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

REPLY BRIEF

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36751
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 2076
(240) 612-4777
ryan.crnkovich.3@us.af.mil

Counsel for Appellant

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4777
mark.bruegger.1@us.af.mil

Counsel for Appellant

INDEX

Argument……..……..1

A. Lt Col M.S. shared his negative view on Appellant's case with prospective witnesses……....1

B. The NCO-only meeting following the commander's call did not solve Lt Col M.S.'s unlawful commentary; it served only as "reinforcement."……..……4

C. Lt Col M.S. may not have used Appellant's name, but as the Air Force Court recognized, Appellant was clearly a subject of his remarks……6

D. The Government concedes the "concerning" nature of the message relayed during the commander's call……6

E. In an attempt to meet its burden, the Government relies upon the testimony of only a handful of the hundreds who were tainted by Lt Col M.S.'s comments, and fails to address the entirety of what they actually said or appreciate the nuances of the commander's authority over them……....9

F. Personal prejudice was not waived and is a "significant factor that must be given considerable weight" in deciding Appellant's claim of apparent UCI……..11

G. The Government misapplies its burden of meeting the harmless beyond a reasonable doubt standard……15

H. Good order and discipline will not be compromised by finding UCI based on the particular facts of this case……..20

TABLE OF AUTHORITIES

Court of Appeals for the Armed Forces and Court of Military Appeals Cases

United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017).....12, 13

United States v. Douglas, 69 M.J. 349 (C.A.A.F. 2010).....12, 15, 17

United States v. Gerlich, 45 M.J. 309 (C.A.A.F. 1996).....11

United States v. Gleason, 43 M.J. 69 (C.A.A.F. 1995).....15

United States v. Johnston, 39 M.J. 242 (C.M.A. 1994).....12

United States v. Kitts, 23 M.J. 105 (C.M.A. 1986).....11

United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006).....12

United States v. Thomas, 22 M.J. 388 (C.M.A. 1986).....19, 20, 21

Air Force Court of Criminal Appeals Cases

United States v. Moore, No. ACM S32423, 2019 CCA LEXIS 92 at *6 (A.F. Ct. Crim. App. Mar. 4, 2019 (unpub. op.).....18, Appendix A

Statutes

Article 37, UCMJ, 10 U.S.C. § 837.....21

Other Authority

Merriam-Webster.com Dictionary, Merriam-Webster, https://merriam-webster.com/dictionary/impede (last visited November 29, 2020).....15

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Eric R. Proctor, the Appellant, hereby replies to the Government's Answer (Govt Ans.) concerning the granted issue, filed November 23, 2020.

ARGUMENT

A. Lt Col M.S. shared his negative view on Appellant's case with prospective witnesses.

The Government claims there was no "evidence introduced that [Lt Col M.S.] had shared his view with any prospective defense witness in Appellant's case" and "Appellant does not provide any nexus between any supposed animus Lt Col MS may have felt following an acquittal and his own court-martial." Govt Ans. at 42-43. This is inaccurate.

First, when Lt Col M.S. voiced his displeasure regarding SSgt C.M.'s acquittal to his team of senior enlisted leaders, he was tacitly expressing his views on Appellant's twin specification as Appellant and SSgt C.M. were tried for reciprocal no-contact order violations which mirrored each other in all relevant respects. *See* JA at 78, 130, 360-361, and 462. Lt Col M.S. believed that both SSgt C.M. and Appellant were guilty of violating his no-contact orders and even acknowledged

that his unit viewed Appellant "as the second half of this dynamic situation[.]" JA at 106. There was thus no daylight between the two, and his disdain for SSgt C.M.'s acquittal inherently reflected how he felt about the near-identical specification in Appellant's companion court-martial.

In addition, Lt Col M.S., without prompting and of his own volition, arranged to meet with TSgt C.A. after she testified against SSgt C.M. JA at 81, 183. During this meeting, Lt Col M.S. expressed his negative views on SSgt C.M.'s acquittal when he said the court-martial failed to hold her accountable. JA at 82. Given the reciprocal nature of the no-contact order violations, Lt Col M.S. was once again implicitly making his views on Appellant's case known to someone he knew "was on the witness list" in Appellant's case. JA at 102.

Moreover, Lt Col M.S. took exception to SSgt J.P. commenting upon Appellant's release from confinement and dismissal of charges in front of TSgt C.A. precisely because she was on the witness list. JA at 109. *See also* Govt Ans. at 43. Yet, he apparently saw no problem arranging a one-on-one meeting with TSgt C.A. – a meeting she never

asked for – so he could personally share his views on SSgt C.M.'s case, and by necessary extension, Appellant's.

Furthermore, the Government's contention that Lt Col M.S. did not share "his view with any *prospective* defense witness in Appellant's case" (Govt Ans. at 42 (emphasis added)) fails to recognize that the commander's call addressed the entirety of 50 SFS and "everybody" knew Appellant and SSgt C.M. "were in some kind of trouble." JA at 197. There were literally hundreds of prospective witnesses within this pool. In fact, Lt Col M.S. pointedly told his unit that while "they may think they know everything that's going on," he had "the big picture and [knew] everything that's going on, and there's more than one chapter to a book." JA at 144. Thus, Lt Col M.S. effectively informed his entire squadron that any views on the Appellant's case which ran counter to his own were uninformed.

Equally troubling, the senior enlisted leaders tasked with making sense of Lt Col M.S.'s remarks after the commander's call during the NCO-only question-and-answer session included SMSgt B.K. and the First Sergeant, MSgt C.P. JA at 103, 130, 168, 263. These same individuals were previously (and repeatedly) tainted by Lt Col M.S.'s

penchant for explicitly sharing his views on the matter with them.[1] By tasking them to serve as his mouthpiece, Lt Col M.S. wed his senior enlisted team to his cause and ensured his message was likewise made their own.

B. The NCO-only meeting following the commander's call did not solve Lt Col M.S.'s unlawful commentary; it served only as "reinforcement."

The Government claims the NCO-only meeting "after the commander's call clarified that the squadron commander was not discouraging anyone from supporting a fellow Airman facing disciplinary trouble." Govt Ans. at 40. However, the record does not support this contention; rather, it is directly contradicted by MSgt C.P., who testified: "All I remember, basically, it was like a reinforcement." JA at 177.

[1] According to Lt Col M.S., both SMSgt B.K. and MSgt C.P. were likely present for the meeting where SSgt J.P.'s removal from duty was discussed. JA at 146. SMSgt B.K. issued SSgt J.P. the Letter of Reprimand. JA at 44. Lt Col M.S. also thought they would have been present when he expressed his disbelief with SSgt M.J.'s report to law enforcement in which SSgt M.J. evinced support for Appellant. JA at 110-111. Finally, both SMSgt B.K. and MSgt C.P. were among those whom Lt Col M.S. voiced his displeasure to regarding SSgt C.M.'s acquittal. JA at 130.

MSgt J.T.'s testimony is likewise devoid of any reference to a clarifying message delivered at the follow-on session. The military judge found as fact that he was not present for the commander's call, and MSgt J.T. testified that he did not attend the follow-on session. JA at 160, 388. Nor can proof of this clarifying message be gleaned from the testimony of SrA R.E. or SSgt A.G. since neither of them testified about the follow-on session. JA at 192-215. That leaves only SSgt J.P.

While SSgt J.P. acknowledged there was "kind of a jumble of things" about supporting versus enabling Airmen, he also testified that after the NCO-only portion of the commander's call concluded, he was approached by MSgt T., a senior NCO and a member of his leadership chain. JA at 243, 246. MSgt T. told SSgt J.P. "he was pissed off because of the way it was handled, because it felt like [they] got called out, all parties involved . . . ." *Id*. They then discussed how Lt Col M.S. had "just aired [them] out in front of everyone" and "[they] had targets on [their] backs now." JA at 247. According to SSgt J.P., the only other senior NCO who spoke with him after the commander's call was the MSgt C.P., who asked "[a]re things clear now?" JA at 247-248. SSgt J.P. replied they were not. JA at 248.

C. Lt Col M.S. may not have used Appellant's name, but as the Air Force Court recognized, Appellant was clearly a subject of his remarks.

The Government relies on the fact that Lt Col M.S.'s message was "without reference to Appellant or his case" and he "did not name anyone or reference any specific incidents" during the commander's call. Govt Ans. at 15, 28. But he did not have to. As the Air Force Court observed, Lt Col M.S. was obviously referring to Appellant 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. Even Lt Col M.S. admitted that the commander's call presented "a situation where [he] felt like [he] had to talk about things without talking about them[.]" JA at 108-109. Multiple witnesses testified that they knew Lt Col M.S. was referring to Appellant in his remarks. *See* JA at 206, 200, 225.

D. The Government concedes the "concerning" nature of the message relayed during the commander's call.

The Government acknowledges that Lt Col M.S.'s "story about refusing to provide a character letter to an airman" is "concerning." Govt Ans. at 41. And while the Government's own witness better captured the gravamen of the commander's message when he described

it as "pretty messed up" on direct examination, the point remains the same.[2] No party seriously disputes the troubling nature of Lt Col M.S.'s decision to tell a personal anecdote to his entire squadron in a formal setting in which the moral of the story was authoring a character letter may carry adverse career consequences.

Nevertheless, the Government questions the precise language that Lt Col M.S. would have used to convey this message and claims "it is unclear how many details he had included." Govt Ans. at 42. But it still cannot refute that, at a minimum, the following was communicated:

> *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."

JA at 108 (emphasis added). [3]

---

[2] This witness was also the named victim to a battery specification and the senior trial counsel would later describe him during closing arguments as "a squared away junior NCO" who "earn[ed] every stripe on his sleeve." JA at 32, 291.

[3] The Court Reporter's use of quotation marks in this passage makes it all the more clear that Lt Col M.S. was describing with precision that which he had previously conveyed during the commander's call.

Despite Lt Col M.S.'s admission, the Government maintains his message "was not an admonition not to provide character letters." Govt Ans. at 42. This assertion cannot be squared with Lt Col M.S.'s own testimony. In fact, his anecdote was even more problematic given the "couple of analogies" he also used at the commander's call, including when he drew upon the difference "between supporting somebody who has an addiction . . . and then enabling their addiction. Going to the liquor store and buying them the next bottle." JA at 104-105. In other words, Lt Col M.S. equated writing a character letter with buying an alcoholic a bottle of booze.

The Government's contention that Lt Col M.S.'s message did not discourage those in his unit from providing character letters also fails to explain how a junior Airman or NCO could reach the same conclusion. Lt Col M.S. (who was "[f]or the longest time . . . the only officer in the unit") formally told them in no uncertain terms that when he was an enlisted security forces member, providing a character letter for an Airman facing disciplinary action would have foreclosed specific career paths and resulted in the commander "question[ing] [his] judgment." JA at 104, 108. The Government characterizes these

statements as "a story that was told as part of his message to support airmen without enabling bad behavior[.]" Govt Ans. at 42. But that makes it all the worse; the clear message conveyed to junior enlisted was that in the commander's eyes, writing a character letter enables bad behavior.

E. In an attempt to meet its burden, the Government relies upon the testimony of only a handful of the hundreds who were tainted by Lt Col M.S.'s comments, and fails to address the entirety of what they actually said or appreciate the nuances of the commander's authority over them.

The Government argues "that, of the multiple witnesses called to testify during an Article 39(a) motions hearing, not a single one feared any repercussions or retaliation for their testimony." Govt Ans at 31. This is not entirely accurate when analyzing the totality of the witness' testimony.

For example, while SrA R.E. claimed to understand that he was free to support Appellant without ramifications, he qualified his position by explaining that he only intended to serve one term in the military. If SrA R.E. had planned on making it a career, he "wouldn't even take the chance" as "the last thing [he would] want to do is rub [his] leadership the wrong way." JA at 194. This extended to "even

talking to anybody that may be in trouble." *Id.* SrA R.E. also conditioned his response when asked if he felt there would be any ramifications for testifying in court: "*Since I never had like any situations with the commander*, I believe that there wouldn't be . . . ." JA at 201 (emphasis added). The implication is that if he had been someone like SSgt J.P., who did have previous negative interactions with Lt Col M.S., then he would have feared ramifications relating to his testimony.

SrA R.E. further discussed why he had not talked about the message relayed at the commander's call with other Airmen:

> And I really didn't talk to anyone about it, because it's about my commander, and also, only reason I'm talking about it now is because I'm talking to Legal. But just to talk about it just to any other person, just to be talking about it, I kind of try to be smart and keep my mouth closed about situations like that.

JA at 201.

SSgt A.G. shared similar sentiments and, prior to testifying, "asked several times if the commander would be present when [he] testified." JA at 210. When asked to explain this concern, SSgt A.G. responded "I still think it's a little hard to say what I say when there's somebody in a position of power over me specifically in that room." JA

at 212. He acknowledged that if Lt Col M.S. were present in the courtroom he would still testify if it were the right thing to do, but would also "be a little bit put-off by it." *Id*. The military judge followed up by asking "[b]ut you had some concerns?" and SSgt A.G. responded "Yes." JA at 213.

Thus, it was not as though these two Government witnesses lacked trepidation. Instead, their testimony evinces the truisms this Court has observed regarding unlawful command influence in that there are "subtle pressures that can be brought to bear by 'command' in military society," and there is an inherent "difficulty of a subordinate ascertaining for himself or herself the actual influence a superior has on that subordinate." *See United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986); *United States v. Gerlich*, 45 M.J. 309, 313 (C.A.A.F. 1996).

F. Personal prejudice was not waived and is a "significant factor that must be given considerable weight" in deciding Appellant's claim of apparent UCI.

The Government devotes five pages of its brief (Govt Ans. at 21-25) in an attempt to argue against a proposition this Court addressed just three years ago:

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

United States v. Boyce, 76 M.J. 242, 248 n. 5 (C.A.A.F. 2017).

Apart from the fact that "this Court has not applied the doctrine of waiver where unlawful command influence is at issue,"[4] the Government's argument for application of the doctrine is flawed for an entirely different reason. The consideration of personal prejudice in an apparent UCI case is both consistent with and fundamentally necessary to assess such a claim under the totality of the circumstances and through the lens of "an objective, disinterested observer, *fully informed of all the facts and circumstances*[.]" *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (emphasis added).

Contrary to the Government's assertion, the mere presence of personal prejudice and the doctrine of actual UCI are not one and the same. The above-quoted language from *Boyce* recognizes this, as does

[4] *United States v. Douglas*, 68 M.J. 349, 356 n.7 (C.A.A.F. 2010) (citing *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994)).

the Government, itself, later on in its brief when it says "[i]n fact, in conducting an analysis of apparent UCI, the Court often necessarily looks to the absence of personal prejudice." Govt Ans. at 38. If the *absence* of personal prejudice is such a "significant factor" that "must" be considered in assessing apparent UCI, then the converse is logically true as well. Consistent with *Boyce*, the *presence* of personal prejudice "must" be considered.

At the end of the day, Appellant's ability to garner favorable character evidence from a number of individuals with military backgrounds (including *former* members of 50 SFS who were no longer subject to military authority) but not a single person from within 50 SFS form facts and circumstances that weigh on the analysis. But the Government's argument in favor of waiver would affix blinders upon disinterested members of the public and divest them of evidence which they otherwise would be entitled to consider. Under such a theory, hypothetical members would no longer be "fully informed of all the facts and circumstances" even when plainly captured in the record.

Moreover, this case illustrates how the actions of a commander may give rise to an initial claim of apparent UCI in which the personal

prejudice is not as readily apparent, but makes itself known at a later stage. While the Government faults trial defense counsel for failing to raise actual UCI at the trial level, the Defense can hardly be blamed for failing to anticipate just how impactful Lt Col M.S.'s comments would prove to be nine months later during the presentencing stage. In any event, and as Appellant stated in his initial brief, the identification of personal prejudice in the record buttresses his claim of apparent UCI; it does not replace it with an entirely new theory as the Government suggests.

Finally, the merits of Appellant's apparent UCI claim do not live or die with personal prejudice. Yet, it would be folly to conclude that when personal prejudice blossoms after a claim of apparent UCI has been raised, this is information which qualified members of the public should be stripped of in considering whether they have a significant doubt about the fairness of Appellant's court-martial. The fact that Appellant was personally prejudiced in this case serves as an exacerbating factor that a fully informed member of the public would, and should, consider.

G. The Government misapplies its burden of meeting the harmless beyond a reasonable doubt standard.

The Government relies upon the "witnesses called to testify during an Article 39(a) motions hearing" but does not address the hundreds of other 50 SFS witnesses who were tainted by Lt Col M.S.'s comments and are just as relevant. As trial counsel argued during motions practice: "we've heard from a handful of airmen from this Commander's Call out of a great many more airmen that we did not fear from this Commander's Call." JA at 269. That is precisely the problem.

As this Court reiterated in *Douglas*, "the ordinary test" for determining whether UCI deprived an accused of access to character witnesses requires the Government "to establish beyond a reasonable doubt that defense access to witnesses was not *impeded* by unlawful command influence." 68 M.J. at 351 (emphasis added) (citing *United States v. Gleason*, 43 M.J. 69, 73 (C.A.A.F. 1995). To "impede" is simply to "to interfere with or slow the progress of."[5] Therefore, once

[5]*See Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/impede (last visited November 29, 2020).

Appellant meets his threshold burden under "the ordinary test" it is the Government's burden to demonstrate the *absence of an impediment* beyond a reasonable doubt.

Appellant has no obligation to specifically identify a witness who refuses to testify under any condition. *Contra* Govt Ans. at 35-36. Indeed, SSgt M.J.'s avoidance of Appellant's trial defense counsel serves as a fitting example of an "impediment" caused by Lt Col M.S. Yet, like hundreds of others who were tainted at the commander's call, SSgt M.J. was never called to testify.

Considering that SSgt M.J., one of Appellant's *friends*, went from saying "he thought the unit and the Air Force were after [Appellant] and he wasn't that bad" (JA at 109-110) *before* the commander's call to avoiding Appellant's defense counsel (JA at 110) *after* the commander's call, it stands to reason he would have hardly been the only one to disassociate himself from Appellant. Indeed, doing so would be consistent with what SrA R.E., a first term Airman, understood to be a smart career move for 50 SFS personnel: it is not worth taking the chance of rubbing leadership the wrong way by "even talking to

anybody that may be in trouble[.]" *See* JA at 194. The *Government's* failure to call such witnesses means that it cannot carry its burden.

To be clear, Appellant does not contend that the Government is necessarily required to call each and every Airman who attended the commander's call to the witness stand in order to meet its burden. Instead, this Court's precedents indicate that the Government could have done so by proving remedial measures were implemented and cured the unlawful command influence.[6] But in the absence of curative measures or testimony to the contrary, there is no means by which the Government can prove beyond a reasonable doubt that these hundreds were not deterred from offering favorable character evidence on behalf of Appellant after being exposed to Lt Col M.S.'s comments. Ultimately, the Government's failure to recognize how this is *its* burden to meet exposes the flaws in its argument.

For example, the Government takes aim at Appellant's "parade of 'possibles'" as to why he could not garner favorable character

[6] As cited in Appellant's initial brief, *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) discusses remedial measures which could have potentially cured the UCI in this case. App. Br. at 44.

evidence from his unit. Govt Ans. at 46. It also offers its own string of "possibles" which provide alternative explanations as to why this may have been. *Id*. What the Government fails to recognize, however, is that it cannot satisfy its harmless beyond a reasonable doubt burden by merely establishing possibilities; indeed, it must offer more.

Consistent with the Air Force Court's determination, the Defense satisfied its initial burden by establishing that Lt Col M.S.'s comments and actions gave rise to unlawful command influence.[7] Now the Government bears the sole burden of assuaging any reasonable doubt

[7] The Government argues that the Air Force Court "did not find UCI actually occurred in this case" because it "skipped the secondary portion of the analysis" and "elected to resolve the case on the question of prejudice rather than squarely confronting the underlying allegation of improper conduct." Govt Ans. at 26-27. If this were actually the case, then the court would have said so through use of language such as "assuming without deciding." *See* e.g., *United States v. Moore*, No. ACM S32423, 2019 CCA LEXIS 92 at *6 (A.F. Ct. Crim. App. Mar. 4, 2019) (unpub. op.) ("Assuming without deciding that the issue involved error, we discern no resulting prejudice to Appellant"). In fact, that is precisely what the court did elsewhere in this very same opinion where it said "[e]ven if we were to assume Appellant had the requisite property rights . . . ." and "[e]ven if we accept the military judge's factfinding that Lt Col MS did not orchestrate a message . . . ." JA at 18, 23. The Air Force Court did not use any similar prefatory language in finding that Lt Col M.S.'s comments amounted to UCI. Therefore, a logical reading of the Air Force Court opinion is that the predicate facts so obviously amounted to UCI that there was no need to even address this matter.

as to whether Appellant's proceedings would be viewed as fair even though it took no curative efforts and failed to take evidence from the "great many more airmen" who were tainted by Lt Col M.S.'s message.

For the Government to assure a hypothetical member of the public – and by extension this Court – it would need to prove there is no reasonable possibility these hundreds of others (including SSgt M.J.) were discouraged from writing a character letter on behalf of Appellant due to the uncured taint of Lt Col M.S.'s comments. While the Government claims that it cannot defend against "nebulous claims"[8] that someone may have refused to provide favorable character evidence on behalf of Appellant due to Lt Col M.S.'s comments, this Court's predecessor considered like arguments unavailing:

> In view of this high standard, if an accused properly raises the issue that his ability to secure favorable evidence has been impaired, the Government obviously bears a heavy burden in establishing that defense access to witnesses (character or otherwise) was not impeded by command influence to the extent that it affected the results of trial. Indeed, appellate defense counsel might well argue that the Government can never overcome this heavy burden because there will always be a possibility that a witness might have been available who could have tipped the scales in the defense's behalf.

[8] Govt Ans. at 35-36.

United States v. Thomas, 22 M.J. 388, 396 (C.M.A. 1986).

Moreover, it is not as though Lt Col M.S.'s Airmen would have been clearly advertising the impact of the commander's call for trial defense counsel to easily identify. In this regard, SrA R.E. stated the obvious: "I really didn't talk to anyone about it, because it's about my commander, and also, only reason I'm talking about it now is because I'm talking to Legal." JA at 201. As a matter of practical effect, it makes sense that the Government must shoulder this burden once properly raised by the Defense because it is the only party equipped to ensure curative measures are undertaken.

H. Good order and discipline will not be compromised by finding UCI based on the particular facts of this case.

Finally, the Government contends that if Appellant succeeds on this claim, it "would substantially curtail and limit a commander's authority to maintain good order and discipline within his unit . . . ." Govt Ans. at 18. Such an argument is unpersuasive as evidenced by the decision of this Court's predecessor in *Thomas*. In that case, the Court noted that even mere "misguided zeal" can give rise to UCI. 22 M.J. at 394. And while that Court empathized with "the desire of military commanders to assure that members of their command adhere

to high standards of discipline," and even expressed that it did "not wish to inhibit lawful zeal in achieving this end," it nevertheless understood that these command prerogatives are tempered by Article 37, UCMJ. *Id*. at 400.

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

Respectfully Submitted,

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36751
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Office: (240) 612-4770
Email: ryan.crnkovich.3@us.af.mil

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.bruegger.1@us.af.mil

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitation of Rule 24(c) because: this Brief contains 4,553 words and 506 lines of text.

This Brief complies with the typeface and type style requirements of Rule 37.

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36751
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: ryan.crnkovich.3@us.af.mil

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 December 3, 2020.

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36751
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: ryan.crnkovich.3@us.af.mil

APPENDIX A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32423 (f rev)

UNITED STATES
Appellee

v.

Sonia E. MOORE
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Upon further review

Decided 4 March 2019

Military Judge: Andrew Kalavanos.

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1. Sentence adjudged 23 May 2016 by SpCM convened at Pope Army Airfield, North Carolina.

For Appellant: Lieutenant Colonel Anthony D. Ortiz, USAF.

For Appellee: Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Before MAYBERRY, HUYGEN, and POSCH, *Appellate Military Judges*.

Senior Judge HUYGEN delivered the opinion of the court, in which Chief Judge MAYBERRY and Judge POSCH joined.

HUYGEN, Senior Judge:

We have this case for further review after returning the record of trial to The Judge Advocate General for remand to the convening authority for new post-trial processing. *See United States v. Moore*, No. ACM S32423, 2017 CCA LEXIS 763, at *12 (A.F. Ct. Crim. App. 19 Dec. 2017) (unpub. op.). New post-trial processing has been accomplished. Appellant now asserts the convening authority failed to comply with the court's remand, and therefore she is entitled to meaningful sentence relief. We find no prejudicial error and affirm the findings and sentence.

I. BACKGROUND

Appellant and the convening authority entered into a pretrial agreement (PTA) in which Appellant agreed, *inter alia*, to plead guilty to charges and specifications concerning Articles 107 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 907, 912a. In exchange, the convening authority agreed, *inter alia*, to approve no confinement in excess of 60 days if a bad-conduct discharge was adjudged. At trial, the military judge sentenced Appellant to a bad-conduct discharge, confinement for four months, and reduction to the grade of E-1.

During the original post-trial processing of Appellant's case, the staff judge advocate signed a recommendation (SJAR) that advised, "In accordance with the pretrial agreement, I recommend you only approve so much of the sentence as calls for 60 days confinement, reduction to E-1, and a bad conduct discharge." Conversely, the addendum to the SJAR advised, "I recommend that you approve the findings and sentence as adjudged . . . ." The convening authority's action stated, in relevant part, "the sentence is approved and, except for the bad conduct discharge, will be executed. The term of confinement having been served, no place of confinement is designated."

When Appellant's case underwent new post-trial processing, the resulting action approved "only so much of the sentence as provides for 60 days confinement, reduction to the grade of E-1, and a bad conduct discharge."

II. DISCUSSION

The proper completion of post-trial processing is a question of law the court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) (citing *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998)). Failure to comment in a timely manner on matters in the SJAR or matters attached to the SJAR waives in the absence of plain error, or forfeits, any later claim of error. Rule for Courts-Martial (R.C.M.) 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citations omitted). Analyzing for plain error,

we assess whether "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65) (additional citation omitted).

When we initially reviewed Appellant's case, we found several errors in post-trial processing, including the two-fold failure of the SJAR addendum (1) to account for the terms of the PTA, specifically, the 60-day cap on confinement, and (2) to correct the incorrect statement in Appellant's clemency submission that the convening authority "could only reduce the reduction in rank" when he could also affect the adjudged four months of confinement, even beyond honoring the 60-day cap of the PTA. *Moore*, unpub. op. at *9–11. We also noted other errors in the SJAR, action, and court-martial order. *Id.* at *11–12. Having now reviewed the new post-trial processing of Appellant's case, we find no prejudicial error.

With the case returned for our further review, Appellant asserts that the convening authority failed to comply with the court's remand because, even after new post-trial processing, the record still "contains no document that proves Appellant received the benefit of the PTA and was released from confinement no later than 60 days after entering." We find there is no failure of compliance because the action was corrected and therefore no such document was necessary.[*] New post-trial processing resulted in a new action that withdrew the original action and substituted for it a correct action that approved "only so much of the sentence as provides for 60 days confinement, reduction to the grade of E-1, and a bad conduct discharge."

The issue concerning Appellant's clemency submission that we identified in our earlier opinion was nullified by the absence of a clemency submission when her case was processed anew. However, we are compelled to note the absence of a written waiver of her right to submit clemency matters, *see* Article 60(b)(4), UCMJ, 10 U.S.C. § 860(b)(4) (2016); R.C.M. 1105(d)(3), and the apparent lack of trial defense counsel to advise Appellant during post-trial processing despite our remand directing "new post-trial processing and conflict-free trial defense counsel." *See Moore*, unpub. op. at *12. It is not clear why the legal office responsible for post-trial processing contacted several entities but not the offices that detail trial defense counsel. However, we recognize the multiple efforts made by the legal office over an extended period of time to contact Appellant, her previously detailed defense counsel, her origi-

[*] The new, corrected action made unnecessary a document proving Appellant's timely release from confinement. However, Appellee provided one, and the court granted the motion to attach it to the record.

nal appellate defense counsel, and the current area defense counsel at Pope Army Airfield about post-trial processing. Without resolving the issue of defense counsel, the legal office substantially complied with R.C.M. 1106(f)(1), served on Appellant a copy of the SJAR, dated 5 March 2018, and received confirmation of delivery on 7 March 2018. Appellant was given significantly more time than the 10 days provided by R.C.M. 1105(c)(1), and, on 12 October 2018, the staff judge advocate continued post-trial processing with an SJAR addendum that indicated Appellant could have but "did not submit clemency matters." *See* R.C.M. 1105(d)(1) ("Failure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters."). While we reviewed this issue of an apparent lack of trial defense counsel for post-trial processing, it was not raised by the appellate defense counsel representing Appellant in the case now before us. Assuming without deciding that the issue involved error, we discern no resulting prejudice to Appellant.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c) (2016). Accordingly, the approved findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court