* involved a prosecutor who "repeatedly" referenced Air Force policy, to it was twice during the trial and only at sentencing. 15 M.J. at 275–76. Moreover, in *Grady* the defense counsel was the first party to reference the Air Force policy at issue. *Id*. at 275.

established by Congress for a particular crime is an important and egregious species of unlawful command influence that this Court should not allow.

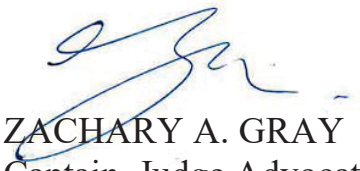
To the extent defense counsel did not specifically invoke UCI at trial, this is irrelevant. *See United States v. Baldwin*, 54 M.J. 308, 310–11 (C.A.A.F. 2001) (rejecting the government's similar assertion that "'appellant never raised the issue at trial' nor made any 'effort to bring this allegation to the military judge's attention and conduct some minimal *voir dire* before findings and sentence deliberations.'") Notably, the government brief stops short of saying the issue is waived, because this Court has plainly held otherwise. *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994) ("Unlawful command influence at the referral, trial, or review stage is not waived by failure to raise the issue at trial."); *United States v. Kirkpatrick*, 33 M.J. 132, 134 (C.M.A. 1991) (this Court "considered this matter critical to the integrity of the military justice system…[and] a finding of waiver of such an obvious and substantial error is likewise inappropriate.")

The government brief's further attempts to draw a distinction between constitutional UCI claims and "non-constitutional error claims of improper references to command policy." (Gov't Br. 15). This distinction is not supported. This Court has made clear that both actual UCI and apparent UCI are to be tested for harmlessness beyond a reasonable doubt. *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). And while this Court's line of command-policy based UCI

cases were somewhat unclear on the prejudice test they used in light of the fact they were applying plain-error analysis, this Court has since made clear that the constitutional prejudice test is appropriate. *United States v. Tovarchavez*, 78 M.J. 458 (C.A.A.F. 2019).

Conclusion

WHEREFORE, Private Washington respectfully requests this Honorable Court set aside the Charge and Specification, and the sentence in this case.



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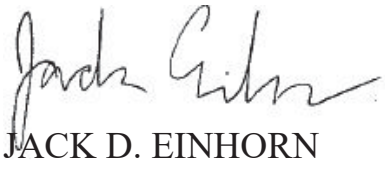

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Washington,* Army Dkt. No. 20170329, USCA Dkt. No. 19-0252/AR, was electronically filed brief with the Court and Government Appellate Division on December 5, 2019.

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