IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ERIC R. PROCTOR,
Technical Sergeant (E-6), USAF
Appellant.

Crim. App. No. S32554

USCA Dkt. No. 20-0340/AF

BRIEF ON BEHALF OF APPELLANT

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AT AN ALL-CALL PRIOR TO APPELLANT'S COURT-MARTIAL, APPELLANT'S SQUADRON COMMANDER SOUGHT TO ADDRESS HIS "NCO PROBLEM" BY HIGHLIGHTING THE NEGATIVE CAREER IMPACTS SOMEONE COULD SUFFER IF THEY PROVIDED A CHARACTER LETTER FOR AN ACCUSED AIRMAN. DID THE AIR FORCE COURT ERR WHEN IT FOUND, BEYOND A REASONABLE DOUBT, THAT THIS UNLAWFUL COMMAND INFLUENCE DID NOT PLACE AN INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM?

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

Technical Sergeant (TSgt) Eric R. Proctor (hereinafter Appellant) was tried by a special court-martial composed of officer and enlisted

[1] All references in this brief to the Uniform Code of Military Justice and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2016 ed.), unless otherwise noted.

members from November 14-16, 2017, May 21-22, 2018, and August 20-24, 2018, at Schriever Air Force Base (AFB), Colorado. Joint Appendix ("JA") at 40-41, 467. Contrary to his pleas, the panel convicted Appellant of one charge and six specifications of willfully disobeying a lawful command from his squadron commander, in violation of Article 90, UCMJ, 10 U.S.C. § 890; one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one charge and one specification of wrongfully communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934. JA at 462-464.[2]

The court-martial sentenced Appellant to a bad-conduct discharge, hard labor without confinement for three months, and reduction to the grade of E-3. JA at 464. The convening authority approved the bad-conduct discharge and the reduction in grade, but disapproved the hard labor without confinement. JA at 465. On June 4, 2020, the Air Force Court affirmed the findings and sentence. JA at 1-2.

[2] Appellant was acquitted of one specification of aggravated assault and one specification of wrongfully communicating a threat. JA at 463.

STATEMENT OF FACTS

Lieutenant Colonel (Lt Col) M.S. was the commander of the 50th Security Forces Squadron (50 SFS) from June 28, 2016 to June 28, 2018 – the timeframe covered by the charges and additional charges brought against Appellant. JA at 30-36, 274. 50 SFS was comprised of approximately 200 military and civilian personnel, including Appellant and his then-girlfriend, Staff Sergeant (SSgt) C.M.[3] JA at 51, 112.

In February of 2017, Lt Col M.S. learned that flight sergeants from 50 SFS were called to the shared residence of Appellant and SSgt C.M. JA at 54. SSgt C.M. called the flight sergeants to the home to help calm Appellant down because Appellant was upset and crying. JA at 54-55. SSgt C.M. and Appellant had been in an altercation that resulted in a scratch mark on Appellant's face. JA at 55-56. As a result of this episode, Lt Col M.S. issued Appellant and SSgt C.M. respective no-contact orders. JA at 56. Lt Col M.S. later allowed these no-contact orders to expire because there were no other "incidents of violence" between the two. JA at 53. Thereafter, Lt Col M.S. learned of an

[3] SSgt C.M. is referred to as SSgt C.B. at times throughout the record. This filing will continue to use the initials C.M.

allegation that Appellant harmed SSgt C.M.'s dog, so he issued Appellant the second of what would come to be many no-contact orders involving SSgt C.M. JA at 58. Lt Col M.S. concluded that SSgt C.M. was "obviously . . . a victim of domestic violence" and was in a "cycle of violence" – a determination he reached based of his own "life experience." JA at 61.

Lt Col M.S. decided to meet privately with SSgt C.M. and share a personal story about how, as a young child, he and his sister had to pick up their mother "from behind a dumpster at 7-Eleven after [his] step-dad busted her in the mouth, and he'd hit her many times." JA at 61, 280. After sharing this story with SSgt C.M., Lt Col M.S. told her "men that hit women typically will not change." JA at 61. Despite his personal plea to SSgt C.M., Lt Col M.S. observed that neither SSgt C.M. nor Appellant appeared to be cooperating with civilian law enforcement. JA at 62.

Lt Col M.S. also learned that both SSgt C.M. and Appellant were violating his no-contact orders. JA at 74. Consequently, on or about May 10, 2017, Lt Col M.S. offered them both nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815. JA at 74, 358. Neither

individual accepted the forum. JA at 74. Less than two weeks later, on May 22, 2017, Lt Col M.S. ordered Appellant into pretrial confinement based upon one of Appellant's Facebook posts that Lt Col M.S. considered to be of a threatening nature. JA at 42, 73. In June of 2017, Lt Col M.S. preferred charges against both SSgt C.M. and Appellant. JA at 74. SSgt C.M.'s case was referred to a summary court-martial while Appellant's case was referred to a special court-martial. JA at 27, 75.

SSgt C.M.'s Acquittal

SSgt C.M.'s court-martial took place first and occurred on June 28, 2017, while Appellant was still in pretrial confinement. JA at 75, 360-361. SSgt C.M. was acquitted, to Lt Col M.S.'s great dissatisfaction.[4] JA at 76-77. This result left him with the belief that "justice wasn't served" and SSgt C.M. had "beat the system." JA at 77,

[4] The specification SSgt C.M. was acquitted of alleged that she, "[h]aving received a lawful command from [Lt Col M.S.], her superior commissioned officer, then known by [her] to be her superior commissioned officer, to not have contact with [Appellant], or words to that effect, did within the state of Colorado, on divers occasions between on or about 24 March 2017 and on or about 22 May 2017, willfully disobey the same." JA at 360-361. This specification substantially mirrors Specification 1 of Charge I that Appellant was convicted of at his court-martial. JA at 462.

81. In his opinion, the "acquittal negatively impacted members of [his] unit . . . ." JA at 77. Lt Col M.S. believed SSgt C.M. "got on the stand and lied to the summary court officer" and that this officer "took her side over people who were telling the truth on the stand." JA at 81.

Not only was Lt Col M.S. "upset over the outcome" because he "want[ed] [SSgt C.M.] to be found guilty for her violations[,]" he also voiced his displeasure with the verdict to a number of individuals, both inside and outside of the unit. JA at 78, 130. Lt Col M.S. made these comments to the squadron's senior team, including Senior Master Sergeant (SMSgt) B.K. as well as the First Sergeant and at least two other senior noncommissioned officers (NCOs) within the squadron. JA at 130-131. Lt Col M.S. even told SSgt C.M. that he believed she had "beat the system."[5] JA at 79, 278. Lt Col M.S. was aware his displeasure was palpable, that "people probably saw a difference in [him]," and that they "could extrapolate that [he] was probably upset with the outcome." JA at 131.

[5] This comment, along with how Lt Col M.S. "had spoken very negatively about the whole court case . . . and . . . felt like [SSgt C.M.] was protecting [Appellant]," prompted SSgt C.M. to file a complaint against Lt Col M.S. with the Inspector General's office. JA at 278.

After SSgt C.M. was acquitted, and on his own volition, Lt Col M.S. arranged to meet with TSgt C.A. – one of the witnesses who had testified against SSgt C.M. at her court-martial. JA at 81, 183. Lt Col M.S. attempted to console TSgt C.A. by likening the acquittal to what their civilian law enforcement brethren routinely encounter. JA at 81-82. He told her: "[t]hey go through this every single day where people who should be held accountable are not held accountable or they are not held accountable to the level they should be." JA at 82.

Approximately one month later, on August 1, 2017, the commander of the 50th Space Wing withdrew and dismissed without prejudice Appellant's June 7, 2017 charges, and Appellant was released from pretrial confinement. JA at 27, 82, 96. The decision to withdraw charges was based on witness availability and additional matters discovered during law enforcement's investigation. JA at 85. Lt Col M.S. still intended to pursue charges against Appellant in the military at the time charges were withdrawn. JA at 122.

SSgt J.P.'s Removal from Duty and Letter of Reprimand

On the day that Appellant's charges were withdrawn and he was released from pretrial confinement, SSgt J.P., one of Appellant's

friends and a fellow member of 50 SFS, was heard telling TSgt C.A. that his "homeboy was free and all his charges were dismissed . . . ." JA at 44, 93. Lt Col M.S. knew SSgt J.P. was "a smart guy" who was also "very close friends with Appellant" and "side[d] with" Appellant. JA at 93. Lt Col M.S. was concerned that SSgt J.P.'s comments would cause others in his unit to lose their "faith in the system." JA at 86.

Two or three days after SSgt J.P. made these comments, he was approached by his visibly upset supervisor, Master Sergeant (MSgt) J.T. JA at 221. MSgt J.T. told SSgt J.P. that Lt Col M.S. was "pissed" because of SSgt J.P.'s conversation with TSgt C.A. and his posts on social media. *Id.* SSgt J.P. asserted that the only thing he posted was "Damn, I miss [Appellant]" and expressed confusion as to what the commander was angry about. *Id.* MSgt J.T. informed SSgt J.P. that there would "be more coming down throughout the day." JA at 222.

Lt Col M.S. ultimately met with his squadron's senior enlisted leaders to question why SSgt J.P. was assigned to his present position. JA at 145. Although Lt Col M.S. never told them to specifically remove SSgt J.P. from his duty assignment, he asked "[w]hy is [SSgt J.P.] still training my junior airmen?" *Id.* On August 3, 2017, SSgt J.P. received

a Letter of Reprimand for telling fellow 50 SFS personnel, including TSgt C.A., that Appellant had been released from confinement and his charges had been dismissed. JA at 44. The Letter of Reprimand also alleged that SSgt J.P. "made several social media posts referencing [Appellant] and his release from confinement . . . ." *Id.* That same day, SSgt J.P. was told that he was to be removed from his training position. JA at 223. Lt Col M.S. approved of the decision to remove SSgt J.P. from his duty assignment. JA at 145-146.

The Commander's Call

On August 7, 2017 – 42 days after SSgt C.M. was acquitted and four days after SSgt J.P. received a Letter of Reprimand and was informed that he would be removed from his duty position – with full knowledge that "everybody" in his unit "talk[s]" (JA at 66) and that his security forces personnel "gossip" (JA at 296), Lt Col M.S. held a squadron commander's call. JA at 124. One of the topics Lt Col M.S. decided to discuss at this commander's call was NCO misbehavior. JA at 124-125. At the time, however, the only examples of "NCOs behaving badly" who were not involved in Appellant's case were an individual who had gotten in a motorcycle accident and failures in

physical fitness assessments. JA at 103. Lt Col M.S. also did not limit his audience to just NCOs; rather, he addressed his "whole unit, so [his] airmen heard [his] message."[6] *Id.*

Lt Col M.S. felt that he needed to address his unit on this matter at the commander's call because it "was suffering" due to a "series of events of NCOs behaving badly." JA at 105-106. He explained that it was "suffering" because:

> We already discussed the acquittal and then my unit sees, you know, the second half of this dynamic situation, and this toxic, violent relationship that these two had together, [Appellant] and [SSgt C.M.]. They see him get dismissed without prejudice. They have no idea what that means. All they know is he's not going to court. And then you have [SSgt J.P.] walking around telling everybody he's getting released. He's not going to court. And there were members, and I could feel it in my unit. When you are in command, you can feel it. You can feel your unit start to question and doubt what is going on. Why is leadership not taking care of things?

JA at 106.

Lt Col M.S. still planned on preferring renewed charges against Appellant. JA at 108. And while he did not mention anyone by name

[6] A subsequent question-and-answer session between the NCOs and several senior enlisted leaders occurred after Lt Col M.S. left the commander's call. JA at 103.

at the commander's call, it was "a situation where [he] felt like [he] had to talk about things without talking about them[.]" JA at 108-109. Lt Col M.S. purportedly wanted 50 SFS to support their fellow Airmen without enabling them. JA at 104. To him, enabling Airmen would mean: "[y]ou can't stand there and say, 'The Air Force is bad. The unit is bad. You're doing nothing wrong,' even when you know they are in a violent, physically violent relationship with their partner." *Id*.

At one point, Lt Col M.S. told the squadron a story about his time as a staff sergeant when he declined to provide a character letter for someone because of his duty to the Air Force and the negative consequences that could follow from "sticking your neck out there" for someone in trouble. JA at 108, 126. Lt Col M.S. described his response:

> [H]e is going through the process and he comes to my office, and he says, "Hey, can you give me a character statement?" . . . But I told him, I said, "Hey . . . I'm here to support you. You can come talk to me any time [but] I'm not putting my name on a piece of paper for you telling the commander that he should consider reducing the punishment and not take stripes from you. . . . Not only did you disobey the order of the mission commander, but I looked you in the eye and I told you to make sure you are back on time. . . . You embarrassed everybody. You violated the order. If I were you, I would go into the commander and I would . . . ask for forgiveness and maybe he'll go light on you, but I'm not

going to support you with a piece of paper."

JA at 107-108. Lt. Col. M.S. elaborated on his "duty to the Air Force" in that situation:

> And I did tell them that, "Why would [my commander] want to send me to [military police investigator] school if I am going to sign a letter saying, 'Hey, don't punish [him]. You know, don't take a stripe, even though he did this bad thing.' He's going to question my ability as an investigator. He's going to question my judgment."
>
> . . .
>
> I probably wouldn't have been his investigator . . . because back then even he understood the difference between, you know, taking care of our airmen back in 1997 or something like that, taking care of our airmen and then sticking your neck out there saying, "Well, he may have done something really, really bad, but not punishing him is more important than the Air Force as a whole, the good order and discipline in the unit."

JA at 108. Lt Col M.S. did not inform his squadron that character letters were a legally authorized and acceptable way to support someone as opposed to improperly enabling illegal conduct, nor did he mention that he himself had provided character letters for individuals in the past. JA at 127.

Reception of Lt Col M.S.'s Message

Shortly after the commander's call, SSgt M.J., a member of 50

SFS, scheduled a meeting with Lt Col M.S. JA at 109. SSgt M.J. previously provided a statement to law enforcement pertinent to Appellant's case wherein SSgt M.J. indicated that "he thought that the unit and the Air Force were after [Appellant] and he wasn't that bad." JA at 109-110. Lt Col M.S. was aware of this statement at the time of the commander's call because he had read it in the Air Force Office of Special Investigation's Report. JA at 110. In fact, when Lt Col M.S. read this statement, he made the following remark to at least one senior NCO: "Sergeant, what's going on with [SSgt M.J.]? I mean, he's one of my best NCOs. *In fact, just this morning I just signed a letter of recommendation for him to go be an FTAC guy*, and it kind of just shocked me that I read that."[7] JA at 111 (emphasis added). Lt Col M.S. knew that these sentiments "probably got back to" SSgt M.J. JA at 129-130.

Lt Col M.S. surmised that SSgt M.J. scheduled the meeting to say he understood the message of the commander's call and, despite being friends with Appellant, SSgt M.J. would "wash[ ] his hands from it or something along those lines." JA at 130. Lt Col M.S. interpreted SSgt

[7] The abbreviation "FTAC" stands for First Term Airman Center.

M.J. to be trying to convey, in so many words, "[h]ey, I'm a good NCO." *Id.* At one point during this meeting, Lt Col M.S. asked SSgt M.J. whether he understood "the violence that's going on" in Appellant and SSgt C.M.'s relationship. JA at 110. SSgt M.J. responded, "[y]es." *Id.* Lt Col M.S. later learned that SSgt M.J. was not returning trial defense counsel's calls, and Lt Col M.S. told SSgt M.J. in a separate conversation that it was acceptable to speak with Appellant's defense counsel. *Id.*

SrA R.E., another member of 50 SFS, understood the commander's message to be that "if [Lt Col M.S.] sees you supporting a fellow NCO that's in trouble, then it might put you in a negative light also, or you might be looked at as the problem, also." JA at 192, 200. Given that "everybody" knew Appellant and SSgt C.M. "were in some kind of trouble" and with the unit being relatively small, they were the first two NCOs who came to SrA R.E.'s mind during the commander's call. JA at 197. SrA R.E. believed the takeaway from the commander's message to be, "[i]f you're supporting an NCO that's in trouble, you might want to rethink your career." JA at 200.

SSgt A.G., despite being a named victim to a battery specification

in this case, also thought that Lt Col M.S.'s message "was pretty messed up." JA at 32, 203. He understood the commander's message to be specifically referencing "certain NCOs in the current situation," which made him think of Appellant. JA at 206. SSgt A.G.'s takeaway from the commander's call was if you supported Airmen like Appellant, the commander would view this as a reflection upon your own career. JA at 209.

SSgt J.P., whose removal from duty and Letter of Reprimand were less than a week old at the time of the commander's call, understood Lt Col M.S. to be saying, "[i]f you are an NCO and you are supporting an NCO that is doing negative things . . . then you should really reconsider your career choice as a Security Forces airman." JA at 225. He also recognized Lt Col M.S.'s message to be "directly referencing [Appellant] and [himself] and anyone that supported him." *Id.* SSgt J.P. explained:

> Well, the timing – it's just too much of a coincidence. There is the dismissal, then there is [Appellant's] dismissal from the court case of his charges, and then like two days later I get [a Letter of Reprimand] and get removed from my duty position. And then a few days after that, now the commander is talking about NCOs supporting NCOs that are doing negative things, so the timing was just too much of a coincidence.

Id. He believed this was a situation in which Lt Col M.S. was "talking about" Appellant and SSgt J.P. "without actually talking about" them. JA at 238-239. SSgt J.P. believed that the adverse career impact and reputational harm he suffered was due to his support of Appellant. JA at 225.

SSgt J.P. later went to his supervisor, MSgt J.T., and stated that he and some other airmen thought the message conveyed at the commander's call was that it would not be in their professional interest to visit or support Appellant or anyone facing disciplinary action. JA at 162-163. Even though MSgt J.T. did not see most of the commander's call and did not stay afterward for the subsequent NCO-only question-and-answer session, he told SSgt J.P. that this was incorrect. JA at 164. MSgt J.T. assumed that this conversation corrected SSgt J.P.'s understanding. *Id*.

The Motion to Dismiss for Unlawful Command Influence (UCI)

One week after the commander's call took place, Lt Col M.S. preferred charges against Appellant for a second time and

recommended that the case proceed to a special court-martial.[8] JA at 30-32, 37. Following referral, the Defense filed a motion to dismiss for unlawful command influence citing Lt Col M.S.'s comments at the commander's call. JA at 349. During motions practice, trial defense counsel clarified that the Defense was alleging apparent UCI at the adjudicative stage. JA at 257. The Defense called several witnesses, including Lt Col M.S., in support of the motion. JA at 48, 149, 168, 179, 216. The Government called two: SrA R.E and SSgt A.G. JA at 192, 202. The military judge later denied the motion, concluding that the Defense failed to meet its threshold burden of establishing some evidence of UCI. JA at 384, 396.

Appellant's Trial and Post Trial

Appellant did not present any evidence or testimony during the findings stage of his court-martial. JA at 467, 469-470. During closing arguments, Senior Trial Counsel repeatedly told the members that Lt Col M.S. is "waiting on you" and challenged them to answer "what will

[8] Two of the specifications alleged that Appellant assaulted SSgt C.M.; however, these specifications were later withdrawn and dismissed without prejudice prior to pleas. JA at 32, 463. Additional charges were also preferred by Lt Col M.S. prior to trial. JA at 33-36.

you do?" JA at 286, 292. The members subsequently returned mixed findings, but convicted Appellant of all offenses directly involving Lt Col M.S. JA at 462-464.

During the sentencing phase of Appellant's court-martial, the Government published five exhibits. JA at 397-438. These exhibits consisted of the Appellant's personal data sheet (showcasing that Appellant had served four combat tours), his enlisted performance reports, and three letters of reprimand he had previously received. *Id.* The Government also called two witnesses, Lt Col M.S. and SSgt A.G. JA at 294, 298.

The Defense introduced 11 exhibits during its sentencing case, four of which were character letters. JA at 301, 439. One character letter was authored by Appellant's oldest sister, while the other three came from civilian employees assigned to the 50th Logistics Readiness Flight at Schriever AFB (each of whom previously served in the military). JA at 443-448. The Defense also called four witnesses, including Appellant's youngest sister and father. JA at 302, 312. The other two witnesses were civilians who had previously served as security forces personnel alongside Appellant at Schriever AFB, but

who had since separated and were no longer affiliated with the military at the time of their testimony. JA at 306, 309. No member of 50 SFS provided a character letter or testified on behalf of Appellant. *See* JA at 301-324, 439-454.

After the court was closed for deliberations, the members asked the military judge, "[a]re other punitive discharges an option like Under than Honorable?" JA at 345, 455. The military judge informed the members that the instructions she provided describe all permissible forms of punishment available. JA at 346. Ultimately, the members sentenced Appellant to reduction to the grade of E-3, hard labor without confinement for three months, and discharge from the service with a bad conduct discharge. JA at 347.

Appellant's trial defense counsel submitted clemency matters on behalf of Appellant following the conclusion of trial. JA at 458. Trial defense counsel noted there were "serious legal issues" with the court-martial, and reiterated the presence of UCI. *Id.* He specifically addressed Lt Col M.S.'s commander's call "where he told the squadron about how supporting an NCO like [Appellant] would negatively impact their careers." *Id.*

The Air Force Court's Analysis of UCI

The Air Force Court concluded (contrary to the military judge's ruling) that Appellant had met his burden of showing evidence of UCI. JA at 23. As the lower court explained:

> Even if we accept the military judge's factfinding that Lt Col MS did not orchestrate a message to discourage members of his squadron from providing character letters or testifying on Appellant's behalf as Appellant contends he did, there is no question Lt Col MS had Appellant in mind when he made his comments, and members of the squadron who knew Appellant well would recognize Appellant was among the Airmen who were the focus of his remarks. The commander's recitation of the personal story illustrated reasons not to provide a requested character statement for an Airman facing discipline that was heavy on repercussions and less so on providing information to assist with disposition and discipline of the offender. Lt Col MS knew he was going to reprefer charges on Appellant when he made his remarks.

Id. Nevertheless, the Air Force Court found that the Government proved "there was no intolerable strain upon the public's perception of the military justice system beyond a reasonable doubt" and that "no fully-informed disinterested, objective observer would doubt the fairness of Appellant's court-martial." *Id.* at 23-24.

SUMMARY OF THE ARGUMENT

The totality of the circumstances establish that Lt Col M.S. committed UCI by dissuading his subordinates from vocalizing support for Appellant. Moreover, the Government cannot prove there is *no reasonable possibility* this UCI failed to 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 Appellant's proceeding. Accordingly, this Court should set aside the findings and sentence in this case.

Lt Col M.S. made it clear to his unit that the trajectory of one's career bears a direct correlation to whether or not they "stick[ ] [their] neck out there" for Airmen facing disciplinary action. JA at 108. And when he provided his squadron this message, "there is no question Lt Col MS had Appellant in mind . . . and members of the squadron who knew Appellant well would recognize Appellant was among the Airmen who were the focus of his remarks." JA at 23. Nevertheless, the Air Force Court concluded the Government met its burden of proving that there was no intolerable strain upon the public's perception of the

military justice system. This is incorrect for at least three reasons.

First, the totality of the circumstances that would be known to a *fully informed*, disinterested member of the public demonstrate that the UCI in this case was direct, pervasive, and went without any meaningful remedy. Second, though personal prejudice is not required to merit relief under a claim of apparent UCI, Appellant *did* suffer personal prejudice when this case is properly analyzed under the rubric set forth in *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Third, even in the absence of personal prejudice, the Government simply cannot meet its burden of satisfying the harmless beyond a reasonable doubt standard and leaving this Court convinced there is no *reasonable possibility* that this case would harbor significant doubt in the mind of a qualified member of the public.

ARGUMENT

THE AIR FORCE COURT ERRED WHEN IT FOUND, BEYOND A REASONABLE DOUBT, THAT THERE WAS NO INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM WHEN APPELLANT'S COMMANDER ADDRESSED HIS "NCO PROBLEM" BY HIGHLIGHTING THE NEGATIVE CAREER IMPACTS HIS AIRMEN COULD SUFFER IF THEY PROVIDED A CHARACTER LETTER FOR AN ACCUSED AIRMAN.

Standard of Review

"Allegations of unlawful command influence are reviewed *de novo*." *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)).

Law

A. Unlawful Command Influence – Generally

"It has long been a canon of this Court's jurisprudence that '[unlawful] [c]ommand influence is the mortal enemy of military justice.'" *Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017) (quoting *Thomas*, 22 M.J. at 393). This Court has also "long recognized the problems arising in the administration of military justice because of the 'subtle pressures that can be brought to bear by 'command' in military society . . . .'" *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997) (quoting *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986)). It has likewise "repeatedly condemned unlawful command influence directed against prospective witnesses." *United States v. Gore,* 60 M.J. 178, 185 (C.A.A.F. 2004).

The applicable version of Article 37(a), UCMJ, provides, in relevant part:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions 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 reading the findings and sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

10 U.S.C. § 837(a). "[T]he plain language of Article 37(a), UCMJ, does not require intentional action." *Barry*, 78 M.J. at 78.

There are two types of UCI: actual and apparent.[9] *Boyce*, 76 M.J. at 247. Actual UCI "has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Id.* By contrast, apparent UCI "will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would

[9] This Court has further distinguished between UCI that occurs during the accusatorial process (i.e., how a case is brought to justice) and during the adjudicative stage (i.e., how a case is tried). *See United States v. Weasler*, 43 M.J. 15, 17-18 (C.A.A.F. 1995). The accusatorial process involves the preferral, forwarding, and referral of charges, while the adjudicative process concerns itself with interference with witness, judges, members, and counsel. *Id.* at 17.

harbor a significant doubt about the fairness of the proceeding." *Id.* at 248 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)). The appearance of UCI "is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).

Actual UCI is evaluated pursuant to *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). Under *Biagase*, the Defense must satisfy the low threshold of providing "some evidence" of UCI. *Id.* at 150 (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)); *United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F. 2003). "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Biagase*, 50 M.J. at 150. On appeal, the Defense must show (1) facts, which if true, constitute UCI; (2) that the proceedings were unfair; and (3) that UCI was the cause of the unfairness. *Id.* If the Defense meets its burden, the Government must either (1) disprove beyond a reasonable doubt the predicate facts on which the allegation of UCI is based; (2) prove beyond a reasonable doubt that the facts do

not constitute UCI; or (3) prove beyond a reasonable doubt that the UCI will not affect the proceedings. *Id.* at 151.

Unlike actual UCI, apparent UCI requires no showing of personal prejudice in order to merit relief. *Boyce*, 76 M.J. at 248-49. Instead, there is apparent UCI where (1) there are facts which, if true, constitute UCI; and (2) this UCI placed an intolerable strain on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *Id.* at 249.

To succeed on a claim of apparent UCI, the appellant must show that, under the totality of the circumstances, there is "some evidence" that UCI occurred. *Id.* (citing *Stoneman*, 57 M.J. at 41; *Ayala*, 43 M.J. at 300). The burden is low and the evidence presented must be more than mere allegation or speculation. *Boyce*, 76 M.J. at 249. (quoting *Salyer*, 72 M.J. at 423). Once an appellant presents some evidence of apparent UCI, then the burden shifts to the Government to prove beyond a reasonable doubt that either the predicate facts offered by the appellant do not exist, or the facts as presented do not constitute UCI.

Boyce, 76 M.J. at 249 (citing *Salyer*, 72 M.J. at 423; *Biagase*, 50 M.J. at 151).

If the Government meets its burden, then the appellant is not entitled to relief. *Boyce*, 76 M.J. at 250. If, however, the Government does not meet its burden, it may seek to prove beyond a reasonable doubt that the UCI did not place an intolerable strain upon the public's perception of the fairness of the military justice system 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.* at 249-50. If it does not meet this burden, the military appellate courts will fashion an appropriate remedy. *Id.* at 250 (citing *Lewis*, 63 M.J. at 416).

B. UCI Impacting Character Witnesses

In *United States v. Thomas*, this Court's predecessor approved of three alternative methods for the Government to meet its burden of establishing that an accused has suffered no personal prejudice as the result of UCI discouraging character witnesses:

> To satisfy its burden of demonstrating that an accused was not deprived of favorable character witnesses, the Government might elect to proceed in one of several ways. The first would be to show that appellant had offered

> extensive favorable character evidence at trial, so that it could be infered [sic] that [the commander's] remarks had not inhibited the availability of character witnesses. A second way would be to demonstrate from the accused's military records and otherwise that there simply was no evidence of good character available or that readily available rebuttal evidence of bad character would have been so devastating that, as a tactical matter, the accused could not have afforded the risk of putting his character in evidence. A third way for the Government to meet its burden might be to demonstrate that the prosecution evidence at trial was so overwhelming that there was no way in which the character evidence could have had an effect. This latter alternative should be used very sparingly, however: First, we recognize that character evidence can be very effective in creating reasonable doubt at trial; and, second, we do not wish to create even an appearance of condoning command influence on findings.

22 M.J. at 396-97; *see also United States v. Gleason*, 43 M.J. 69, 73 (C.A.A.F. 1995) (citing to this framework where the commander left such "a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy") (internal quotations and citations omitted); *United States v. Douglas* 68 M.J. 349, 354 (C.A.A.F. 2010) (applying this framework where an enlisted supervisor's "negative behavior discouraged witnesses from providing character statements . . . and resulted in unlawful command influence").

C. Proof Beyond a Reasonable Doubt

"[T]he harmless beyond a reasonable doubt standard applies to all claims under Article 37(a), UCMJ." *Barry*, 78 M.J. at 77 n.4. This standard is employed "[w]hen issues of constitutional dimension are at play . . . ." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020). "[I]t is solely the Government's burden to persuade the court that constitutional error is harmless beyond a reasonable doubt." *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009).

Where personal prejudice is required, the Government meets this burden when it can leave the court "confident that there was *no reasonable possibility* that the error might have contributed to" the outcome. *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (emphasis added); *see also Bush*, 68 M.J. at 102 ("In the trial error arena, a determination of harmless beyond a reasonable doubt tests 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'").

Analysis

A. Consistent with the Air Force Court's determination, the totality of the circumstances establish that Lt Col M.S. committed unlawful command influence.

Appellant met his low burden of establishing "some evidence" of UCI in this case. This contention is supported both by the record and the Air Force Court's conclusion. As the lower court noted, the personal story told by Lt Col M.S. at the commander's call "illustrated reasons not to provide a requested character statement for an Airman facing discipline . . . ." JA at 23. The Air Force Court also aptly observed that Lt Col M.S. "knew he was going to reprefer charges on Appellant when he made his remarks." *Id.* He did, in fact, do so just one week later.

Indeed, the Air Force Court was able to easily reach this conclusion without passing mention of SSgt J.P.'s Letter of Reprimand and removal from duty, Lt Col M.S.'s explicit and well known dissatisfaction with the acquittal in a companion court-martial, or Lt Col M.S.'s own inelastic disposition regarding the rehabilitative potential of those who commit domestic violence. Moreover, while the Air Force Court touched upon SSgt M.J.'s actions following the commander's call, it hardly explored the full, troubling context of this

situation in detail. Despite these omissions, the Air Force Court still correctly found the presence of UCI.

The statements relayed by Lt Col M.S. during his commander's call are concerning in and of themselves. However, the scope of their egregiousness cannot be wholly appreciated until they are given context and viewed within the totality of all other relevant circumstances. Given that the Air Force Court was able to make this determination without reference to some of the most troubling facts demonstrating unlawful command influence, this is not a close call. Appellant has met and exceeded his burden.

B. Lt Col M.S.'s unlawful command influence was direct, pervasive, and unmitigated.

The testimony of SSgt A.G. – a named assault victim in this case and one of only two witnesses the Government called during the motions hearing – demonstrates how Lt Col M.S.'s comments were negatively construed against Appellant by those who attended the commander's call. Even SSgt A.G. believed that Lt Col M.S.'s message "was pretty messed up" (an opinion that was elicited on direct examination by the Government, no less). JA at 203. SSgt A.G. associated Lt Col M.S.'s message with Appellant and understood it to

mean that whether or not support was shown toward such Airmen would be a reflection upon one's career in the commander's eyes. JA at 209.

Yet, SSgt A.G. was not the only 50 SFS member to relay such sentiments. Testimony from the Government's only other witness, SrA R.E., is similarly troubling. He, too, associated Lt Col M.S.'s comments with Appellant and SSgt C.M. given that "everybody" in their small unit knew they "were in some kind of trouble." JA at 197. Like SSgt A.G., SrA R.E. also understood Lt Col M.S. to be saying "[i]f you're supporting an NCO that's in trouble, you might want to rethink your career." JA at 200.

That was undoubtedly the message SSgt M.J. took away as well given his race to Lt Col M.S.'s office after the commander's call. From a matter of strict career preservation, it should come as no surprise that SSgt M.J. would feel compelled to offer Lt Col M.S. a mea culpa and "wash[ ] his hands" of Appellant following his commander's comments. *See* JA at 129. After all, when Lt Col M.S. first read SSgt M.J.'s statement to law enforcement wherein he indicated support for Appellant, Lt Col M.S.'s immediate reaction was to say "I just signed a

letter of recommendation for him to go be an FTAC guy." JA at 111. Lt Col M.S. was also aware that his reaction "probably got back to" SSgt M.J. JA at 129-130. Clearly SSgt M.J., SSgt A.G., SrA R.E. (and undoubtedly many more in the unit) took Lt Col M.S.'s message to be a shot across the bow—do not risk your career by sticking your "neck out there" for airmen like Appellant. This understanding of Lt Col M.S.'s message makes all the more sense when considering the context in which his statements were made.

First, as Lt Col M.S. himself acknowledged, the unit could tell he was displeased with the acquittal in SSgt C.M.'s companion court-martial that concluded six weeks before the commander's call took place. This acquittal served as one of the inspirations for him to make NCO misconduct a theme of his commander's call. JA at 105-106. Those in the unit associated Lt Col M.S.'s message with Appellant and SSgt C.M., and following the commander's call they would have realized it would be a poor career move to help Appellant if it could result in another disfavored Airman "beat[ing] the system" (JA at 79) or "not [being] held accountable to the level they should be" (JA at 82) in the commander's eyes.

Second, and as would have surely been known to this relatively small unit where "they all talk" (JA at 66), one of Appellant's friends, SSgt J.P., had just been removed from a coveted duty assignment for vocalizing his support for Appellant that very week. It is reasonable to infer many in the unit would also have known of SSgt J.P.'s Letter of Reprimand. When the totality of the circumstances are considered and placed in appropriate context, it is easy to see why individuals like SSgt M.J. would have reason to worry about their careers if they supported Appellant. Lt Col M.S. told them as much by drawing upon his own personal experience where he indicated that it would have been a poor career decision to author a character letter.[10]

Third, and although this may not have been known to all who attended the commander's call, Lt Col M.S.'s own actual bias and inelastic disposition in domestic violence cases would not have been lost upon a *fully informed* member of the general public. The fact that Lt Col M.S. drew upon his "life experience" and shared a personal tragedy with SSgt C.M. in an attempt to convey that people like

[10] *See* JA at 108 ("And I did tell them that, 'Why would [my commander] want to send me to [military police investigator] school if I am going to sign a letter saying 'Hey, don't punish [him]'").

Appellant "typically will not change" (i.e., have little or no rehabilitative potential) demonstrates a significant degree of personal bias. JA at 61. It is also significant that Lt Col M.S. asked SSgt M.J. after the commander's call if he was aware of "the violence that's going on" (JA at 110) between Appellant and SSgt C.M., particularly when juxtaposed with his other testimony.

After being asked to discuss the difference between "supporting" and "enabling" Airmen, Lt Col M.S. explained that enabling an Airman would be to "stand there and say, 'The Air Force is bad. The unit is bad. You're doing nothing wrong,' even when you know they are in a violent, physically violent relationship with their partner." JA at 104. This was a patent allusion to the statement SSgt M.J. previously provided to law enforcement where he said "the unit and the Air Force were after [Appellant] and he wasn't that bad." JA at 109-110. As Lt Col M.S. saw it, SSgt M.J. served as the paradigmatic example of what it meant to "enable" an Airman facing disciplinary action.

When considering this information, it becomes even more obvious why an outside observer would harbor significant doubts about the fairness of this proceeding. A fully informed member of the public

would realize that Lt Col M.S.'s message of discouragement from authoring character letters in such cases was not merely professional advice; it was also motivated by specific examples from individuals like SSgt M.J. who were, in his eyes, "enabling" domestic abusers merely by providing his assessment of the case when asked to do so by federal law enforcement officers.

Worse yet, no serious attempt was made to dissipate the taint from Lt Col M.S.'s UCI. This is not a case in which the Government took "early action to transfer Appellant to another jurisdiction in light of the potentially improper statements by the commander[.]" *Compare with Simpson*, 58 M.J. at 376. Nor is this a case where the compromised commander refrained from making "any recommendation as to the disposition of the charges." *Compare with United States v. Newbold* 45 M.J. 109, 111 (C.A.A.F. 1996). Rather, this is a case in which the UCI was left to percolate in the unit for over a year after it was committed.

The Government did not present evidence that remedial measures were taken once it became apparent that Lt Col M.S.'s message was being construed in the adverse way that it was (to the

point where one potential witness was going so far as to avoid defense counsel's phone calls). A subsequent squadron call, either by Lt Col M.S., a superior commander, and/or the Staff Judge Advocate, could have issued a curative message in an attempt to mitigate the inappropriate statements. A letter could have also gone out to the squadron on the commander's (or a superior commander's) letterhead. Or Appellant could have been transferred (not just temporarily detailed) to an entirely different command or unit – such as the 21st Security Forces Squadron mere miles down the road at Peterson AFB, Colorado. In fact, there was nothing stopping such actions from occurring even after the motions hearing where UCI was discussed in November 2017. The Government still had nine months before trial to take remedial efforts, but there is no evidence that it did anything of the sort.

When viewed together and in context, the record demonstrates that Lt Col M.S. intentionally set out to deter his subordinates from vocalizing support for Appellant by indicating through implication – and, in SSgt J.P.'s case, explicit action – that their careers were at stake. Moreover, Lt Col M.S.'s personal story wherein he explained

why someone should not write a character letter for an Airman facing disciplinary action because it would be a poor career move is particularly egregious.

However, even if Lt Col M.S. did not subjectively intend to discourage those in his unit from providing favorable character evidence on behalf of Appellant, that is of little consequence. As this Court recognized in *Barry*, UCI does not turn upon intent. *Cf. United States v. Youngblood*, 47 M.J. at 339 (when panel members are challenged on the grounds of implied bias after being exposed to comments amounting to unlawful command influence, the "focus is on the impact of the remarks on the members rather than the exact language, intentions, or motivations of the speakers."). The relevant question is an objective one: whether Lt Col M.S.'s actions would place an intolerable strain upon the public's perception of the military justice system. And, considering the totality of the circumstances in this case, the answer to that question is yes.

C. The intolerable strain upon the public's perception of the military justice system is exacerbated by the presence of personal prejudice in this case.

As this Court has stated, there is no requirement for Appellant to establish personal prejudice in order to merit relief. Where apparent UCI has been alleged, the prejudice "is the damage to the public's perception of the fairness of the military justice system as a whole[.]" *Boyce*, 76 M.J. at 249. However, to the extent that the existence of personal prejudice informs whether the UCI at issue placed an intolerable strain on the public's perception of the military justice system – non-dispositive as it may be – the record reveals that Appellant *was* personally prejudiced.[11] This further buttresses his claim of apparent UCI.

Although the differing standards inherent to actual and apparent UCI were not clearly delineated at the time *Thomas* was decided, it is nevertheless instructive in assessing whether an accused was actually "deprived of favorable character witnesses" (i.e., whether personal

[11] *See Boyce*, 76 M.J. at 248 n.5 (noting that personal prejudice "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" but is not dipositive).

prejudice, in fact, occurred) as the result of UCI. *Thomas*, 22 M.J. at 396. Under this framework, in order for the Government to disprove personal prejudice, it has three avenues open to it; none of which are available here.

The first method requires the Government to show that the accused offered "extensive" favorable character evidence as proof that the commander's remarks did not inhibit character witnesses. Here, Appellant's sentencing case cannot reasonably be described as "extensive" within the plain and ordinary meaning of that word. Appellant was able to provide favorable character evidence – both in the form of written letters and live testimony – from five individuals associated either with Appellant in a different unit or who had previously served with him before separating from the military. However, not one of them was presently affiliated with 50 SFS.

This is precisely what happened in *Gleason*, where "no soldier from the appellant's unit testified for him on extenuation and mitigation." 43 M.J. at 74 (internal quotations and citation omitted). Instead, the appellant in that case also brought forth five character witnesses, none of whom were associated with his unit. *Id.* Although

the Army Court of Military Review initially reassessed the sentence, this Court went further and set aside the findings because there was no indication that in the absence of UCI, "witnesses would have been any less willing to testify as character witnesses on the merits and to extol [the accused's] general good character and truthfulness." *Id* at 75.

Like *Gleason*, it is not as though Appellant's lack of character letters from his unit speaks to a lack of favorable character. Based on the evidence Appellant did provide, there were those with military backgrounds who had worked alongside Appellant and thought favorably of him. The record also demonstrates that Appellant had friends and supporters in the unit (e.g., SSgt M.J. and SSgt J.P.); yet, none of the Defense's sentencing evidence came from them. SSgt M.J.'s support would have likely been of particular help to Appellant given that Lt Col M.S. considered him one of the best NCOs in his unit. Taken together, the fact that Appellant did not benefit from any favorable evidence arising out of his unit constitutes personal prejudice in this case – just as it did in *Gleason*.

The second method available to the Government under the *Thomas* framework would be for it to establish that Appellant simply had no evidence of good character or that readily available rebuttal evidence would have been so devastating that, as a tactical matter, Appellant could not afford to place his character at issue. But the Government cannot pursue this line of argument because, as previously noted, Appellant *did* offer character letters and testimony during his sentencing case.

The third and final method, albeit a method which the *Thomas* Court expressed should be used "very sparingly," would be for the Government to establish that its evidence at trial was "so overwhelming that there was no way in which the character evidence could have had an effect." 22 M.J. at 297. Within the ambit of sentencing proceedings in particular, it is quite difficult to say with any degree of certainty that character letters from those in Appellant's unit would have had "no effect" on his sentence. This is especially true given that the members here would not have been blind to the fact Appellant could not garner even *one* character letter from a co-worker.

Moreover, it is not as though Appellant's case presented a foregone conclusion – particularly at the sentencing stage. It stands in stark contrast to the most recent apparent UCI case this Court has considered. There, the appellant pled guilty at a general court-martial to an offense which is punishable by death, the circumstances surrounding the misconduct "foreordained" the government's handling and disposition of the case, and the Appellant explicitly asked for a punitive discharge. *United States v. Bergdahl*, 2020 CAAF LEXIS 489 at *5, *21 (C.A.A.F. Aug. 27, 2020). Conversely, this case arose out of an Article 15 turn-down that led to a fully litigated special court-martial in which some charges were withdrawn prior to pleas, a panel of officer and enlisted members returned mixed findings, and then asked the military judge if they could sentence the accused to an administrative, rather than punitive, discharge. Given that the punitive discharge was an open question to the members, it stands to reason that a showing of support from those in Appellant's unit may have tipped the scales the other way in this case.

Consequently, even though personal prejudice is not required for Appellant to merit relief, when viewed under the *Thomas* framework,

it is clear that Appellant did suffer personal prejudice. Due to the presence of personal prejudice in this case, the intolerable strain upon the public's perception of the military justice system is that much greater. And, as a corollary, the Government's burden is that much higher.

D. With or without personal prejudice, the Government cannot meet the harmless beyond a reasonable doubt standard, especially given that no curative efforts were made.

The Defense satisfied its initial burden by establishing that Lt Col M.S.'s comments and actions amounted to UCI. The Government now bears the sole burden of convincing this Court that there is *no reasonable possibility* an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of Appellant's proceeding. Even assuming, *arguendo*, that Appellant had not suffered personal prejudice, the Government cannot meet its burden.

United States v. Douglas demonstrates how the Government could have attempted to meet its burden by proving that remedial measures were implemented and cured Lt Col M.S.'s UCI. 68 M.J. 349. Like the instant case, *Douglas* involved a military superior whose

"negative behavior discouraged witnesses from providing character statements for [the accused] and resulted in unlawful command influence." *Id.* Rather than dismiss the case, however, the military judge fashioned a narrowly tailored remedy which consisted of several curative measures: (1) providing a continuance to enable the parties to co-author a memorandum on behalf of the accused's commanding officer, (2) allowing the Defense to decide upon the memorandum's use, and (3) making this memorandum available for use by the Defense in its pursuit of witnesses. *Id.* at 352. The military judge also "strongly recommended," *inter alia*, that the accused be reassigned and that the supervisor who committed UCI be issued an order "to immediately cease and desist communications regarding [the accused] and the investigations, charges, and court-martial . . . ." *Id.*

On appeal, this Court noted that "[w]hile the memorandum alone would not have been enough to alleviate other impediments to [the accused] obtaining witness statements . . . collectively, these actions were reasonably tailored to alleviate the harm in this case." *Id.* However, because the record did not establish that *all* aspects of the military judge's remedy were actually implemented, and "given that

the burden of proof is on the Government," the *Douglas* Court reasoned that it could not "be convinced beyond a reasonable doubt that the taint from the unlawful command influence did not prejudice [the accused]." *Id.* at 356. It explained that the harm in that case was that the UCI could have prevented the accused from "more effectively pursu[ing] a good military character defense during the findings and sentencing portions of his court-martial."[12] *Id*. Accordingly, the findings and sentence were set aside. *Id.* at 357.

Whereas this Court granted relief in *Douglas* because it could not be convinced that the full scope of prescribed remedial measures were carried out, the case at bar does not indicate that *any* meaningful efforts were even attempted, much less accomplished. Had the Government taken such curative measures, it would not be in the untenable position that it is now – attempting to convince this Court that no reasonable member of the public would harbor doubt as to the fairness of Appellant's proceedings when his entire unit was subjected

[12] In a footnote, the Court explained that "[t]his would be true even if an appellant did not pursue a good military character defense as there are tactical considerations, apparent or not, which could influence that decision." *Id* at 357 n.9.

to UCI delivered in a formal setting by the squadron commander.

There were a host of options available to the Government on the front end. Now, however – left with only a closed record – "[t]he Government must . . . find an alternative way to meet its burden." *Douglas*, 68 M.J. at 357. And the only way for it to do so in this case is to "prove a negative" by relying upon the testimony of those who thought Lt Col M.S.'s message "was pretty messed up" (JA at 203) and understood it to mean they "might want to rethink [their] career[s]" (JA at 200) if they supported individuals like Appellant. This task proves impossible, especially when considering that where military courts are obligated to ensure the perception of fairness in the military justice system, they are to consider whether most people in the same position would be compromised, *regardless* of any disclaimer to the contrary.[13] On the facts of this case, the Government cannot meet its burden and Appellant is entitled to relief.

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[13] *See United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (describing the implied bias standard as one "intended to address the perception of appearance of fairness in the military justice system"); *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (noting that "[i]mplied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [that is, biased]" (internal quotations omitted)).

CONCLUSION

This Court should find that Lt Col M.S.'s actions and comments amounted to unlawful command influence and the Government failed to meet its burden of establishing, beyond a reasonable doubt, that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of Appellant's proceeding.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings and sentence.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitation of Rule 24(c) because: this Brief contains 10,122 words and 1,086 lines of text.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on October 22, 2020.

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