IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **RONALD C. GIVENS** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20190132 USCA Dkt. No. 21-0086/AR

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFECTIVE PREFERRAL/UNLAWFUL COMMAND INFLUENCE MOTION ON PROCEDURAL GROUNDS.

Argument

A. The government's reliance on *United States v. Hamilton* is misplaced.

The government argues that appellant waived any objection to accusatory unlawful command influence (UCI) because he failed to raise the issue prior to entry of pleas. (Appellee's Br. 9–10). To support its argument, the government contends this Court's decision in *Hamilton* "ma[de] clear" that Rule for Courts-Martial (R.C.M.) 905(b)(1) "dictates that allegations of UCI at the preferral stage must be raised prior to the entry of pleas." (Appellee's Br. 10) (citing *United*

States v. Hamilton, 41 M.J. 32 (C.M.A. 1994)). However, in reaching that conclusion, the government glosses over the plain language of R.C.M. 905(b)(1) and ignores the actual holding from *Hamilton*.

For example, the government asserts "the Rules for Courts-Martial required appellant to raise his objection that UCI tainted the preferral of charges prior to the entry of his pleas[]" without explaining how the plain language of R.C.M. 905(b)(1) supports such a claim. (Appellee's Br. 9). Appellant does not dispute that true "defects" in the "preferral, forwarding, or referral of charges" must be raised before a plea is entered. R.C.M. 905(b)(1). However, the government points to no provision within the Rules for Courts-Martial that categorizes UCI as a mere defect. Instead, the government clings to a few remarks from *Hamilton* where the majority described accusatory UCI as a "defect" akin to unsigned or unsworn charges. (Appellee's Br. 11). However, that language was merely dicta because it was not essential to the outcome of the case. *See Cohens v. Virginia*, 19 U.S. 264, 399 (1821) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.")

In *Hamilton*, the appellant raised his claim of accusatory UCI for the first time on appeal. 41 M.J. at 34. As such, this Court's decision did not turn on

whether accusatory UCI is a type of "defect" that must be raised prior to entry of pleas. This Court simply decided that appellant waived the issue because he did not raise it at the trial level *at all*. *Id.* at 37. Specifically, this Court held, "any defects in the preferral or forwarding of charges were waived, since appellant did not raise them *at trial*[.]"[1] *Id*. (emphasis added). This Court should not adopt the dicta from *Hamilton* that characterizes accusatory UCI as a "defect" because, as Judge Wiss noted in his concurrence, the majority's approach was "not based on solid precedent or sound reasoning." *Id.* at 40 (Wiss., J, concurring in the result).

Similarly, the government's argument that "[t]his court has consistently required appellants to raise UCI concerns about the accusatory phase before they enter pleas" relies upon a contorted view of this Court's jurisprudence surrounding UCI. (Appellee's Br. 11-12, n.8). For example, in *United States v. Johnston*, which was decided just four months prior to *Hamilton*, this Court specifically held the appellant did not waive his claim of accusatory UCI even though it was raised for the first time on appeal. 39 M.J. 242, 244 (C.M.A. 1994) (citing *United States v. Blaylock*, 15 M.J. 190, 193 (C.M.A. 1983)) ("Appellate government counsel argue that the command-influence issue was waived by appellant's failure to raise

[1] This Court's use of the term "at trial" is instructive. If the *Hamilton* majority had truly intended to relegate claims of accusatory UCI to the same status as other procedural defects, using the term "at trial" is inaccurate because *true* defects in the preferral of charges must be raised *before* trial. R.C.M. 905(b).

it at his court-martial. . .We hold that the issue was not waived."). Moreover, appellant is not aware of any case where this Court held that an appellant waived a claim of accusatory UCI *solely* because it was raised after entry of pleas. Because appellant raised his motion alleging accusatory UCI prior to trial, he satisfied the time requirements of R.C.M. 905(e) and this Court's precedent in *Hamilton*.

B. Appellant did not affirmatively waive his claims of defective preferral and accusatory UCI.

The government argues that appellant "affirmatively waived any objections based on defects in the preferral" simply because his defense counsel – a First Lieutenant[2] – stated "[t]he defense has no motions at this time" at the arraignment. (Appellee's Br. 14). First, even appellant's inexperienced counsel conditioned his declaration with the disclaimer "at this time." (JA 057). Second, prior to arraignment, the military judge set a separate deadline for motions to be filed in the case. (JA 058, 322). The government ignored these clear facts and contends that appellant *affirmatively* waived his claim of accusatory UCI the instant his defense counsel uttered the words "[t]he defense has no motions at this time." (Appellee's Br. 14). According to the government's logic, appellant's defense counsel would have also waived any other potential motions by stating a single sentence at

[2] Only one defense counsel, First Lieutenant (1LT) JW, was present at appellant's arraignment. (JA 051). Appellant elected to proceed with just 1LT JW at his arraignment even though he was also represented by CPT DR. (JA 053).

arraignment. This Court should not adopt such a hyper-technical approach in evaluating waiver. Moreover, for the reasons stated above, appellant could not have waived his claim of accusatory UCI prior to adjournment. *See supra* Argument, Part A.

C. The military judge abused his discretion.

Even if this Court finds that appellant's motion was untimely, the military judge abused his discretion by failing to consider it. When the military judge denied appellant's motion, he failed to cite any rule, case, or other legal authority to support his decision. (JA 128-129). As such, it is unclear whether the military judge, like the government, improperly relied upon dicta from *Hamilton* to conclude that appellant's claim of accusatory UCI was untimely despite having raised it prior to trial. Unsurprisingly, the government asserts the military judge did not apply an erroneous view of the law because "R.C.M. 905(e) and this Court's precedents expressly indicate that the types of objections Appellant raised in his February 24, 2019 motion are waived if not raised prior to the entry of pleas." (Appellee's Br. 22).

However, the government overlooks a key distinction between the facts of this case and those of *Hamilton*[3], *Drayton*[4], *Brown*[5], *Richter*[6], and *Weasler*[7]. In each of those cases, the appellant raised the issue of accusatory UCI for the first time on appeal or affirmatively waived the issue in exchange for favorable terms in a plea agreement. Had the military judge read those opinions, he would have understood that this Court's precedent only required appellant to raise accusatory UCI "at trial" rather than for the first time on appeal. *See, e.g.*, *Hamilton*, 41 M.J. at 34. While this Court has made it clear that accusatory UCI *can* be waived, it certainly has not provided *carte blanche* for military judges to dispose of such claims simply because the issue was raised after entry of pleas. To the extent the military judge relied upon dicta from *Hamilton*, such reliance was misplaced and constituted an erroneous view of the law.

Additionally, this Court should give little deference to the military judge's findings of fact. Appellant recognizes that this Court cannot simply "substitute its view of the facts for the view of the military judge." (Appellee's Br. 21, n.11).

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[3] 41 M.J. 32, 34 ("This issue was not raised at trial").
[4] 45 M.J. 180, 181 (C.A.A.F. 1996) (UCI was raised "for the first time on appeal").
[5] 45 M.J. 389, 399 (C.A.A.F. 1996) ("No motion was made at trial to dismiss the charges or for other appropriate relief based on command influence.").
[6] 51 M.J. 213, 223 (C.A.A.F. 1999) ("Appellant did not assert unlawful command influence at trial.")
[7] 43 M.J. 15, 19 (C.A.A.F. 1995) (Appellant "affirmative[ly]" and "knowing[ly]" waived any accusatory UCI in exchange for a plea deal).

However, the military's judge's findings of fact were far more interpretive and conclusory than they were factual. *See United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) ("Military judges must be careful to restrict findings of fact to things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequence, or interpretation.'") (quoting *Black's Law Dictionary* 628 (8th ed. 2004)).

The military judge's findings of fact only included a timeline of events along with a bare conclusion that "the facts upon which the defective preferral and unlawful command influence portions of the motion are based were discoverable by the defense beginning on 23 April 2018, the date of preferral." (JA 128-129). The government points its finger at appellant for failing to show good cause but fails to adequately address the military judge's hands-off approach in deciding whether good cause existed. (Appellee's Br. 16, 18). The government also claims "[a]ppellant did not even attempt to explain or excuse his tardiness." (Appellee's Br. 19). However, appellant's defense counsel clearly stated that he was not aware of CPT JE's conduct until just days before he filed the motion. (JA 104, 112). While the late discovery of that information *could* have been due to negligence, the military judge simply did not possess the facts to support such a conclusion.

Finally, the military judge abused his discretion because his decision was "outside the range of choices *reasonably* arising from the applicable facts and the

law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted) (emphasis added). Because the military judge was so dismissive of appellant's motion, it is clear that he did not adequately apply all of the relevant law to the facts of this case. For example, the military judge failed to consider his important role as "the last sentinel" protecting appellant from the "mortal enemy of military justice." *See United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998); *see also United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). The government implicitly and incorrectly asserts that such vivid language is only relevant to cases of adjudicatory UCI. (Appellee's Br. 11, n.8) ("Appellant's invocation of the oft-repeated mantra that UCI is 'the mortal enemy of military justice,'. . . to exalt appellant's objection here to waiver-proof status is contrary to this court's precedent and conflates accusatory and adjudicative UCI."). However, even in cases involving accusatory UCI, this Court has recognized the harm that can result from undue influence in the military justice system. *See Weasler*, 43 M.J. at 19 ("We will be ever vigilant to ensure that unlawful command influence does not play a part in our military justice system.").

Even if accusatory UCI can be categorized as a type of "defect" it is still different from true technical flaws such as a typo on the charge sheet because UCI often involves manipulation rather than oversight. As such, the military judge should have expressed a greater degree of concern for the serious issues raised by

appellant. Moreover, if military judge believed that claims of accusatory UCI should be raised prior to entry of pleas, he should have considered this Court's instruction in *United States v. Coffin* to be "liberal" when enforcing procedural timing requirements related to motions to suppress, which also must be raised prior to entry of pleas. 25 M.J. 32, 34 (C.M.A. 1987). Notably, the government does not address *Coffin* in its analysis of the military judge's ruling.

D. The error was not harmless.

The government's characterization of CPT JE's coercive behavior as a candid "legal opinion" is inaccurate. (Appellee's Br. 23). When CPT JE told CPT CF that "someone else" would prefer charges if he declined to do so, CPT JE was not providing CPT CF with information that would have assisted him in understanding the charges or any other legal matter. Instead, the statement was delivered as an ultimatum: if you don't prefer these charges, I'm going to take this to your boss. Furthermore, CPT JE's failure to provide CPT CF with any alternative options contributed to the coercive nature of the conversation – CPT CF did not feel that he had "any other option but prefer charges." (JA 341).

Similarly, the government's argument related to defective preferral fails to account for all of the facts. The government claims "Captain CF did not indicate that he thought the matters stated in the charges were not true in fact; rather, he felt that they should be treated less harshly." (Appellee Br. 24). However, in his

sworn statement, CPT CF plainly stated, "[b]ased on my knowledge of the BAH issues, SPC Givens has not committed BAH fraud." (JA 341).

The government also contends that appellant suffered no prejudice because, in its own estimation, "referral to a general court-martial was wholly appropriate." (Appellee's Br. 25). The most obvious flaw in the government's argument is that it fails to consider the possibility, and even likelihood, that had CPT CF been aware of all the options at his disposal, appellant would have only faced a court-martial for the domestic violence offenses. Captain CF told CPT JE that he wanted to address all of the charges, except the "domestic violence charges" at "[his] level." (JA 341). It would have been completely reasonable for CPT CF to just prefer the "domestic violence offenses" and handle the rest of the alleged misconduct through non-judicial punishment or other means because the majority of the offenses on the charge sheet were not so serious as to definitely warrant trial by general court-martial.

Finally, the government's argument that the convening authority's eventual referral softened the blow of any UCI is hardly persuasive. (Appellee's Br. 25-26). Under the government's theory, there would be no such thing as accusatory UCI, as all such cases would eventually be cured by referral[8]. Furthermore, had CPT CF

[8] The fact that the convening authority "independently" withdrew the initial charges only remedies the problems raised in the initial defense motion related to defective referral. (Appellee's Br. 26).

only preferred the "domestic violence charges," it is equally likely that the convening authority would have referred just those offenses. Moreover, when the staff judge advocate provided his advice to the convening authority, he incorrectly stated "[t]he accused's entire chain of command recommends that the original charges and their specifications and the additional charge and its specification be referred to trial by a general court-martial." (Supplemental JA 001–002). Clearly, that was not CPT CF's recommendation and the staff judge advocate's erroneous advice only served to exacerbate the prejudice to appellant. Therefore, this Court should find that both the defective preferral and UCI caused appellant to suffer prejudice.

Conclusion

Because the military judge abused his discretion by denying the defense motion to dismiss on procedural grounds, appellant respectfully requests this Court set aside his remaining convictions.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Givens*, Crim. App. Dkt. No. 20190132, USCA Dkt. No. 21-0086/AR, was electronically filed with the Court and the Government Appellate Division on May 10, 2021.

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