23 November 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Technical Sergeant (E-6), ERIC R. PROCTOR, USAF, *Appellant.*	)))))))))	BRIEF ON BEHALF OF THE UNITED STATES Crim. App. Dkt. No. S32554 USCA Dkt. No. 20-0340/AF

BRIEF ON BEHALF OF THE UNITED STATES

JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

MARY ELLEN PAYNE,
Associate Chief
Government Trial and
Appellant Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

MATTHEW J. NEIL, Lt Col, USAF
Deputy Chief
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

SHAUN S. SPERANZA, Col, USAF
Chief
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

INDEX OF BRIEF

TABLE OF AUTHORITIES

Page(s)

COURT OF APPEALS FOR THE ARMED FORCES

STATUTES

OTHER AUTHORITY

23 November 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Technical Sergeant (E-6), ERIC R. PROCTOR, USAF, *Appellant.*	)))))))))	BRIEF ON BEHALF OF THE UNITED STATES Crim. App. Dkt. No. S32554 USCA Dkt. No. 20-0340/AF

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

ISSUE GRANTED

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 (AFCCA) reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2012). (JA at 1-24.) This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

Appellant's Committed Offenses

On Thanksgiving Day, 2016, SSgt CM invited several other airmen from her flight to the apartment that she shared with Appellant. (JA at 2.) Appellant was working swing shift and was not at the apartment when the airmen arrived. (JA at 9.) When Appellant returned home, he changed his clothes, told everyone to leave, and turned off the music that was playing. (Id.) Appellant then began cursing at the airmen. (Id.) As one of the junior airmen was leaving the apartment, Appellant began yelling at him and then "went charging right after him." (JA at 9-10.) SSgt AG, one of the guests at the party, stepped between the two of them. (JA at 10.) Appellant then grabbed SSgt AG by the throat. (JA at 10.) SSgt AG pushed Appellant back and Appellant released his grip, at which point SSgt AG left the apartment. (Id.) The altercation at Appellant's house was not reported and his commander, Lt Col MS, did not immediately become aware of the incident. (JA at 3.)

In February 2017, SSgt CM contacted her supervisor because "she and Appellant were in a physical altercation and she needed help." (JA at 3.) SSgt CM reported to her supervisor and first sergeant that Appellant had strangled her and

threatened to kill her and that she had scratched his face to get away. (Id.) When civilian law enforcement officers arrived at the shared residence, neither Appellant nor SSgt CM were willing to cooperate with an investigation. (Id.) When Lt Col MS learned of the incident, he issued no-contact orders to both Appellant and SSgt CM. (JA at 3-4.)

After the February 2017 no-contact order had expired, civilian police officers responded to another call at Appellant's residence based on an allegation that Appellant had harmed SSgt CM's puppy. (JA at 4.) SSgt CM told Lt Col MS that Appellant had choked and abused her on multiple previous occasions. (Id.) This resulted in Lt Col MS issuing a second no-contact order. (Id.)

Multiple members of the squadron provided statements that Appellant violated this second no-contact order. (JA at 5.) Lt Col MS also became aware that Appellant had made threats towards people who were cooperating with investigators and makings statements against Appellant. (Id.) Around this same time, in May 2017, Lt Col MS became aware of other acts of violence that Appellant committed against SSgt CM, and learned of the Thanksgiving 2016 incident. (Id.) On 22 May 2017, Lt Col MS ordered Appellant into pretrial confinement. (JA at 42.)

Lt Col MS preferred charges against Appellant on 7 June 2017. (Id.; JA at 26.) Those charges were referred to court-martial on 9 June 2017. (JA at 26-27.)

On 1 August 2017, the convening authority withdrew and dismissed the charges without prejudice and Appellant was released from pretrial confinement. (JA at 19, 27.) The charges were withdrawn and dismissed due to some witness availability issues and receipt of the final Report of Investigation from the Office of Special Investigations. (JA at 85.) On 14 August 2017, Lt Col MS re-preferred the charges, and they were referred to a special court-martial that same day. (JA at 30-31.)

The Commander's Call

On 7 August 2017, after the withdrawal of the initial charges and before preferral of the charges resulting in court-martial, Lt Col MS held a biannual commander's call. (JA at 19, 387.) Commander's calls were usually scheduled and put on the calendar four to six weeks before they were held, and Lt Col MS believed that was the same for his particular one. (JA at 124.) The commander's call included a variety of topics, including military awards and recognition, briefings about sexual assault, and statements from Lt Col MS addressing non-commissioned officers ("NCOs") behaving poorly. (JA at 19, 387.) Lt Col MS encouraged the squadron to support individual airmen but not to enable bad behavior. (JA at 19, 388.)

After the commander's call, the senior NCOs held a meeting with the NCOs alone to further discuss the topic of NCO leadership. (Id.)

During pre-trial motions hearings, Lt Col MS described the issues he was dealing with in the unit. As he explained, he had NCOs, including Appellant and SSgt CM, discussing their repeated violations of no-contact orders in front of junior airmen. (JA at 71.) SSgt CM was offered an Article 15 nonjudicial punishment for her violation of the no-contact orders.[1] (JA at 74.) She turned down the Article 15 and requested trial by court-martial, and Lt Col MS subsequently preferred charges against her. (Id.) SSgt CM was ultimately tried at summary court-martial in the summer of 2017 and was acquitted. (JA at 75-77.) As a result of her acquittal, Lt Col MS noted that there was a negative impact on members of his unit. (JA at 77.) Specifically, Lt Col MS observed that one of the witnesses who testified at SSgt CM's trial was dismayed at the result. (JA at 81-82.) Lt Col MS was aware that SSgt CM had burned a lot of bridges in the unit throughout the investigation and court-martial process. (JA at 80-81.) Nonetheless, when a senior NCO told Lt Col MS that SSgt CM should not be allowed back into the unit, Lt Col MS's response was that she would get another opportunity to prove herself. (JA at 80.)

Rumors began circulating throughout the squadron that Appellant would not be held accountable for his actions. (JA at 86.) These rumors began after the initial

[1] Appellant was likewise originally offered nonjudicial punishment for his violation of no-contact orders. (JA at 5.)

charges against Appellant were withdrawn. (Id.) Most of the rumors were started by SSgt JP. (Id.)

SSgt JP, meanwhile, was making a number of poor decisions entirely outside of his involvement with Appellant's case. Lt Col MS had concerns about SSgt JP's judgment and integrity, based upon an incident downtown where SSgt JP had a number of drinks, got into his vehicle, and then had a seizure. (JA at 91.) Because there was a medical response and SSgt JP never drove his vehicle, Lt Col MS elected not to take any punitive action against him. (Id.) Nonetheless, he was still concerned both with the poor judgment of drinking and getting into a vehicle, and because of SSgt JP's misrepresentations about how much he'd had to drink. (Id.) Meanwhile, Appellant was posting messages on Facebook which Lt Col MS interpreted as being a veiled threat against the people investigating him.[2] (JA at 92.) SSgt JP was also engaging in the Facebook conversation. (Id.) While Appellant was in pretrial confinement, SSgt JP posted comments on Facebook to "Free Yayo."[3] (JA at 151.) Finally, after Appellant was released from confinement, SSgt JP approached one of the witnesses in the case and mentioned that his "boy is getting out." (JA at 93.) He repeated this language to a second

[2] The postings were of rap lyrics, but appeared to Lt Col MS to be threatening, in light of the investigations, as the lyrics referred to "sh*t talkers" and "ether drops tomorrow." (Id.)

[3] Appellant's "rapper name" was "Yayo."

prospective witness against Appellant, as well as a number of new airmen and master sergeants. (JA at 93-94.)

Lt Col MS was concerned that SSgt JP was intentionally engaging people he knew had testified in SSgt CM's case, or were expected to testify in Appellant's case. (JA at 95.) One of SSgt JP's supervisors told him that he could still be friends with Appellant and support him, but it was not professional to be walking around the unit talking about Appellant being "free." (JA at 153.) During his testimony at the pretrial motions hearing, Lt Col MS summarized his views of SSgt JP's behavior, explaining:

> While there is a process going on, you may be happy that your member is getting out, supporting them, picking him up, you know, if the first sergeant can't, helping him go buy some groceries, but don't walk around the unit, especially approaching the people who are on the witness list, bragging about him getting out and the process is over.

(JA at 97.)

Lt Col MS testified that he chose to address the topic of NCOs behaving poorly at the commander's call because there were a number of NCOs failing to lead within his unit. (JA at 102-103.) He had a technical sergeant riding around with junior airmen resulting in a severe injury to one of the junior airmen;[4] he was dealing with Appellant and SSgt CM's repeated violations of no-contact orders; he

[4] The technical sergeant is not named in the record, but does not appear to have been a witness in Appellant's case, or related to Appellant's case in any way.

was also thinking about SSgt JP's drunken incident, his Facebook postings, and his behavior when Appellant's charges were dismissed; and Lt Col MS knew of a few other NCO issues, including NCOs who were failing physical fitness assessments. (JA at 103, 113.) The military judge, in his ruling on the motion, made a finding of fact that the "NCO problem" included a number of issues within the unit that were unrelated to Appellant's case. (JA at 388.)

Lt Col MS testified that his message at the commander's call was to support airmen, but that there's a line between supporting an airman and enabling an airman engaging in misconduct. (JA at 104.) The military judge made a finding of fact that the message was supporting versus enabling airmen, "no matter what process the airman may be going through." (JA at 388.) The military judge also made a finding of fact that the commander did not intend to chill communication to defense counsel or support for the accused. (Id.)

Lt Col MS used a few analogies during the commander's call to drive home the message of supporting as opposed to enabling. One analogy was about having grown up with a friend who suffered from an addiction, and how supporting them was a positive thing, but going to the liquor store and buying them "the next bottle" was enabling. (JA at 104-105.) He also used an example of an Airman who received an Article 15 while deployed. (JA at 105.)

During a pretrial motions hearing, trial defense counsel asked Lt Col MS to tell "the whole story" about the Article 15. (JA at 106.) Lt Col MS explained that one night his unit was allowed off base and Lt Col MS had told the airmen to stick together. The next day, he learned that a junior airman had gone off on his own and gotten drunk, missing the unit curfew. (JA at 107.) Lt Col MS explained that he declined to write a character letter for the airman, because he believed what the airman had done was wrong. (JA at 107-108.) It was not clear from the record how much of the story was discussed at the commander's call. Later, Lt Col MS testified that at the commander's call he discussed how sometimes "you got to look a friend in the eye and tell them 'You're F'ing up,' if you really want to help them." (JA at 180.) He also testified that he never said at the commander's call that character letters could not constitute support and that he didn't indicate that it was bad to write character letters. (JA at 127.) Lt Col MS also testified that he had written character letters for individuals in the past, though he had not addressed that at the commander's call. (JA at 127.)

Lt Col MS never mentioned Appellant's name or case throughout the commander's call. (JA at 23, 108, 393).

Clarifications After the Commander's Call

After the commander's call, SSgt MJ asked to make an appointment with Lt Col MS. (JA at 109.) He expressed that he was friends with Appellant, but

"understands everything that's going on." (JA at 109.) Lt Col MS reinforced to him to call the defense and to tell the truth. (JA at 109-110.) At some point during the conversation, SSgt MJ said something about "washing his hands from it" and Lt Col MS interrupted him to tell him that he could support his friend. (JA at 130.) SSgt MJ was not called to testify in the pretrial motions hearing.

MSgt JT had to leave the commander's call early, but he heard from others who attended that Lt Col MS's message was to support their fellow airmen. (JA at 153-54.) However, SSgt JP had a conversation with MSgt JT in which he expressed that he thought the message was *not* to support other airmen. (JA at 161.) Although SSgt JP never directly said that Lt Col MS had said not to support airmen during the commander's call, MSgt JT inferred that the commander's call was probably the event which triggered SSgt JP's comment. (JA at 163.) MSgt JT immediately corrected SSgt JP about his ability to support Appellant and said that SSgt JP could visit Appellant in confinement. (JA at 162.)

MSgt CP, the unit First Sergeant, explained that in addition to the NCOs who were failing to meet standards, the commander also wanted to tighten up the overall NCO leadership. (JA at 175.) He recalled that at the commander's call, Lt Col MS made clear that airmen could support one another, even if they were in trouble. (Id.)

SrA RE attended the commander's call and left feeling free to support Appellant without any ramifications from the unit. (JA at 193.) He testified that he had the impression after the commander's call that it might "rub [Lt Col MS] the wrong way" if he wrote a character letter for someone in trouble. (JA at 196.) However, SrA RE testified that he would not have a concern about writing a character letter. (JA at 195.) He testified that the commander's statements were unclear and left "a lot of room for imagination." (JA at 196.) He did not hear anyone discussing the commander's call and did not know how anyone else interpreted the commander's message. (JA at 200.) He did not believe there would be any negative ramifications from Lt Col MS in reaction to his testimony in court. (JA at 201.)

SSgt AG was also present at the commander's call and recalled the message to be that Airmen should rethink their position in the United States Air Force if they were supporting some individuals or NCOs. (JA at 203.) SSgt AG also testified that he knew the difference between supporting an airman and enabling an airman to make bad decisions, and believed that Lt Col MS also understood the difference. (JA at 204.) While SSgt AG was confused by Lt Col MS's statements, he did not feel like he could not cooperate with defense or write a character letter for Appellant. (JA at 205.) SSgt AG explained that he did not think Lt Col MS was telling people they could have negative career repercussions from supporting

an airman in trouble, but that maybe they were not in the right career field. (JA at 210.) He did not remember Lt Col MS telling any stories during the commander's call. (JA at 212.)

SSgt JP testified that he believed Lt Col MS was talking about him and Appellant during the commander's call, because the timing was "too much of a coincidence." (JA at 225.) However, he acknowledged that Lt Col MS did not refer to any names or specific cases during the commander's call. (JA at 230.) He also admitted that nobody in the unit ever told him not to be friends with Appellant or not to speak to trial defense counsel. (JA at 230-31.) SSgt JP testified that after the commander's call, during the NCO meeting, the attendees griped about how NCOs in general were not the problem in the unit. (JA at 242.) He also testified that during the NCO session it was clarified that the commander's message was not to enable someone, but that airmen could absolutely support their fellow airmen. (JA at 243.)

The military judge made findings of fact that the witnesses called did not believe that they would be punished for providing support for Appellant. (JA at 388.) The military judge found that SSgt JP "did not believe the commander told him to stay away from the accused or refuse to speak with defense counsel." (Id.) He found that SSgt AG believed the commander's message was "to rethink one's position in the Air Force so as not to follow a bad path." (Id.) The military judge

also noted that there was no evidence that individuals were unwilling to provide support for Appellant as a result of the commander's call. (JA at 394-95.)

Motion Litigation

On 31 October 2017, Appellant filed a motion to dismiss for unlawful command influence. (JA at 349.) In his written motion Appellant alleged both actual and apparent unlawful command influence ("UCI"). (Id.) The motion was litigated on 16 November 2017. At the conclusion of the oral argument, the military judge asked trial defense counsel, "is your argument appearance or actually UCI?" (JA at 257.) Trial defense counsel answered unequivocally, "Ma'am, it is appearance." (Id.) The military judge also pointed out that the motion touched on issues that were not argued in court. (Id.) Trial defense counsel acknowledged that the motion included more broad accusations of UCI, but did not reassert a claim of actual UCI. (Id.) During trial counsel's argument, she began to argue that there was no showing of prejudice. (JA at 270.) The military judge interrupted her to point out that the defense position is "they were not actually unlawful command influence, but the argument is for appearance?" (Id.) At the conclusion of trial counsel's argument, the military judge again presented trial defense counsel with an opportunity to be heard. (JA at 271.) Trial defense counsel ultimately did not raise any additional basis for relief. After the military judge issued her ruling, she asked trial defense counsel if there were any

questions on the written ruling, and trial defense counsel responded, "No, Your Honor." (JA at 272.)

On 19 February 2018, the military judge issued her ruling on the motion. (JA at 384-96.) In addition to the findings of fact discussed above, she also noted that two NCOs, including SSgt MJ, visited Appellant in pretrial confinement and MSgt CP was aware of those visits and thanked SSgt MJ after each visit. (JA at 387.) She found that Lt Col MS did not name anyone specifically or reference specified incidents, and that his message was to support airmen but not to enable airmen, no matter what process an airman was going through. (JA at 388.) She found as fact that during the commander's call Lt Col MS provided a personal story about when an airman asked for a character letter, and he declined because "he had a duty to the Air Force to care for the airman but not to choose him over the good of the unit." (Id.) She then found that the defense "has provided no evidence that raises the appearance of UCI in the adjudicative stage." (JA at 393.) She found that the evidence was that "the squadron commander addressed his unit at a commander's call regarding NCO misconduct in general, and at a time when the accused was no longer under preferred or referred charges, nor in pretrial confinement." (JA at 393.) She also found "there is no evidence before this court that witnesses once supportive of the accused had since altered a prior promise of support." (JA at 395.)

The Air Force Court Opinion

The Air Force Court noted that "the record is unclear as to the exact words Lt Col MS spoke at the commander's call or the message that was conveyed." (JA at 23.) Nonetheless, the Court found that Appellant had met his initial showing of "some evidence" of apparent unlawful command influence (Id.) However, the Air Force Court found that the government had successfully rebutted allegation of apparent unlawful command influence by proving beyond a reasonable doubt that there was no intolerable strain upon the public's perception of the military justice system. (Id.) The Court did not issue a holding as to whether the government had succeeded, or failed, in rebutting Appellant's initial showing of unlawful command influence by proving that the alleged facts were untrue, or that the facts did not themselves rise to the level of unlawful command influence.

SUMMARY OF THE ARGUMENT

The doctrine of unlawful command influence precludes any person from exerting any unlawful or coercive action upon a court-martial, or attempting to do so. The doctrine does not prohibit commanders from engaging in lawful disciplinary measures, nor does it limit their ability to enforce good order and discipline within their units. In this case, Lt Col MS took lawful steps to address disciplinary problems in his unit without reference to Appellant or his case and did not commit unlawful command influence.

Appellant did not allege at court-martial, nor in his appeal before the Air Force Court, that actual unlawful command influence occurred in his case, or that he ever suffered personal prejudice. Rather, he had always limited his argument to whether there existed an *appearance* of unlawful command influence. Therefore, to the extent that he argues that he suffered personal prejudice, this Court should consider that question to be waived by his failure to ever assert that ground for relief before either the military judge or the Air Force Court.

Contrary to Appellant's assertion, the Air Force Court did not determine that Appellant's squadron commander engaged in unlawful command influence in his case – the Court held only that Appellant had made a preliminary showing of unlawful command influence. It is not the law of the case that unlawful command influence occurred, and this Court may review the case to determine whether the government successfully rebutted the facts or allegation of unlawful command influence itself.

In reviewing all of the circumstances of the commander's call, this Court should find that the Government rebutted evidence that unlawful command influence occurred. Based upon Appellant's initial showing, there were two possible ways in which UCI could have been committed: Lt Col MS could have attempted to coerce witnesses, or could have, by unlawful means, influenced the court-martial. The government proved beyond a reasonable doubt that the

statements made by Lt Col MS were not intended to coerce any participant in the court-martial, but rather were intended to address proper issues of good order and discipline. Similarly, by demonstrating that there were no witnesses unwilling to testify or provide character letters, the Government proved beyond a reasonable doubt that the court-martial was not influenced by any of Lt Col MS's statements, particularly in light of Appellant's waiver of actual prejudice.

This Court should also find that no intolerable strain was placed upon the military justice system. The fact that Appellant failed to allege personal prejudice until this final appeal is a factor for consideration, as a reasonable, disinterested member of the public would not believe that his court-martial was unfair when he himself never alleged any actual unfairness at trial. Second, after considering the same facts that establish the lack of UCI, the Court should also recognize the fact that a fully informed member of the public would be aware that the commander's call was held to address NCOs failing to meet standards and was not directed at Appellant, nor discussed Appellant's case. The record is not clear on what the commander's message was, but what is clear is that there is no evidence, not even a proffer, that any member of the unit was unwilling to support Appellant or write a character letter for him,

This Court should not expand the doctrine of apparent unlawful command influence to a case in which Appellant repeatedly declined to assert personal

prejudice and has never produced any evidence or a proffer of prejudice, and in which there was neither an intent to influence, nor actual influence exerted upon a court-martial. Such expansion of the doctrine would substantially curtail and limit a commander's authority to maintain good order and discipline within his unit and is not warranted under the facts of this case.

ARGUMENT

THE SQUADRON COMMANDER'S STATEMENTS AT THE COMMANDER'S CALL DID NOT CONSTITUTE UNLAWFUL COMMAND INFLUENCE, NOR DID THEY PLACE AN INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM.

Standard of Review

When a military judge has made a ruling on a motion to dismiss for unlawful command influence, her findings of facts are reviewed under a clearly erroneous standard. United States v. Stirewalt, 60 M.J. 297, 300 (C.A.A.F. 2004). The ultimate issue of whether unlawful command influence happened under those facts is a question of law which is reviewed de novo. United States v. Wallace, 39 M.J. 284 (C.M.A. 1994).

Law and Analysis

Unlawful Command Influence Doctrine

Article 37 of the Uniform Code of Military Justice contains the basic provision against persons attempting to influence a court-martial. It states:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any other member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving or reviewing authority with respect to his judicial acts.

Unlawful command influence ("UCI") "is the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). Article 37 and the doctrine of UCI protect against improper influence "with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the function of the court-martial. . ." R.C.M. 103(a)(1).

There are two types of UCI: actual UCI and the appearance of UCI.[5] United States v. Boyce, 76 M.J. 242, 246 (C.A.A.F. 2017).

[5] The current version of Article 37 states that "no finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of an accused." National

Actual UCI occurs when there is an "improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." Id. (*citing* United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991)). To succeed on a claim of actual UCI, an accused must establish: (1) facts which, if true, constitute UCI; (2) that the accused suffered prejudice; and (3) that the UCI caused the prejudice. United States v. Lewis, 63 M.J. 405, 413 (C.A.A.F. 2006). Though the initial burden of demonstrating a factual predicate for UCI is low, it must be more than "mere allegation or speculation." United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013) (*citing* United States v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. 2002)).

In contrast, apparent UCI does not require a demonstration of prejudice to the accused. Boyce, 76 M.J. at 248. Rather, the "prejudice" is that which is done to the "public's perception of the fairness of the military justice system as a whole." Id. To succeed on a claim of apparent UCI, the accused must prove: (1) a factual predicate for UCI; and (2) that the UCI placed an "intolerable strain" on the public's perception of the military justice system, through the eyes of a reasonable member of the public. Lewis, 63 M.J. at 415.

Defense Authorization Act for Fiscal Year 2020, enacted 19 December 2019. However, the amendment only applies to allegations committed after enactment, and Appellant is therefore entitled to the version of Article 37 in place at the time of his court-martial.

Once an accused meets the "some evidence" threshold, the burden shifts to the government to prove beyond a reasonable doubt that either the predicate facts supporting UCI do not exist, or that the facts as presented do not constitute UCI. Boyce, 76 M.J. at 249. For apparent UCI, if the government cannot prove the foregoing, then "it must prove beyond a reasonable doubt that the unlawful command influence 'did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" United States v. Bergdahl, 2020 CAAF LEXIS 489 at *6 (*quoting* Boyce, 76 M.J. at 249). In other words, if UCI occurred in a case, the court's analysis shifts to the prejudice prong and the government must prove that the error was harmless beyond a reasonable doubt. *See* Lewis, 63 M.J. at 413. This same standard applies to both actual and apparent UCI.

1. Appellant Waived Any Claim of Actual UCI and this Court Should Decline to Consider His Post-Waiver Claims of Personal Prejudice.

After waiving the question of actual UCI before the trial court, and declining to raise it before the Air Force Court, Appellant attempts to resurrect a claim of personal prejudice in this final appeal. (App. Br. at 39-44). This Court should decline to review Appellant's belated, and unsupported, assertions of actual UCI.

This Court reviews de novo whether an issue has been waived, forfeited, or preserved for review. United States v. Haynes, 79 M.J. 17, 19 (C.A.A.F. 2019).

"[W]aiver is the intentional relinquishment or abandonment of a known right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). It is "a deliberate decision not to present a ground for relief that might be available in the law." United States v. Rich, 79 M.J. 472, 475 (C.A.A.F. 2002).

While Appellant's initial written motion to dismiss at the court-martial addressed the case law and standards that applied to a military judge's review of an allegation of actual UCI, he clarified orally, during an Article 39(a) session, that he was alleging only apparent UCI. (JA at 257.) Similarly, in his appeal before the Air Force Court, Appellant did not allege that actual UCI had been exerted in his case, but rather that there was an "appearance" of UCI, arising from comments made by Appellant's squadron commander, Lt Col MS, during a regularly scheduled commander's call. (Assignment of Errors, dated 8 October 2019); (*see also* JA at 23) (summarizing Appellant's argument before the Air Force Court). By explicitly waiving any allegation of actual UCI at the trial level, and declining to raise it before the Air Force Court, Appellant effectively deprived two fact-finding bodies of the opportunity to review an allegation of actual UCI. He also deprived the Government of the opportunity to present evidence which would contradict an allegation of actual UCI or allegations that Appellant suffered actual prejudice.

This Court has previously noted that "[u]nlawful command influence at the referral, trial, or review stage is not waived by failure to raise the issue at trial."

United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994). However, in Hamilton, the Court was distinguishing between the doctrines of forfeiture and waiver – it was not addressing a situation in which an appellant, on the record, acknowledged his right to assert UCI and declined to do so. Nor was it addressing a situation such as this, where Appellant pursued an allegation of UCI on one basis, while demonstrating a knowing and intentional decision not to pursue a second basis. Further, Hamilton addressed a case in which, on direct appeal to the court of criminal appeals, Appellant raised an issue and presented additional evidence to a fact-finding authority.

Following the Hamilton decision, this Court again addressed the doctrine of waiver in relation to UCI one year later in United States v. Weasler, 43 M.J. 15, (C.A.A.F. 1995). The Court began by drawing a distinction between the accusatorial phase of a court-martial involving preferral, forwarding, and referral, and the adjudicative phase which involves the court-martial itself. Id. at 17-18. The Court then held that an appellant was not foreclosed from making a knowing and intelligent waiver of UCI in the accusatory stage. Id. at 19. The Court noted its precedent allowing an accused to waive errors in preferral or referral, and held that the doctrine of UCI should not prevent an appellant from making a knowing waiver to UCI for the same stages. So long as the appellant initiated the affirmative and knowing

waiver of an allegation of unlawful command influence in the accusatory stage, the Court held that the waiver was legally permissible.

This Court was confronted again with the question of waiver of UCI in United States v. Douglas, 68 M.J. 349 (C.A.A.F. 2010). In Douglas, this Court reviewed a clearly preserved allegation of UCI in which the military judge had crafted a remedy to satisfy concerns about the effect of UCI on the case. Id. at 359. The Government, however, failed to implement the full remedy, and trial defense counsel made no further objection after the failure to implement the military judge's remedy. Id. This Court noted that the military judge "is not required, in the face of apparent satisfaction from the defense, to intuit possible objections for the defense and to raise them sua sponte." Id. at 355. Ultimately, the Court determined that the issue was not waived under the facts of that case.

Hamilton does not stand for the proposition that an appellant may never waive a claim of UCI in the adjudicative stage. Nor does Douglas hold that there is no situation in which an appellant may waive a claim of UCI. The finding that a claim is not waived is predicated upon the understanding that the party could be "deterred by unlawful command influence from challenging at trial any defects" committed due to UCI. Hamilton, 41 M.J. at 37. Appellant, though, was clearly not deterred from challenging his squadron commander for UCI – he simply declined to assert any personal prejudice and chose to assert only the basis of apparent UCI.

Importantly, he also declined to raise the issue before the Air Force Court – which has independent fact-finding authority. Rather than presenting the case, or any additional evidence to the Air Force Court, Appellant raises a claim of personal prejudice (and therefore, actual UCI) for the first time before this Court – which does not possess fact-finding authority. This Court should hold that in these narrow situations where an appellant preserves an allegation of UCI on the basis of apparent UCI, but affirmatively declines to assert the basis of actual UCI, he has made a knowing and intelligent waiver, and this Court thereby is precluded from reviewing the issue. To the extent Appellant asks this Court to hold that he was personally prejudiced in this case, the Court should find that issue waived and focus its inquiry solely on the question of apparent UCI. It should further decline to review any new assertions that Appellant suffered personal prejudice while analyzing the prejudice prong for the allegation of apparent UCI.

2. The Air Force Court Did Not Hold That There Was UCI in Appellant's Case

When neither party appeals a ruling of a court below, the ruling is regarded as law of the case. United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006) (citations omitted). However, the law of the case doctrine is a matter of discretionary appellate policy and does not prohibit this Court from reviewing the ruling below. Id.

Appellant argues repeatedly that the Air Force Court held UCI was committed in his case. That is an inaccurate interpretation of the lower court's opinion. The Air Force Court found Appellant met the burden of his initial showing of "some evidence" of apparent UCI.[6] (JA at 23.) It did not find UCI actually occurred in the case.

After an appellant has met his initial showing of "some evidence" of UCI, the burden shifts to the government to prove beyond a reasonable doubt that either the predicate facts proffered by appellant were not true, or the facts did not amount to UCI. Boyce, 76 M.J. at 249. It is at this point that a Court resolves whether there was UCI in a case. Here, the Air Force Court never found UCI, despite Appellant's assertions. It found Appellant met his initial showing of "some evidence" which, if true, would constitute UCI. (JA at 23.) It then skipped the secondary portion of the analysis, and did not issue a holding as to whether the government successfully rebutted this showing by proving that either the predicate

[6] The Air Force Court's finding was inartfully worded. An appellant's burden is to show "some evidence" of unlawful command influence – not "some evidence" of the *appearance* of unlawful command influence. Irrespective of whether actual or apparent UCI is being asserted, the initial prongs of the Boyce test are the same: that an appellant first make a showing of "some evidence" of UCI (in other words, "some evidence" of a violation of Article 37), at which point the burden shifts to the government to prove beyond a reasonable doubt that either "the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence." Boyce, 76 M.J. at 249. It is not until analyzing prejudice that a difference exists in the Court's analysis for actual or unlawful UCI.

facts were untrue, or that the predicate facts did not amount to UCI. Rather, the court moved directly to the third and final prong of the test and found that "the evidence of apparent UCI"[7] was rebutted beyond a reasonable doubt by a showing that no intolerable strain was placed upon the military justice system. In other words, the Air Force Court elected to resolve the case on the question of prejudice, rather than squarely confronting the underlying allegation of improper conduct. (*See* JA at 23.)

This distinction is important. Because the Air Force Court never issued a ruling as to whether the government had successfully rebutted Appellant's underlying claim of UCI, it is not the law of the case, and this Court is free to review the question of whether the government rebutted Appellant's initial showing, thus disproving the allegation of UCI. For the reasons below, this Court should find that the government successfully rebutted Appellant's UCI allegation.

3. Lt Col MS Did Not Commit UCI During the Commander's Call

Although the Air Force Court disagreed with the military judge's determination that Appellant had not even raised "some evidence" of UCI, it did not hold that any of her findings of fact were clearly erroneous. Appellant has not

[7] Again, the Air Force Court improperly referred to evidence of apparent UCI rather than to the proper standard. Given the confusion of terminology in the lower courts, this Court should take the opportunity to clearly lay out its test for analyzing allegations of UCI.

challenged any of the military judge's findings of fact in this appeal. The military judge found that the commander's call was a routine one which was held every six months. The military judge found that the commander addressed "NCO problems" at the commander's call, but that his comments were not directed at Appellant, but at a number of issues which included Appellant, but also included a technical sergeant who was charged with a DUI, Facebook postings, a motorcycle accident, NCO physical fitness assessment failures, and other issues. He did not name anyone or reference any specific incidents. The military judge also found that the commander "did not intend to chill communication to defense counsel or support for the accused." Perhaps most importantly, the military judge found that "there is no evidence that the squadron commander was trying to influence the outcome of a prospective court-martial involving the accused in either the findings or the sentencing stage, let alone for offenses that had yet to be charged."

Ultimately, the military judge concluded that "A commanders' call that addressed multiple topics, one of which was NCO misconduct in general terms, fails to create an atmosphere with the appearance of a chilling effect on members of the command that if you testify for this accused, their career will be in jeopardy." (JA at 393.)

In the context of raising a claim of UCI at the trial level, an appellant must show that the alleged UCI has a logical connection to the court-martial, in terms of

its potential to cause unfairness in the proceedings. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999). Mere exposure to comments suggesting unlawful command influence does not mandate a finding of prejudice requiring reversal. United States v. Martinez, 42 M.J. 327, 332 (C.A.A.F. 1995).

In fact, Appellant has never succeeded in succinctly expressing what the alleged UCI in this case was: he has not alleged that UCI occurred in the accusatory phase, nor that it was exerted upon the military judge, counsel, members, or any particular witness. His vague assertions that the squadron commander made comments about not supporting NCOs in trouble fails to demonstrate a sufficient nexus to his own court-martial to establish a finding of UCI, as required by Biagase, 50 M.J. at 150.

Appellant attempts to argue that Lt Col MS committed UCI by discouraging witnesses from testifying for, or writing character letters on behalf, of Appellant. However, there is no evidence in the record to support this contention, and the military judge found the opposite in her findings of fact. The lack of clarity on the words used by Lt Col MS demonstrate that he did not commit UCI. The commander's overall message was to support airmen, but not to enable bad behavior. This is a permissible message and a permissible way for a commander to reinforce messages of good order and discipline. As part of that message, he told a number of stories. Appellant's argument hinges upon a story that Lt Col MS told

in which he declined to write a character letter for a subordinate who was facing nonjudicial punishment. The record is not clear as to how much of the story was told, or how Lt Col MS drew a nexus to his overall message of supporting as opposed to enabling.

Appellant argues that "Lt Col MS intentionally set out to deter his subordinates from vocalizing support for Appellant by indicating through implication . . . that their careers were at stake." (App. Br. at 37.) Appellant fails to account for the military judge's finding of fact that Lt Col MS did *not* intend to, or attempt to, deter subordinates from supporting Appellant. In United States v. Barry, this Court noted that when the alleged UCI action is an "attempt to coerce" there is an element of intent required to find UCI, but that when an individual unlawfully influences an action via unauthorized means, UCI has been committed regardless of intent. 78 M.J. 70, 78 (C.A.A.F. 2018). In Barry the Court was addressing an allegation of actual UCI, in which personal prejudice was asserted, and the subject of the UCI admitted that his decision-making had been improperly influenced. Id. That decision stands for the proposition that when an individual has unlawfully influenced a court-martial, his intent is irrelevant. It does not stand for the proposition that intent is irrelevant in considering whether an intolerable strain has been placed upon the military justice system in the *absence* of any actual influence exerted on the court-martial itself. Here, Appellant's best argument is

that Lt Col MS *attempted* to discourage witnesses from testifying. The Barry opinion acknowledged that an attempt to coerce or influence the court would require a showing of intent. Therefore, the government proved beyond a reasonable doubt that Lt Col MS did not "attempt" to influence the proceedings as prohibited by Article 37 because he lacked the subjective intent necessary.

Appellant fails to account for the fact 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. He argues that United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) is controlling, as he argues that he was deprived of favorable character witnesses. In Thomas, this Court was confronted with an allegation of actual UCI – a claim, supported by evidence, that the appellant had been deprived of favorable character witnesses. While Appellant correctly identifies that Thomas was decided before the Court had developed the standard now used for determining whether there was an appearance of unlawful command influence, it was not the first time the Court had addressed the doctrine of apparent UCI. In fact, as early as 1964, the Court had reversed a conviction based upon an appearance of unlawful command influence. *See* Boyce, 76 M.J. at 247-49 (describing the evolution of the doctrine).

Regardless, Thomas is not applicable to Appellant's case. First, the remarks made by General Anderson in Thomas and those made by Lt Col MS were

substantially different – as was the speaker's rank and respective power. General Anderson's comments were clear and direct, and this Court was able to state with specificity that the general officer had made remarks that unit commanders who had preferred charges should not appear as defense character witnesses, testify to an accused's good character, or recommend retention. Id. at 391. Those statements themselves were clearly directed at testimony in a court-martial; as opposed to Lt Col MS's vague and short comments which were addressed in a general manner to explain his theme of supporting airmen but not enabling bad behavior. Unlike Lt Col MS, who never referred to courts-martial at all, General Anderson's remarks clearly stated that no person from the accused's unit should give favorable presentencing testimony on behalf of an accused. Id. Among the remedies to correct General Anderson's comments were "limited hearings to determine whether the accused had been deprived of character witnesses." Id.

Here, in contrast, there was a pretrial motions hearing, at which multiple, potential defense witnesses were called to testify. Every single one testified that they did not feel that they would be retaliated against if they supported appellant, or testified for him. SSgt JP and SSgt AG, who both testified that they did not believe the commander would retaliate against them for supporting Appellant, also both testified that they disagreed strongly with the way that the commander's message was delivered. (*See* JA at 203-206, 225, 229-231.) This shows that they

did not fear reprisal as a result of any message Lt Col MS had given; they felt comfortable to testify in open court in a manner critical of the commander. This Court may be confident, as the military judge was confident, that their testimony was credible and that they should be believed when they stated that they did not believe that Lt Col MS would take career ramifications were they to testify in support of Appellant.

Unlike in Thomas, and the various other cases impacted by General Anderson's remarks, this case litigated at trial on the question of whether Lt Col MS's statements at the commander's call actually influenced any witnesses. *See* Martinez, 42 M.J. at 332 (considering that full disclosure of the matter on the record is part of the analysis of whether an accused has been given a fair trial).[8] Appropriately, neither the military judge nor the trial counsel attempted to delve into the question of whether the witnesses would ultimately provide testimony or a letter on support of Appellant.[9] But, given their testimony, and the findings by

[8] These facts were raised by the government to rebut the showing of UCI. The fact that the government attempted to rebut a prospective argument does not change the analysis as to Appellant's own decision to waive an issue. While government action or a military judge's action may help to determine whether waiver happened in an unclear case, they are irrelevant in a case such as this where trial defense counsel, in response to a judge's question, affirmatively raised only one argument when presented the opportunity to raise both arguments.

[9] To do so would necessarily require delving into the defense's strategy of the case – an inappropriate and dangerous tactic, particularly when the defense had already explicitly stated that they were not alleging any actual UCI.

both the military judge and the Air Force Court that no witnesses feared providing evidence in support of Appellant, this Court should decline to further address this contention. Appellant's assertion that the government had to somehow "remedy" the fact that Appellant was deprived of witnesses is an impossible task, since Appellant has never identified any witness who was unwilling to participate as a result of Lt Col MS's statements. (*See* App. Br. at 46-7.)

The case of United States v. Gleason is similarly inapplicable to appellant's situation. The appellant in Gleason had been apprehended and placed in leg irons and chains. 43 M.J. 69, 72 (C.A.A.F. 1995). Soon after, his battalion commander told members of his battalion that the appellant was guilty, that his defense counsel was the "enemy" and that they should not testify on the appellant's behalf. Id. Like General Anderson's comments which were addressed by this Court in Thomas, the battalion commander's comments were specific to courts-martial, and specific in prohibiting certain actions. The commander created "a pervasive atmosphere in the battalion that bordered on paranoia." Id. at 73 (*citing* the Army Court's opinion.) This stands in stark contrast to what was, at most, a few confused comments that were not directly related to Appellant or to his court-martial, uttered more than a year before trial.

Rather, this case is more similar to United States v. Ashby, 68 M.J. 107 (C.A.A.F. 2009) and Biagase, 50 M.J. 143. In Ashby, the appellant alleged that a

number of statements by senior military officers constituted UCI. In reviewing the claims, the Court noted that the appellant had not "pointed to any specific witnesses who decided not to testify because of the alleged statements" nor had he pointed to "any other specific facts that the court-martial process was tainted by unlawful command influence." Id. at 129. In Biagase, the appellant alleged that the commander had engaged in pretrial condemnation of his conduct which had the potential to deter members from coming forward and supporting the appellant. 50 M.J. at 151. The Court did not address whether this was actual UCI, because the military judge took remedial measures to ensure that the appellant's court-martial was not prejudiced, including ordering the government to produce any witness who had expressed a reluctance to testify. Id. In assessing whether the appellant was prejudiced following the military judge's actions, the Court noticed that the appellant had never proffered any evidence that any witnesses were deterred from testifying. Id. Similarly, here, Appellant has never produced evidence, or even proffered, that he was deprived a witness.

Appellant's arguments that witnesses may have been dissuaded from supporting him as a result of the comments at the commander's call stands in stark contrast to the record of the case, the military judge's findings of fact, and the Air Force Court opinion. He has still not produced any evidence or proffered the name of any witness who refused to write a character letter or testify on his behalf. The

Government cannot defend against such nebulous claims, nor can a military judge create a remedy for such speculative assertions.

No court has ever found that a few, confusing statements at a commander's call, without any direction toward a particular individual or court-martial process, has constituted UCI. This case should not be the first. This is particularly true given the language of Article 37 itself. There is no allegation in this case that any authority censured, reprimanded, or admonished any person regarding the findings of the court-martial. There is no evidence that Lt Col MS attempted to coerce any person, and the military judge's finding of fact that he did not intend to influence the court-martial is relevant. Appellant's failure at trial to ever allege actual prejudice, and the absence of evidence or even a proffer that a witness was influenced demonstrates that Lt Col MS's words did not "influence the action" of the court-martial in any way. Under the language of Article 37 itself, the Government has proven beyond a reasonable doubt that the actions of Lt Col MS during the commander's call did not amount to UCI.

Therefore, this Court should find that the Government successfully rebutted Appellant's assertions of UCI, and resolve the case on that ground.

4. Even if Not Waived, Appellant's Affirmative Statement at Trial That He Did Not Allege Actual UCI Demonstrates Both That There Was no UCI And That There Was No Intolerable Strain Placed Upon the Military Justice System.

In reviewing this case, both for the underlying allegation of UCI and for the prejudice prong, this Court should consider that Appellant has never alleged, until this appeal, that actual unlawful command influence occurred in his case or that he suffered any personal prejudice. The fact that Appellant himself has never produced any evidence supporting a finding of personal prejudice, nor proffered any evidence that prejudice resulted from his commander's action, supports a finding that any appearance of unlawful command influence would not place an intolerable strain upon the public's perception of the military justice system. This appeal represents the first instance that Appellant has ever claimed that he suffered personal prejudice. A fully informed, disinterested member of the public would not find that Appellant was subjected to an unfair court-martial where Appellant himself waived at trial an argument that there was any actual harm or prejudice to him.

Speculation and claims of command influence "in the air" are insufficient to satisfy the standard necessary to prove that UCI occurred. United States v. Shea, 76 M.J. 277, 282 (C.A.A.F. 2017). "[T]here must be something more than an appearance of evil to justify action by an appellate court in a particular case." Id. (*quoting* United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991)). An appellant

must be able to show a logical connection between the alleged unlawful command influence and its potential to cause unfairness in his own proceedings. United States v. Ayers, 54 M.J. 85, 95 (C.A.A.F. 2000). This "logical connection" requirement applies to the initial showing of evidence to support both actual and apparent UCI. Id. ("Our focus is on appellant's court-martial, not other cases.") Appellant's failure to identify personal prejudice in this case show that he has done nothing more than raise allegations of "UCI in the air."

This court's precedents have demonstrated the difficulty of assessing a claim of apparent UCI in the absence of any corresponding claim of actual UCI. In fact, in conducting an analysis of apparent UCI, the Court often necessarily looks to the absence of personal prejudice. *See* Bergdahl, 2020 CAAF LEXIS 489; Ayers, 54 M.J. 85; United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003). Similarly here, Appellant's failure to allege personal prejudice, and the lack of any evidence in the record supporting his belated claims of personal prejudice, are a factor to be considered in determining whether an intolerable strain has been placed upon the public's perception of the military justice system.

The Government does not contend that there could never exist a case in which an appearance of UCI exists even where there is no allegation of actual UCI. However, such cases should be distinguished as those in which there is a direct and palpable strain placed upon the military justice system itself. For instance, there is

more strain on the system where there is unlawful coercion resulting in the recusal of a military judge or influence exerted in the selection of panel members, or "systemic problems" as addressed in Boyce.[10] In the vast majority of cases, like this one, an appellant's own declination at trial and before the Court of Criminal Appeals to raise the issue of personal prejudice to his case would satisfy the public's perception that the appellant's court-martial was fair and not impacted by any UCI. After all – if an appellant did not believe at the time of his trial that he suffered unfairness, no objective, disinterested member of the public would intuit that on his behalf.

5. Statements Made at the Commander's Call Did Not Place an Intolerable Strain on the Public's Perception of the Military Justice System

Even if this Court determines that it will resolve this case on the basis of whether the Government rebutted the prejudice prong for apparent UCI, it should consider all of the circumstances in the case, including the arguments advanced above. It should also consider the commander's dual mission of ensuring good order and discipline within his unit while guaranteeing a fair court-martial for any

[10] For example, in Salyer, the Court found apparent UCI because there was an "impression that the prosecution in a military trial has the power to manipulate which military judge presides in a given case" based upon its access to personnel files and access to the judge's chain of command. Though an appellant could never show actual prejudice where a military judge who has recused himself is replaced by an impartial judge, the apparent, unlawful manipulation of the military justice system itself is too damaging to stand. 72 M.J. at 427.

individual facing charge and find that no intolerable strain was placed upon the public perception of the military justice system.

In addition to the facts discussed above, the Court should also recognize that a fully informed member of the public would be aware that a number of non-commissioned officers Lt Col MS's unit were failing to meet the standards expected of them. In addition to Appellant, the squadron was also dealing with an NCO who was engaging in unprofessional relationships with subordinates, NCOs behaving unprofessionally on social media, NCOs failing physical fitness assessments, and other general disciplinary issues. The squadron commander addressed this in a general nature. Addressing issues of good order and discipline, without addressing a particular case or expected disposition, does not rise to the level of unlawful command influence. This Court should also consider the appropriate steps which were taken after the commander's call to ensure that the message was received as it was intended. The fact that the commander and his senior NCOs corrected individuals who misinterpreted the garbled message demonstrates that no additional remedy from the court-martial was necessary to dissipate any perception of unlawful command influence. A meeting held with NCOs immediately after the commander's call clarified that the squadron commander was not discouraging anyone from supporting a fellow Airman facing disciplinary trouble. Every airman who expressed confusion about the

commander's message was told that they should cooperate with defense counsel, and that they did not need to withdraw support from Appellant. Members of the unit were thanked for visiting Appellant in prison, and for supporting him throughout the disciplinary process. A disinterested member of the public would be aware of these other steps taken to preserve a fair trial for Appellant, which would help to ameliorate any concerns that the commander may have made inartful comments.

This case was fully litigated in open court. The defense had the opportunity at a motions hearing to call witnesses and put forth its evidence, and trial counsel clearly cross-examined the witnesses and established the lack of prejudice to Appellant's court-martial. The commander's call was regularly scheduled, and occurred a year before the trial on the merits, further demonstrating the lack of nexus between the commanders comments and Appellant's court-martial itself. No member of Appellant's panel was from his same squadron. (JA at 40-41). No reasonable member of the public would believe the proceedings were unfair where Appellant himself cannot provide specific reasons why the actual court-martial proceeding was unfair, outside of his speculative

Out of the entire commander's call, only one statement is concerning; that Lt Col MS told a story about refusing to provide a character letter to an airman. However, even the Air Force Court acknowledged that "the record is unclear as to

the exact words Lt Col MS spoke at the commander's call or the message that was conveyed." (JA at 23.) During his testimony on the motion to dismiss, trial defense counsel asked Lt Col MS to explain the full background of the story leading to him refusing to provide a character letter to an individual. (JA at 106). While the commander testified that he had told the story during the commander's call, it is unclear how many details he had included. Based upon the limited recall of the attendees at the commander's call, he likely provided few. Regardless, it is important to note that this was a story that was told as part of his message to support airmen without enabling bad behavior – it was not an admonition not to provide character letters. No reasonable member of the public would think the commander's message created any unfairness in his court-martial proceeding, when Appellant himself cannot even establish what the message was, who it impacted, or how it impacted his court-martial.

Appellant's arguments that Lt Col MS was biased against the Accused are both irrelevant to the inquiry of UCI and unsupported by the record. Lt Col MS was displeased by the acquittal in a separate case – however, he did not mention that acquittal during the commander's call, nor was there any evidence introduced that he had shared his view with any prospective defense witness in Appellant's case. Further, it must be noted that the acquittal involved members of the squadron testifying against one another. A summary court-martial officer was required to

determine credibility between multiple members of the same squadron, on a question of a violation of no-contact orders. This naturally caused division within the squadron; those who had testified against the acquitted airmen felt like they had been labeled liars. Additionally, UCI is based not upon the thoughts of those wearing the mantle of command authority, but by their actions. Despite any personal feelings Lt Col MS may have had following the acquittal, the military judge made a finding of fact that he "reintegrated" SSgt CM back into the unit, and mentored her on the "opportunity to repair her relationships within the unit." Appellant does not provide any nexus between any supposed animus Lt Col MS may have felt following an acquittal, and his own court-martial.

Appellant's argument of animus toward SSgt JP is also unavailing. SSgt JP was not removed from his duty assignment for "vocalizing his support for Appellant." The record supports that he was removed for unprofessional behavior, including poor judgment in an off-base drinking incident, disrespectful comments, and deliberate provocation of government witnesses. He was not removed from a duty assignment because he supported Appellant – he was removed because he behaved unprofessionally. His supervisors told him that he was free to be happy about his friend being released from confinement, but that he could not parade it around the squadron in an unprofessional matter. SSgt JP himself, while griping about command actions, admitted that he was never told to stop supporting

Appellant; never told not to testify for him; and never told not to write a character letter for him. The military judge in her findings of fact found that SSgt JP was removed from his position as an administrative decision based upon his pattern of poor decisions. (JA at 387).

Finally, Appellant argues that Lt Col MS had a bias against domestic violence cases. Lt Col MS was a Security Forces Commander. It was his responsibility to know the patterns of domestic violence – including that it is often continuously perpetuated within the confines of the home. Lt Col MS *should* have a distaste for those who commit domestic abuse. The fact that he disliked violence does not mean that he engaged in UCI. No reasonable member of the public would have concerns that Appellant's court-martial was unfair based upon these three assertions of personal animus when they are contradicted by the facts in the record and not tied to Appellant's court-martial.

Appellant next argues that Lt Col MS saw SSgt MJ as "the paradigmatic example of what it meant to 'enable' an Airman facing disciplinary action." (App. Br. at 35.) Such an argument could not be more divorced from reality – Lt Col MS testified that he saw SSgt MJ as an exemplary airman, and thus was surprised when he read a witness statement that mentioned a belief that the Air Force was "after" Appellant. (JA at 110-111.) Lt Col MS wondered if SSgt MJ knew of any of the evidence of violence when he made that statement, or had only heard Appellant's

side of the story. (Id.) But again – it is entirely irrelevant what Lt Col MS may have personally believed and thought – Appellant has again failed to allege any improper *action*. When Lt Col MS heard that SSgt MJ had been avoiding trial defense counsel, he told him to cooperate fully and to "tell the truth." Lt Col MS never dissuaded SSgt MJ in any way from supporting Appellant. Nowhere in the record is there any evidence that Lt Col MS believed that SSgt MJ was "enabling" a domestic abuser.

Appellant concludes his brief by arguing that the government should have taken remedial measures. However, Appellant never alleged that any witnesses were refusing to cooperate, to testify, or to provide character statements, as a result of the alleged UCI. Appellant alleges that his sentencing case could have been changed if members of his unit testified in support of him. Appellant is not entitled to the support of his squadron in the presentencing portion of a trial – he is only entitled to a *fair* presentencing trial which is not impacted by unlawful influence. Had Appellant proffered that any individual was unwilling to cooperate in presentencing hearings as a result of alleged UCI, the government could have taken curative measures, or the military judge could have directed remedial action. He did not do so, and to date has not done so. Given Appellant's repeated and continuous violation of no-contact orders, including *after* being released from pretrial confinement and having had charges preferred against him, it was a nearly

foregone conclusion that no member of his unit could provide sentencing testimony as to his value in the unit, or his rehabilitative potential.

It is possible that nobody from Appellant's unit testified or provided a character letter after the court-martial as a result of having heard the full degree of misconduct he committed. It's possible that his continued misconduct, even after the commander's call, dissuaded those who had once supported him from supporting him.[11] It is possible that Appellant made a strategic decision not to call or produce some character letters.

The fact that Appellant relies upon a parade of "possibles" in order to support his assertion that he *may* have been deprived of witnesses demonstrates the lack of evidence supporting a claim that he was prejudiced, or that a reasonable member of the public would harbor doubts as to the fairness of the proceedings.

Rather, in looking to the military judge's findings of fact, this Court should conclude that Lt Col MS's statements during the commander's call did not place a intolerable strain on the military justice system because they addressed the proper topic of good order and discipline, and did not attempt to, or serve to, influence any function of the court-martial. There was a genuine issue within his unit in which NCOs were failing to meet standards and were failing to enforce standards

[11] Even after the commander's call, Appellant continued to violate no contact orders, leading to an additional charge with two specifications being preferred in September 2017.

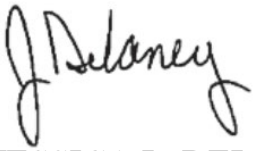
among junior airmen. Lt Col MS tailored his message to be general and to address all NCOs in the unit without singling out or calling attention to Appellant's particular case. Under the facts of this case, no reasonable, interested observer would harbor any doubts about the fairness of Appellant's court-martial, and therefore there was no intolerable strain upon the public perception of the military justice system.

CONCLUSION

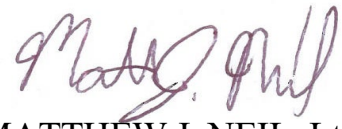
This Court should find that no UCI occurred in this case and that there was no intolerable strain placed upon the public's perception of the military justice system. Appellant's acknowledgement at trial that he did not suffer any prejudice from the comments at the commander's call provides further evidence both that no influence was exerted upon the court-martial and that no intolerable strain was placed upon the military justice system. Finally, the totality of the circumstances, including the length of time that passed between the commander's call and Appellant's court-martial, the vague nature of any statements, the steps taken by both the commander and senior NCOs to clarify that individuals were free to support Appellant, and the absence of any evidence to support a contention that Appellant was deprived of any witness or support as a result of the commander's call, all demonstrate no UCI occurred. Under these facts, a reasonable member of the public would not doubt the fairness of the proceedings, and therefore, no

intolerable strain has been placed upon the public's perception of the military justice system.

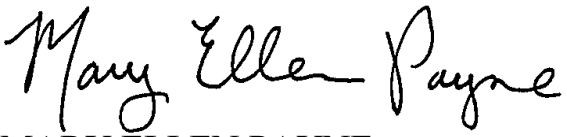
For the foregoing reasons, the United States respectfully requests this Honorable Court answer the granted issue in the negative and affirm the lower court's decision.



JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177



MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

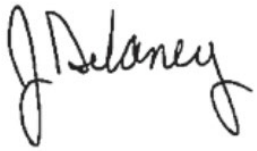


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 23 November 2020.



JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This answer complies with the type-volume limitation of Rule 24(c) because:

☒ This brief contains 11,677 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with 14 characters per inch using Times New Roman.

/s/_____

JESSICA L. DELANEY, Maj, USAF

Attorney for USAF, Government Trial and Appellate Operations

Dated: 23 November 2020