IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Eric S. GILMET Chief Hospital Corpsman (E-7) U.S. Navy, Appellant	REPLY TO APPELLEE'S ANSWER Crim. App. Dkt. No. 202200061 USCA Dkt. No. 23-0010/NA

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

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ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED WHEN HE FOUND THE GOVERNMENT FAILED TO PROVE THAT UNLAWFUL COMMAND INFLUENCE (1) WOULD NOT AFFECT THE PROCEEDINGS BEYOND A REASONABLE DOUBT, AND (2) HAS NOT PLACED AN INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM.

Reasons to Grant Review

This Court should grant review to protect the military justice system, and Chief Gilmet, from the threats launched by a senior judge advocate that sent shockwaves throughout the defense community. This Court should also act to preserve the limits imposed on appellate courts during review of Article 62, UCMJ, appeals.

1. The *Reynolds* test does not—and cannot—apply when assessing pre-trial UCI.

The Government argues the test in *United States v. Reynolds* applies here because "the alleged prejudice has already occurred."[1] But *United States v. Biagase* is clear: the standard in *Reynolds* does not apply to the military judge's

[1]Answer at 14. Notably, the Government seems to concede "prejudice had already occurred," *see* Answer at 15, so that should weigh heavily in this Court's determination as to whether the Government carried its burden on the UCI.

assessment of motions at trial, where the impact of UCI "is a matter of potential rather than actual effect."[2]

The *Reynolds* test provides that "prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting unlawful command influence and *the outcome of the court-martial*."[3] Even where, as here, some prejudice has materialized pre-trial due to UCI, there is no way for an accused to prove UCI has affected the outcome of the court-martial when the trial has not even begun. Although Chief Gilmet already lost two military counsel, the strongest prejudice from the loss of counsel cannot come to fruition unless he actually goes to trial. A military judge evaluating UCI must think prospectively, unlike an appellate judge who can review the entire proceeding on Article 66, UCMJ, review to assess prejudice. Only then can it be shown whether UCI was the proximate cause of the outcome of the court-martial.

2. The Government asks this Court to ignore *United States v. Becker* and endorse the NMCCA's improper factfinding and failure to apply the deferential clearly erroneous standard.

In an Article 62 appeal, reviewing courts are "bound by the military judge's factual determinations unless they are unsupported by the record or clearly

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[2] 50 M.J. 143, 150 (C.A.A.F. 1999) (discussing *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994)).
[3] *Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (emphasis added). Of note, the *Reynolds* court examined whether the UCI affected the findings and sentence. *Reynolds*, 40 M.J. at 202.

erroneous."[4] Reasonable inferences must be drawn in favor of Chief Gilmet, who prevailed at trial.[5] Despite the NMCCA's citations to the clearly erroneous standard, it failed to apply it.

> *NMCCA Fact 1: "Capt [Thomas's] and Capt [Riley's] conflicts were purely subjective."[6]*

The military judge did not find this as a fact. Instead, the military judge found Captain Thomas's and Captain Riley's concerns "valid."[7] The NMCCA apparently disagreed, but did not conclude the military judge's finding was "unsupported by the Record," contrary to the Government's assertion.[8] The NMCCA only said the record contains evidence that shows the conflicts were purely subjective.[9] But this is error.

Reviewing courts are not free to throw out a military judge's factual findings simply because the record contains evidence that cuts the other way.[10] The NMCCA was "not authorized to make factual determinations to support a simple difference of opinion between it and the military judge."[11] The NMCCA needed to

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[4] *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021).
[5] *See id.* at 488 (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)).
[6] *United States v. Gilmet*, No. 202200061, 2022 CCA LEXIS 478, *20 (N-M. Ct. Crim. App. Aug. 15, 2022) (App. A).
[7] Appellate Ex. CIX at 16.
[8] Answer at 17.
[9] *Gilmet*, 2022 CCA LEXIS 478, at *20.
[10] *Becker*, 81 M.J. at 489 (quoting *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007)).
[11] *See Becker*, 81 M.J. at 490.

show its work as to why the military judge's finding was clearly erroneous. It could not because the military judge's finding is well-supported by the numerous affidavits citing the impressions of the seven other judge advocates at the DSO meeting, the Senior Defense Counsel (SDC), and Regional Defense Counsel (RDC).[12]

The military judge is entrusted to make factual findings, and the NMCCA was required to defer to his factual findings. It failed to do so.

> *NMCCA Fact 2: "Capt [Thomas] was selected for highly valued professional military training"[13] and "highly-coveted follow-on orders."[14]*

Contrary to the Government's claim, the NMCCA did not conclude the military judge "failed to consider important facts" when it made these findings.[15] While these facts do not appear in the military judge's ruling, there is no evidence in the record to support that he did not consider them. The military judge may well have considered Captain Thomas's selection for professional military education (PME) and rejected it.

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[12] Appellate Ex. LXXXVI at 1, 3, 5, 7, 10, 12, 74; Appellate Ex. CVI at 18.
[13] *Gilmet*, 2022 CCA LEXIS 478, at *14.
[14] *Id.* at *19.
[15] *Compare* Answer at 17 *with Gilmet*, 2022 CCA LEXIS 478, at *14, *19. Further, it would have been inappropriate for the NMCCA to apply the "failure to consider important facts" test since that is applied when reviewing for an abuse of discretion. *See Becker*, 81 M.J. at 489. But this fact falls within the court's UCI analysis, where the legal issue should have been reviewed *de novo* and facts under the clearly erroneous standard.

The evidence surrounding Captain Thomas's selection for PME cuts both ways, seeing as: (1) Captain Thomas was not aware of his selection at the time of the DSO meeting and (2) Colonel Shaw attempted to find a replacement for Captain Thomas's selection to keep him at the DSO (without first notifying or consulting Captain Thomas).[16] It is entirely possible the military judge found little value in Captain Thomas's PME selection since the circumstances greatly negated its ability to "cure" the UCI here.

NMCCA Fact 3: "Col [Shaw's] comments were patently untrue."[17]

This fact found by the NMCCA ignores a fact found by the military judge: "Col [Shaw's] statements provided to this Court by the government were internally inconsistent, self-serving and directly contradicted by multiple officers."[18] The military judge concluded the Government had not disproved the predicate facts constituting UCI because Colonel Shaw's three statements were inconsistent. The NMCCA neither listed what "evidence" it used to support this finding of patent untruth nor explained why the military judge's finding regarding Colonel Shaw's statements was false.[19] The military judge's logic is sound here: the Government

[16] Appellate Ex. XC at 7-8.
[17] *Gilmet*, 2022 CCA LEXIS 478, at *14.
[18] Appellate Ex. CIX at 12.
[19] *Gilmet*, 2022 CCA LEXIS 478, at *14.

could not prove Colonel Shaw's statements were patently untrue because Colonel Shaw provided multiple statements that all contradicted each other.

It was erroneous for the NMCCA to make that finding. Regardless, the record does not support NMCCA's finding.

> *NMCCA Fact 4: "Capt [Thomas] has since promoted to Major; for clarity's sake, he will be referred to by his previous rank throughout this opinion."*[20]

This finding of fact appears in the NMCCA's first opinion. Yet there is no evidence in the record (or elsewhere) that Captain Thomas promoted to Major. The NMCCA deleted this fact in a corrected opinion upon the Government's motion. The Government wrote that it "confirmed Captain [Thomas] did not promote to Major."[21] This shows the NMCCA did not constrain itself to information in the record. Of note, this extra-record information related to the subject matter of Colonel Shaw's threats—the promotion process.

In addition to the NMCCA's erroneous factfinding discussed above, the NMCCA also failed to view the evidence in the light most favorable to Chief Gilmet. The NMCCA, and the Government, call into question the substance of the conversations between military counsel and their state licensing authorities and supervisory counsel.[22] Given that counsel informed the military judge on the record

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[20] *United States v. Gilmet*, No. 202200061, 2022 WL 3350549, at *1 n.6 (N-M. Ct. Crim. App. Aug. 15, 2022) (App. B).
[21] Gov. Mot. to Administratively Correct Op. at 2 (App. C).
[22] Answer at 9-10; *Gilmet*, 2022 CCA LEXIS 478, at *19-20.

that these consultations occurred and that they still felt an irreconcilable conflict of interest existed despite their conversations, it was erroneous for the NMCCA to view this evidence in a light so unfavorable to Chief Gilmet. Even though military counsel did not share the details of their conversation with supervisory counsel on the record, the SDC's affidavit sheds light on the substance of his conversations with Captains Thomas and Riley, and the "large impact" "a single afternoon with Colonel Shaw" "had on [his] high performing counsel."[23] This evidence supports the military judge's finding of fact and must be viewed in the light most favorable to Chief Gilmet.

3. The Government asks this Court to ignore R.C.M. 801(a)(3) and its Discussion because the Government disagrees with the way the military judge exercised his discretion here.

It is normal in any judicial proceeding for a judge to control the order in which motions are litigated. The Discussion accompanying Rule for Courts-Martial (R.C.M.) 801(a)(3) states what common sense supports: the military judge has discretion to determine "when, and *in what order*, motions will be litigated."[24] Because the Government doesn't like the order the military judge chose here, it casts aspersions at the military judge, alleging he "manipulate[d] the outcome by

[23] Appellate Ex. LXXXVI at 74.
[24] R.C.M. 801(a)(3) Discussion (emphasis added).

resolving motions in a particular order" and both "circumvented" and "sidestepped" the UCI framework.[25] These aspersions are bold and unfounded.

It is entirely appropriate to ask an accused whether he would like to retain his military counsel before ruling on the substance of another related motion, and the Government cites a case to support this.[26] In *United States v. Nicholson*, it came to light that the assistant trial counsel served as the reporting officer for assistant defense counsel's fitness reports, creating a possible conflict of interest.[27] The defense moved to have the assistant trial counsel disqualified from the case. But before ruling on that motion, the military judge engaged in a colloquy with the accused, requesting to know whether he still wanted to be represented by his assistant defense counsel.[28] The military judge only ruled on the disqualification motion *after ascertaining the accused's choice* regarding his military counsel.[29] Some scenarios necessitate such an approach, and military judges must retain the discretion to resolve issues related to potential conflicts of interest in whatever order is necessary based on the specific factual circumstances.

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[25] Answer at 19.
[26] *United States v. Nicholson*, 15 M.J. 436 (C.M.A. 1983).
[27] *Id.* at 437.
[28] *Id.* at 437-38.
[29] *Id.* at 438.

The Government asserts that Chief Gilmet "prompted the Military Judge to avoid entering a finding of good cause."[30] This assertion is unbelievable. Chief Gilmet did not ask the military judge to be heard on the counsel issue at all. On his own volition, the military judge turned to Chief Gilmet after speaking with military counsel on the record.[31] Chief Gilmet did not ask to speak, and certainly said nothing about good cause in response to the military judge. What underlies the Government's argument is pure frustration with the outcome here. The Government could have just as easily asked the military judge to make a good cause finding on the record before Chief Gilmet responded to the military judge's question. The court recessed for eleven minutes while Chief Gilmet consulted with conflict-free counsel.[32] The Government could have requested that the military judge make such a finding when the parties came back on the record, but it failed to do so. The time to request a good cause finding has long expired.

4. <u>The Government continues to ask this Court to review issues that are outside its jurisdiction under Article 62, as the NMCCA already did.</u>

The Government's Answer itself violates the scope of Article 62. Section II in its Answer is styled as an assignment of error, and contains issues outside the scope of Article 62. The only ruling in this case that "terminate[d] the proceedings

[30] Answer at 27.
[31] R. at 210.
[32] R. at 212-13.

with respect to a charge or specification" was the military judge's UCI ruling.[33] The military judge's handling of the conflict issue is not "inextricably tied" to the UCI motion.[34] Certainly the facts surrounding the release of counsel are relevant to this Court's evaluation of the military judge's UCI ruling, but neither the NMCCA nor this Court has jurisdiction to do what the Government is asking.

Further, it is inappropriate to review legal issues in an Article 62 appeal that the military judge, and counsel, did not believe were before him.[35] Here, it is inappropriate for any appellate court to conduct an alternate *de novo* review of whether there was "good cause" to release military counsel because the military judge never ruled on this issue, and at trial the Government agreed this ruling was not required.[36] This Government concession at trial amounts to a waiver of the Government's ability to argue now that the military judge was required to make a "good cause" ruling.[37]

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[33] *See* Art. 62(a)(1)(A), 10 U.S.C. § 862(a)(1)(A).
[34] Answer at 20.
[35] *See United States v. Kosek*, 41 M.J. 60, 63 (C.M.A. 1994) (discussing the military judge's express acknowledgement that a legal issue challenged on appeal was "not before [him]").
[36] R. at 268.
[37] *See United States v. Suarez*, No. 20170366, 2017 CCA LEXIS 631, at *10 (A. Ct. Crim. App. Sept. 27, 2017) (App. D); *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994); *cf. United States v. Augspurger*, 61 M.J. 189, 194 (C.A.A.F. 2005) (Ryan, J., concurring in part) ("The statements of the prosecutor bind the Government, or at least result in judicial estoppel.").

Even if, assuming arguendo, a reviewing court were to find the military judge abused his discretion by not conducting a "good cause" analysis before asking whether the accused consented to release his counsel, the appropriate action would be to remand for the military judge to conduct such analysis.[38] The answer is not to conduct factfinding and legal analysis for the first time on appeal. Particularly where, as here, the military judge did not provide complete factfinding on the "good cause" issue because military counsel were properly released under alternative grounds in R.C.M. 506(c). Even the Government concedes on appeal that "good cause was neither required nor established."[39]

Despite this concession, the Government tries to have it both ways. The Government claims the military judge "failed the requirement to 'investigate and make a final determination' on whether a conflict existed" and "never tested the asserted conflict for good cause."[40] But if that is true, the NMCCA and this Court do not have the facts required to make a "good cause" determination. If the Government believes additional investigation was necessary, surely it believes additional factfinding is also necessary. Neither this Court nor the NMCCA is

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[38] *See United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (noting that in an appeal under Article 62 "if the [military judge's] findings are incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings").
[39] Answer at 24.
[40] Answer at 27-28.

permitted to find facts in an Article 62 appeal, so it would be impossible for any appellate court to do as the Government asks.

The military justice system does not afford the Government carte blanche to appeal any unfavorable ruling. Generally, appellate rights are reserved for the accused—since it is his life and liberty at stake. The Government is only afforded limited grounds to appeal. The R.C.M. 506(c) issue in this case is not one of those limited grounds appealable under Article 62.

Argument

The Government bears the burden to prove beyond a reasonable doubt that the UCI would not prejudice Chief Gilmet's court-martial. At this stage of the proceedings, under *Biagase*, a presumption of prejudice has already attached.[41] The Government has not overcome that presumption despite many opportunities the military judge provided.

1. The Government never proved Colonel Shaw's statements were false.

The NMCCA conclusively wrote, "The 'fact and circumstances' in the present case include the evidence the Government provided to show that Col

[41] *See United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010). On top of the presumption of prejudice in the UCI context, courts also regularly presume prejudice when the government improperly interrupts or materially alters an established attorney-client relationship. *See United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011); *United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1987); *United States v. Iverson*, 5 M.J. 440, 444 (C.M.A. 1978).

[Shaw's] comments were patently untrue."[42] The Government repeated that argument in its Answer, but neither the NMCCA nor the Government explained *how* Colonel Shaw's comments were proven false.

Major General Bligh did not prove Colonel Shaw's comments were false because he did not know what Colonel Shaw said.[43] The affidavits from Marine Corps personnel law experts did not prove Colonel Shaw's statements were false because they only focused on the way the assignment and promotion processes should work, not how it actually works.[44]

2. Colonel Shaw's comments created "valid concerns" in the minds of Captain Thomas and Captain Riley.

The Government calls military counsel's fears "unfounded."[45] The record does not support this. The military judge made the following findings of fact that show he found military counsel's fears regarding Colonel Shaw's threats objectively reasonable.

- "Each of [Colonel Shaw's] comments directly addressed Capt Thomas's zealous representation of Chief Gilmet."[46]
- Colonel Shaw "placed this young Marine in an unworkable situation."[47]

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[42] *Gilmet*, 2022 CCA LEXIS 478, at *14.
[43] Appellate Ex. LXXXVI at 65.
[44] Appellate Ex. LXXXVIII at 4-12.
[45] Answer at 37.
[46] Appellate Ex. CIX at 14.
[47] Appellate Ex. CIX at 14.

- "Capt Thomas was faced with the choice to either zealously represent this client and sacrifice the potential for advancement in the USMC or protect his nascent career."[48]

- "Both [military counsel] indicated that after consultation with their state bar and with conflict-free supervisory counsel, they believed that there were irreconcilable conflicts of interest."[49]

- "Capt Thomas feared that his continued representation of HMC Gilmet . . . would be detrimental to his career."[50]

- "Capt Thomas told HMC Gilmet about the meeting and Col Shaw's comments, which created a rift between he and his client, as Col Shaw's comments caused HMC Gilmet to question Capt Thomas' undivided loyalty to him and his defense."[51]

- Colonel Shaw's "statements directly impacted Capt Thomas' ability to represent HMC Gilmet."[52]

Taken together, the military judge found that Colonel Shaw's comments directly addressed Captain Thomas's representation of Chief Gilmet, Captain Thomas genuinely feared what might happen if he zealously advocated for Chief Gilmet in his court-martial, and those fears negatively affected the relationship between Chief Gilmet and his military counsel.

The military judge's analysis of the objective reasonableness of military counsel's fears was also supported by other information in the record. Every other

[48] Appellate Ex. CIX at 14.
[49] Appellate Ex. CIX at 7.
[50] Appellate Ex. CIX at 6.
[51] Appellate Ex. CIX at 6.
[52] Appellate Ex. CIX at 12.

judge advocate in the room during the DSO meeting left with the same impression: Colonel Shaw directly threatened Captain Thomas because of his representation of Chief Gilmet.[53] The affidavits provided by both the SDC and RDC show that they were also personally affected by Colonel Shaw's comments.[54] If the SDC and RDC—who are senior to Captains Thomas and Riley and have more organizational experience—also feared the repercussions of Colonel Shaw's threats, the military judge did not err in finding military counsel had "valid concerns."

The military judge properly considered military counsel's subjective fears and the objective evidence before him when concluding the UCI had not been cured here. The Government and the NMCCA seem to suggest that military counsel had something other than a good faith belief that they were conflicted.[55] But it is the military judge's job to evaluate whether the accused or his counsel are making requests in good faith,[56] and the military judge here did just that. He was in

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[53] Appellate Ex. LXXXVI at 1, 3, 5, 7, 10, 12.

[54] Appellate Ex. LXXXVI at 74 (explaining he "continue[s] to fear what comes next for [his] counsel and [himself]" and that "multiple Marine Corps leaders" shared "their beliefs about Colonel Shaw's comments . . . 'Everything Colonel Shaw said is true, but you're not supposed to say it'"); Appellate Ex. CVI at 18 (explaining that Colonel Shaw's comments "rattled [him] personally" and he has "come to understand through [his] service as a judge advocate and defense counsel that there are senior leader judge advocates who do not view DSO work favorably").

[55] Answer at 17; *Gilmet*, 2022 CCA LEXIS 478, at *20 (characterizing military counsel's fears as "personal mistakes").

[56] *United States v. Watkins*, 80 M.J. 253, 262 (C.A.A.F. 2020) (Maggs, J., dissenting) (citing *United States v. Palmer*, 59 M.J. 362, 365 (C.A.A.F. 2004)).

the best position to evaluate the credibility of military counsel whose "declarations are virtually made under oath" when "addressing the judge solemnly upon a matter before the court."[57] The military judge gave military counsels' "representation[s] regarding a conflict" "the weight commensurate with the grave penalties risked for misrepresentation."[58] There is nothing in the military judge's ruling to suggest he thought military counsel were misrepresenting their fears, were being opportunistic, or were making any request in bad faith.

3. The Government ignores the substance of Colonel Shaw's threats and the harm they caused.

Colonel Shaw was not, nor purported to be, a lone bad actor. His removal from JAD only prevented *him* from directly impacting future assignments for Captains Thomas and Riley. It did not address the remainder of his threats regarding promotion boards or the consequences that might come from other members of the "small" judge advocate community. In its Answer, the Government fails to address the command investigation, which the military judge found was "tone-deaf[]" and only exacerbated the UCI here.[59]

[57] *See Holloway v. Arkansas*, 435 U.S. 476, 486 (1978).
[58] *See id.* at 486 n.9.
[59] Appellate Ex. CIX at 16.

Likewise, the Government ignores that part of the harm caused by Colonel Shaw's threats was the breakdown of the relationship between Chief Gilmet and his military counsel—not just the resulting conflict of interest.

The military judge noted the "rift" those threats created within their attorney-client relationship, causing Chief Gilmet to "question Capt Thomas' undivided loyalty to him and his defense."[60] The military judge found that Chief Gilmet was "hurt and confused and angry" after his military counsel requested to withdraw from the case and that Colonel Shaw's "comments had a significant impact on Captain Thomas and Captain Riley" who "were no longer able to provide [Chief Gilmet] with legal representation without looking over their shoulder."[61] These facts show just how damaging this UCI was, and how the Government's vague statements about the way assignments and promotion processes are supposed to work fell far short of curing this problem.

4. Chief Gilmet's constitutional and statutory rights were violated by governmental action, correspondingly violating his military-due-process rights.

Chief Gilmet does not claim violations of any rights outside of those recognized by this Court in *United States v. Vasquez*.[62] In fact, the Government

[60] Appellate Ex. CIX at 6.
[61] Appellate Ex. CIX at 6.
[62] 72 M.J. 13 (C.A.A.F. 2013).

correctly acknowledges that Chief Gilmet's "statutory rights to individual military counsel and detailed military counsel" are "at issue."[63]

A servicemember's military-due-process rights are based on the protections afforded by the "panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the *MCM*."[64] Chief Gilmet's military-due-process rights were violated because of the constitutional and statutory violations that resulted from the UCI here. Chief Gilmet was denied his Sixth Amendment right to counsel of choice when the Government materially altered his relationship with both military counsel. Likewise, his statutory rights to individual military counsel and detailed assistant defense counsel were violated by the same governmental action.[65]

The Government's argument regarding structural error also fails.[66] The military judge cited numerous cases—including *United States v. Watkins*—to illustrate how appellate courts have assessed prejudice resulting from the violation of an accused's right to counsel.[67] This does not amount to finding a structural error. The military judge found material prejudice. This point is clear from even

[63] Answer at 32.
[64] *Vasquez*, 72 M.J. at 19.
[65] Arts. 27(a)(1), 38(b)(3)(B), UCMJ, 10 U.S.C. §§ 827(a)(1), 838(b)(3)(B) (2019).
[66] Answer at 31-32.
[67] Appellate Ex. CIX at 18.

the heading he used to highlight his prejudice analysis: "The Government's Actions Materially Prejudiced the Substantial Rights of the Accused."[68]

The Government ignores that Colonel Shaw's threats created an unbearable tension between two sub-sets of Chief Gilmet's Sixth Amendment right to counsel—his rights to conflict-free counsel and counsel of choice. The Supreme Court has held it is "intolerable that one constitutional right should have to be surrendered in order to assert another."[69] "[C]reating this tension between the free exercise of rights is constitutional error."[70]

The Supreme Court has further held a criminal defendant can consent to a choice before him, yet still endure a constitutional violation from that choice.[71] The violation stems precisely from being forced to choose between constitutional rights. The military justice system, and this Court, should not tolerate governmental action—such as Colonel Shaw's here—which forces the accused to make such a choice.

5. <u>The recent amendment to Article 37 can be easily applied within existing appellate review frameworks.</u>

Contrary to the Government's assertions, the recent amendment to Article 37 does not "insulat[e] military judges from regular appellate review of their decisions

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[68] Appellate Ex. CIX at 17.
[69] *United States v. Simmons*, 390 U.S. 377, 394 (1968).
[70] *United States v. Pavelko*, 992 F.2d 32, 34 (3d Cir. 1993).
[71] *Simmons*, 390 U.S. at 393-94.

on apparent" UCI.[72] The military judge's ruling is still subject to appellate review under Article 62, and possibly through an extraordinary writ, as the Government already acknowledged.[73]

The amendment ensures military judges can continue to act as the "last sentinel protecting an accused from unlawful command influence,"[74] but that an accused does not receive a windfall on appeal after having received an otherwise fair court-martial. This Court, and military judges, have "an independent interest in ensuring" courts-martial "appear fair to all who observe them,"[75] and the Article 37 amendment should not be read or applied in a way that nullifies the safeguards of the apparent UCI doctrine.

Conclusion

Because of the UCI that remains uncured in Chief Gilmet's court-martial and the NMCCA's numerous errors in reviewing the issues involved, this Court should grant review, reverse the NMCCA's decision, and reinstate the military judge's ruling.

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[72] *See* Answer at 39.
[73] *See* Answer at 40.
[74] *See United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998).
[75] *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

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APPENDICES

A. *United States v. Gilmet*, No. 202200061, 2022 CCA LEXIS 478 (N-M. Ct. Crim. App. Aug. 15, 2022).

B. *United States v. Gilmet*, No. 202200061, 2022 WL 3350549 (N-M. Ct. Crim. App. Aug. 15, 2022).

C. Gov. Mot. to Administratively Correct Op.

D. *United States v. Suarez*, No. 20170366, 2017 CCA LEXIS 631 (A. Ct. Crim. App. Sept. 27, 2017).

CERTIFICATE OF FILING AND SERVICE

I certify that on November 21, 2022, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to the Appellate Government Division.

CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitation of Rule 24(c) because it contains 4,495 words; and 2) this supplement complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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United States v. Gilmet

United States Navy-Marine Corps Court of Criminal Appeals

June 29, 2022, Argued; August 15, 2022, Decided

No. 202200061

Reporter
2022 CCA LEXIS 478 *; 2022 WL 3712002

UNITED STATES, Appellant v. Eric S. ***GILMET***, Hospital Corpsman Chief Petty Officer (E-7), U.S. Navy, Appellee

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Prior History: Appeal by the United States Pursuant to Article 62, UCMJ **[*1]** . Military Judge: Hayes C. Larsen. Arraignment 24 February 2020 before a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina.

Counsel: For Appellant: Lieutenant Megan E. Martino, JAGC, USN (argued), Major Kerry E. Friedewald, USMC (on brief).

For Appellee: Lieutenant Kristen R. Bradley, USCG (argued), Lieutenant Megan E. Horst, JAGC, USN (on brief).

Judges: Before HOLIFIELD, DEERWESTER, and MYERS, Appellate Military Judges. Senior Judge HOLIFIELD, delivered the opinion of the Court, in which Senior Judge Deerwester and Judge Myers joined.

Opinion by: HOLIFIELD

Opinion

HOLIFIELD, Senior Judge:

This case is before us on appeal pursuant to Article 62, Uniform Code of Military Justice [UCMJ].[1] The Government alleges the military judge abused his discretion in dismissing all charges with prejudice. More specifically, Appellant asserts three assignments of error (AOEs): (1) the military judge erred when he considered counsel's asserted conflicts of interest before shifting the burden to the United States and found Appellee was prejudiced by the voluntary release of counsel; (2) the military judge erred in finding actual unlawful command influence [UCI] when the government **[*2]** provided evidence proving beyond a reasonable doubt that Colonel [Col] Sierra's[2] comments would have no effect on the court-martial; and (3) the military judge erred in conducting an apparent UCI analysis and in finding apparent UCI. We find error, vacate the military judge's ruling, and remand for further proceedings not inconsistent with this opinion.

I. Background [3]

Appellee was charged at a general court-

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[1] *10 U.S.C. § 862(a)(1)(A)*.

[2] All names in this opinion, other than those of Appellee, the judges, and appellate counsel, are pseudonyms.

[3] Unless otherwise noted, the background facts are summarized from the military judge's findings of fact. *See* App. Ex. CIX.

martial with violation of a lawful order, involuntary manslaughter, obstruction of justice, and negligent homicide, in violation of *Articles 92*, *119*, *131b*, and 134, UCMJ,[4] and was arraigned on 24 February 2020.[5] On 9 February 2022, the military judge dismissed all charges with prejudice based on both actual and apparent UCI.

A. Appellee's Counsel and Preparations for Trial

Appellee's lead counsel, Mr. Victor, has represented Appellee as civilian defense counsel [CDC] since January 2019. In March 2020, Appellee requested as his Individual Military Counsel [IMC] Captain [Capt] Tango. This request was approved the following month, accompanied by the excusal of Appellee's detailed defense counsel and the detailing of Capt Romeo as Appellee's new assistant defense counsel [ADC]. Each of the three counsel proceeded **[*3]** to prepare different aspects of Appellee's case, interviewing specific witnesses as appropriate.

After extensive delays due to the impacts of COVID-19, the trial was scheduled to begin in January 2022.

B. Colonel Sierra's Visit and Comments

Col Sierra, as Deputy Director of Community Management and Oversight of the Marine Corps' Judge Advocate Division [JAD], was responsible for managing the assignment process for all Marine judge advocates. While he did not have final say as to what assignments Marine judge advocates would receive, he did supervise preparation of a proposed assignment slate (listing officers matched to specific billets) on which the Staff Judge Advocate to the Commandant of the Marine Corps [SJA to CMC] would make a final recommendation. This recommendation would form the basis for final assignment decisions made by the office of Marine Corps Manpower Management.

Col Sierra was serving in this capacity in November 2021 when he and other members of JAD traveled to Marine bases in North and South Carolina to meet with judge advocates assigned there. On 18 November 2021, Col Sierra met with personnel assigned to Camp Lejeune's Defense Service Office [DSO]. Numerous defense **[*4]** counsel, including Capt Tango, were in attendance. Notably, Capt Romeo was not.

After introducing himself and explaining his role within JAD, Col Sierra described pending legislative changes that will affect the practice of military justice. Capt Tango, curious about the independence of a new position wherein a senior prosecutor, not a commander, will make referral decisions in certain cases, asked what was being done to minimize any effect of improper influences on those referral decisions. As an example, Capt Tango referenced the current practice of having DSO leadership prepare fitness reports for the defense counsel under their responsibility "so as to protect the defense attorneys from outside influences."[6] Here is where the discussion went off the rails.

Col Sierra stated that defense counsel "may think they are shielded, but they are not protected," calling such protection a "legal

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[4] *10 U.S.C. §§ 892*, *919*, *931b*, and *934*.

[5] Other than noting the serious nature of the charges, that Appellant allegedly committed the offenses while assigned to a Marine unit, and that two Marines are facing courts-martial for related, equally serious offenses, the underlying facts of the charged offenses are not relevant to our present analysis.

[6] App. Ex. LXXXVI at 3.

fiction." Col Sierra then turned to face Capt Tango and, looking him in the eye, said: "Captain [Tango], I know who you are, and what cases you are on, and you are not protected." He continued, "the FITREP process may shield you, but you are not protected. Our community is small and there are promotion **[*5]** boards and the lawyer on the promotion board will know you," or words to that effect. As examples, he referenced judge advocates who had served for extended periods as defense counsel on high-visibility cases, noting that spending five or six years in a defense billet could negatively affect a judge advocate's chances of promotion.

Capt Tango interpreted Col Sierra's comments as being directed at him and concerning his representation of Appellee. He subsequently became concerned that his role as Appellee's IMC could negatively impact both his promotion prospects and the billets to which he would be assigned. When Capt Tango relayed the encounter to Appellee, the latter began to question his IMC's undivided loyalty to him and his defense.

While Capt Romeo was not at the meeting with Col Sierra, he believed the latter's comments applied equally to him. Like Capt Tango, Capt Romeo became concerned that his zealous representation of Appellee would put his career opportunities at risk. Hearing this, Appellee's doubt as to his IMC's loyalty now extended to his ADC's, as well.[7]

C. Remedial Actions and Motion to Dismiss Charges

Upon learning of Col Sierra's comments, the SJA to the CMC, Major General **[*6]** [MajGen] Bravo, immediately removed Col Sierra from his position at JAD and, on 30 November 2021, ordered an investigation. The investigating officer [IO] concluded that, while Col Sierra's comments to defense counsel were "ill-advised and lacked proper context and background," the matter did not merit further action.[8]

Over the next few weeks, however, Col Sierra put remarkable effort into digging his hole deeper. He provided a statement to the trial counsel in two related courts-martial, claiming he neither knew Capt Tango nor recalled speaking with him. This claim was directly refuted by texts in which Col Sierra, just hours before the 18 November 2021 DSO meeting, discussed Capt Tango with a subordinate at JAD. The discussion concerned Capt Tango's next assignment: he had been selected for a coveted, highly competitive in-house professional military education program. Col Sierra noted in these texts that he thought Capt Tango may ask to remain in his current billet.

Col Sierra also indicated in his statement to trial counsel that, were he called to testify as a witness in any criminal proceeding, he intended to invoke his right to remain silent. He reiterated this intent in a subsequent **[*7]** statement. Accordingly, he never testified under oath regarding his comments.

On 10 December 2021, Appellee's CDC, IMC, and ADC, jointly signed and submitted a motion to dismiss all charges with prejudice

[7] App. Ex. LXXXVI, encl. 12.

[8] In his ruling on the motion to dismiss, the military judge noted: "The Court is reluctant to mention the findings and recommendations of the IO, as they are not binding on any of the issues this Court must address and resolve. The Court highlights this investigation to show that (a) it was ordered (b) it was completed (c) to utilize the investigations enclosures for facts that may not have been previously provided by the parties in the UCI litigation and (d) to address the curative efforts by the Government." App. Ex. CIX, at 6, n. 14. We agree with and adopt this limited use of the investigation.

based on actual and apparent UCI.[9] Enclosures to the motion included, inter alia, affidavits of Appellee and his two uniformed counsel describing the deteriorated state of their attorney-client relationships.

A week later, MajGen Bravo declared in an affidavit that Col Sierra's statements at the DSO meeting were improper as they do not comport with MajGen Bravo's views or guidance. He indicated that Col Sierra would no longer be involved with the detailing and assignment process. MajGen Bravo went on to praise defense work as vital to success of the military justice system. He further encouraged zealous advocacy and assured counsel that service as a defense counsel will in no way be detrimental to one's career, citing the Marine Corps' need to develop litigation expertise.

Along with MajGen Bravo's affidavit, trial counsel submitted affidavits from various JAD and Military Personnel Law Branch officials detailing the inability of anyone in Col Sierra's role to affect promotion board membership. **[*8]** Trial counsel also provided the official biographies of the past eight SJAs to the CMC, noting that seven of them had served in defense billets during their careers.[10]

D. Release of Counsel

At an *Article 39(a)*, UCMJ session on 21 December 2022, scheduled to address the UCI motion, the military judge first took up the attorney conflict issue. Through a brief series of leading questions,[11] he asked IMC and ADC if, even knowing MajGen Bravo's remedial actions and statements, each believed there still existed a conflict of interest. Both counsel, having spoken with their respective state licensing authorities and conflict-free supervisory counsel, affirmed that they believed a conflict of interest did exist. When asked if they were seeking to be removed from the case, each answered in the affirmative.

Rather than analyze the issue as a motion for withdrawal for good cause under Rule for Courts-Martial [R.C.M.] 506(c), however, the military judge proceeded to ask Appellee whether he consented to the release of his military counsel. He correctly advised Appellee of R.C.M. 506(c)'s meaning, saying, "your counsel may only be excused with your express permission or by the military judge upon application for withdrawal . . . for good cause shown."[12] But, instead **[*9]** of obtaining Appellee's clear, voluntary consent for release of his counsel or finding good cause for their non-consensual release, the military judge did neither.

Appellee described the choice whether to release his counsel as unfair, and how he "didn't do anything wrong to be put in the situation."[13] After a brief recess in which Appellee consulted with conflict-free counsel, he said, "It's a very difficult decision, but I do consent."[14] The military judge excused the IMC and ADC. Appellee then stated that he wished to be represented by his CDC and two new military counsel.

Believing he had settled the conflict of interest matter, the military judge next turned to the UCI motion itself.[15] He first asked CDC whether the release of Appellee's military

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[9] App. Ex. LXXXVI.

[10] App. Ex. LXXXIII.

[11] The entire inquiry regarding both counsel fills less than two transcribed pages. R. at 209-10.

[12] R. at 211.

[13] R. at 212.

[14] R. at 213.

[15] Appellee consented to litigating the UCI motion with only his CDC present.

counsel had mooted the UCI issue. The CDC argued that it did not, as the choice made by his client—a choice created by the Government—was one between two evils. In effect, it was not a voluntary choice.

The military judge agreed with CDC's description of the situation, referring to Appellee's decision as a "Hobson's choice."[16] He then asked whether Appellee's consenting to his counsel's release "created a material prejudice that cannot be cured, **[*10]** or had it mooted the issue? That's how I see it. Very binary. It's either mooted the issue, or it is exhibit A to materially prejudicing the accused."[17]

E. Military Judge's Ruling

In his ruling on the Defense Motion to Dismiss for UCI, the military judge summed up the situation as follows:

> [A] senior judge advocate who occupied a position of authority over the futures of young judge advocates made threatening comments to a young judge advocate about his career while this young judge advocate was assigned as IMC to a HIVIS case, creating an intolerable tension and conflict between an accused and his specifically requested military counsel.[18]

Furthermore,

> Capt Tango was faced with the choice to zealously represent this client and sacrifice the potential for advancement in the USMC or protect his nascent career. This in turn created a difficult choice for [Appellee]; he must either proceed with a conflicted attorney or effectively be deprived of his choice of individually chosen military counsel given the conflict the government created. . . . This really was not a choice.[19]

Having framed the issue thusly, and having already found that Col Sierra's comments materially prejudiced Appellee's **[*11]** substantial rights, it is not surprising that the military judge found both actual and apparent UCI and proceeded to grant Appellee's motion to dismiss all charges with prejudice.

Additional facts necessary to resolve the AOEs are addressed below.

II. Discussion

A. Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial," which in this case is Appellee.[20] We review allegations of UCI de novo, accepting a military judge's findings of fact unless clearly erroneous.[21]

B. Unlawful Command Influence

The prohibition against UCI stems from Article 37(a), UCMJ, which provides: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the

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[16] R. at 265. "[A]n apparently free choice where there is no real alternative" or "the necessity of accepting one of two or more equally objectionable alternatives." Merriam-Webster, *Hobson's Choice*, http://www.merriam-webster.com/dictionary/Hobson'schoice (last visited Jul. 28, 2022).

[17] R. at 270.

[18] App. Ex. CIX at 11 (internal footnote omitted).

[19] *Id.* at 14, 17.

[20] *United States v. Becker, 81 M.J. 483, 488 (C.A.A.F. 2021)* (internal citations omitted).

[21] *United States v. Barry, 78 M.J. 70, 77 (C.A.A.F. 2018)*.

action of a court-martial . . . or any member thereof . . . ."[22] Our superior Court has long held that UCI is the "mortal enemy of military justice."[23]

There are two types of UCI that can arise in the military justice system: actual and apparent.[24] 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.[25] Apparent UCI occurs **[*12]** when, "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[26]

1. Apparent UCI

We address apparent UCI first, as the facts make it more easily dispensed with.

Appellant argues that the 2019 amendment to Article 37, UCMJ, eliminated apparent UCI as a basis for appellate relief. Effective 20 December 2019, the relevant new language in Article 37 states: "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section [i.e., UCI] unless the violation materially prejudices the substantial rights of the accused."[27] We need not address whether the issue before this court involves a "finding or sentence of a court-martial," as we find that, even if apparent UCI is still a viable basis for relief, there was no apparent UCI here.

Whether the Government has created an appearance of UCI is determined objectively.[28] The focus is on "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of [UCI] will exist where an objective, disinterested observer, fully informed of all the facts **[*13]** and circumstances, would harbor a significant doubt as to the fairness of the proceeding."[29]

To establish apparent UCI, Appellee bore the initial burden of demonstrating "some evidence" of UCI. Once he had done so, the burden shifted to the government to prove beyond a reasonable doubt that either a) the predicate facts proffered by the accused did not exist, or b) the facts as presented did not constitute unlawful command influence.[30] If the Government was unable to meet either of these tasks, then it was required to prove beyond a reasonable doubt that the UCI "did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer would not harbor a significant doubt about the fairness of the proceeding." [31]

We expect that "an objective, disinterested observer" will likely find Col Sierra's comments to Capt Tango highly disturbing. They were as shocking as they were incorrect. But it is that very demonstrable (and demonstrated) incorrectness that saves these proceedings from the appearance of UCI. The "facts and

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[22] *10 U.S.C. § 837*.

[23] *United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)*.

[24] *United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017)*.

[25] *Id.*

[26] *Id. at 249* (quoting *United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)*).

[27] *10 U.S.C. 837(c)*.

[28] *Lewis, 63 M.J. at 415* (citation omitted).

[29] *Id.*

[30] *United States v. Bergdahl, 80 M.J. 230, 234 (C.A.A.F. 2020)* (internal citations omitted).

[31] *Id.* (internal quotation and citation omitted).

circumstances" in the present case include the evidence the Government provided to show that Col Sierra's **[*14]** comments were patently untrue, as well as that Capt Tango had been selected for highly valued professional military training. If such an observer is "fully informed" of this evidence, any doubt as to the fairness of the proceeding becomes both unlikely and unreasonable. Thus, we conclude the military judge clearly erred in finding apparent UCI.

2. Actual UCI

The defense has the initial burden of raising the issue of UCI.[32] "The threshold for raising the issue at trial is low, but more than mere allegation or speculation."[33] The evidentiary standard is "some evidence."[34] At trial, "the accused must show facts which, if true, constitute [UCI], and that the alleged [UCI] has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings."[35] But "prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting [UCI] and the outcome of the court-martial."[36] "For an accused to be entitled to appellate action on his case, the unlawful influence must be the proximate cause of the unfairness of his court-martial."[37]

"Once the issue is raised at the trial level, the burden shifts to the Government, which may **[*15]** either show that there was no UCI or show that the UCI will not affect the proceedings."[38] The burden of disproving the existence of UCI or proving that it will not affect the proceeding does not shift until the defense meets the burden of production. If the defense meets that burden, a presumption of prejudice is created.[39] To overcome this presumption, a reviewing court must be convinced beyond a reasonable doubt that the UCI had no prejudicial effect on the court-martial.[40]

The military judge ruled that Appellee's loss of his IMC and ADC, both of whom had been on the case for over a year, demonstrated that the Government had not disproven any prejudicial effect of the alleged UCI. We disagree.

C. Excusal of Counsel

Appellee's loss of counsel is the central issue to all three of the Government's AOEs. First, by allowing Appellee to release his counsel before addressing the UCI motion, the military judge effectively precluded the Government from ever showing that the alleged UCI would not affect the proceedings. Second, the question of prejudicial effect on the proceedings is a critical factor in deciding whether actual UCI occurred. And, third, the causal connection between Col Sierra's **[*16]** comments and the release of counsel is key to answering whether apparent UCI existed. Thus, we focus our analysis on how and why Appellee's IMC and ADC were excused.

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[32] *Barry, 78 M.J. at 77* (internal citations omitted).

[33] *United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013)* (internal citations omitted).

[34] *United States v. Biagase, 50 M.J. 143,150 (C.A.A.F. 1999)*.

[35] *Id.*

[36] *Id.*

[37] *United States v. Reynolds, 40 M.J. 198, 202 (C.A.A.F. 1994)*.

[38] *Id.* (additional citation omitted).

[39] *United States v. Douglas, 68 MJ 349, 354 (C.A.A.F. 2010)* (citing *Biagase, 50 M.J. at 150*).

[40] *Id.*

1. Waiver

In this analysis, we decline to apply waiver based on Appellee's consent to his counsel's release. "The Supreme Court has admonished . . . that courts should not lightly indulge the waiver of a right so fundamental as the right to counsel."[41] We believe this admonishment particularly apt when UCI is claimed as the cause of counsel's conflict of interest, and that conflict purportedly drives an accused's decision to release counsel. Here, although Appellee affirmatively consented to the release of his counsel, the record fails to establish that he did so voluntarily. Appellee, his CDC, and the military judge describe a "Hobson's choice" whereby Appellee had "no real choice." Given the nature of the right at stake and the conflicts in the military judge's findings of fact regarding consent, we do not consider the issue waived.

2. R.C.M. 506(c) Excusal and Withdrawal

"Whether a conflict of interest exists and what effect any conflict of interest has are questions that involve issues of both fact and law."[42] "In addressing such questions, **[*17]** this Court must accept findings of fact by the military judge unless they are clearly erroneous."[43] We review the military judge's conclusions of law de novo.[44]

At first blush, it appears the military judge resolved IMC's and ADC's requests to be released by relying on "the express consent of the accused" provision of R.C.M. 506(c). His extensive questioning of Appellee supports this. But, in his ruling on the Defense Motion to Dismiss, he referred to "an intolerable tension and conflict between [Appellee] and his specifically requested military counsel."[45] He further stated that, "[Appellee] was not really presented with a choice when his counsel sought to withdraw."[46] Rather than resolve the issue under either of R.C.M. 506(c)'s two alternative bases, he created a novel third: *it was consensual, but not really*. In doing so, the military judge never performed the "good cause" analysis contemplated by R.C.M. 506(c).

From R.C.M. 505(f):

> *"Good cause*. For purposes of this rule, 'good cause' includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge or military magistrate unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include **[*18]** temporary inconveniences which are incident to normal conditions of military life."[47]

While "conflict of interest" is not specifically listed, we consider it an "extraordinary circumstance" contemplated by the Rule. Thus, to determine whether there was good cause to excuse the counsel, we examine

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[41] *United States v. Cooper, 78 M.J. 283, 288 (C.A.A.F. 2019)* (Sparks, J., dissenting) (quoting *United States v. Catt, 23 C.M.A. 422, 1 M.J. 41, 47, 50 C.M.R. 326 (C.M.A. 1975)* (citing *Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)*)).

[42] *United States v. Watkins, 80 M.J. 253, 263 (C.A.A.F. 2020)* (Maggs, J., dissenting) *(*citing *United States v. Best, 61 M.J. 376, 381 (C.A.A.F. 2005)*).

[43] *Id.*

[44] *United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)*.

[45] App. Ex. CIX at 11.

[46] *Id.* at 19.

[47] Given the similarity in scope—R.C.M. 505 deals with changes to counsel, R.C.M. 506 addresses excusal and withdrawal of counsel—and the shared use of the term "good cause," we find the former Rule's definition useful in interpreting the latter.

whether Appellee's IMC and ADC did, in fact, have a conflict of interest—and whether any such conflict was caused by the alleged UCI.

3. Any conflict of interest was purely subjective

The military judge states that he kept "com[ing] back to the same question: whether or not Col [Sierra's] comments are true or not [sic], how is a young officer like Capt [Tango] in a position to evaluate the truth of Col [Sierra's] statements?"[48] Yet, having repeatedly confronted the question, the military judge failed to recognize the possible answers. Capt Tango and Capt Romeo could have examined the copious, objective evidence provided by trial counsel refuting Col Sierra's comments. The two counsel (who, while significantly junior to Col Sierra, are licensed attorneys and officers of Marines) effectively took the position that: the clear statements of the Marine Corps' top judge advocate (a major general) and experts **[*19]** in the personnel law field; the immediate, permanent removal of Col Sierra from any role effecting promotions or detailing; the fact that seven of the last eight SJAs to the CMC had served as defense counsel at some time in their careers; and that, despite his current role as a defense counsel, Capt Tango had been selected for highly-coveted follow-on orders, were not sufficient to sway their belief in the truth of Col Sierra's comments.

The two attorneys also could have consulted with their leadership. The views of more experienced, senior judge advocates could have alleviated any impact of the two captains' relative inexperience. Both IMC and ADC stated they had spoken with a supervising attorney. (Unfortunately, it appears that the SDC did little but stoke the fires fueling the two defense counsel's belief that their careers were at risk.[49] We ascribe the diminished value of this potential resource not to any Government action, but to the SDC.)

Both counsel told the military judge that they had consulted their respective state licensing authorities. While the military judge assigned great weight to this, the record is bereft of any evidence as to what that consultation involved, either **[*20]** as to how the counsel described the situation or as to the advice received.

From the evidence in the record, we conclude that Capt Tango's and Capt Romeo's conflicts were purely subjective. "A purely subjective conflict is . . . an attorney's individual shortcoming, flowing from an incorrect assessment of the situation . . . . Purely subjective conflicts are, in fact, no more than a polite way of saying personal mistakes."[50] While "a lawyer's mistake about the existence of a conflict could provide good cause if the mistake would adversely affect the attorney's representation,"[51] such a "personal mistake" by counsel is not the fault of the Government. And, therefore, it does not merit a remedy at the Government's expense—certainly not the most drastic remedy available.

4. UCI Was Not the Proximate Cause of Counsel Excusal

By handling Appellee's counsel's requests to be excused prior to and independent of the UCI claim, the military judge rendered his ultimate ruling a fait accompli. He accepted Appellee's consent to release his counsel,

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[48] App. Ex. CIX at 14.

[49] See LXXXVI at 69-75 (SDC's affidavit).

[50] *Watkins, 80 M.J. 253, 264* (Maggs, J., dissenting) *(*quoting *Tueros v. Greiner, 343 F.3d 587, 595 (2d Cir. 2003)*).

[51] *Watkins, 80 M.J. 253, 264* (Maggs, J., dissenting).

then, citing Appellee's loss of counsel,[52] concluded that the Government had not proven beyond a reasonable doubt that UCI did not affect the proceedings. By **[*21]** not first critically examining the claimed conflict of interest or purported causal link between Col Sierra's comments and the excusal of counsel, the military judge effectively ceded to Appellee the power to rule on his own motion. *I have released my counsel; the harm has been done. How could the Government possibly prove there would be no effect on the proceedings*?

Later, in his written ruling on the motion to dismiss, the military judge found that "the actions of the Government have materially prejudiced [Appellee's] right to an IMC and his right to detailed counsel."[53] As the evidence (of both the Government's curative actions and the demonstrably false nature of Col Sierra's comments) shows that the loss of counsel was not caused by the alleged UCI, we find this to be clear error. While Col Sierra's clearly improper comments began the chain of events leading to the excusal of Appellee's counsel, they were not its proximate cause. Rather, it was the IMC's and ADC's mistaken belief that they faced a choice between their careers and zealously representing their client.

We are convinced beyond a reasonable doubt that Col Sierra's comments and actions at the 18 November 2021 DSO meeting **[*22]** did not cause counsel to be excused. And we are similarly convinced that his comments will not otherwise affect the proceedings. As the Government has met its burden on this point, the military judge erred in finding actual UCI and imposing a remedy therefor.

II. CONCLUSION

After careful consideration of the record and the briefs and arguments of appellate counsel, we have determined that the military judge abused his discretion in dismissing with prejudice the charges in this case.

Accordingly, the 9 February 2022 ruling of the military judge is **VACATED** and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

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[52] The military judge noted that, in rebuttal of the Government's claim that the alleged UCI will not affect the proceedings, "the Defense, in essence, simply points at its table: Three attorneys once sat, and then there was one." App. Ex. CIX at 15.

[53] App. Ex. CIX at 17.

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U.S. Navy-Marine Corps Court of Criminal Appeals.

UNITED STATES, Appellant
v.
Eric S. GILMET, Hospital Corpsman Chief Petty Officer (E-7), U.S. Navy, Appellee

No. 202200061
Argued: 29 June 2022
Decided: 15 August 2022

Appeal by the United States Pursuant to Article 62, UCMJ

Military Judge: Hayes C. Larsen

Arraignment 24 February 2020 before a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina.
For Appellant: Lieutenant Megan E. Martino, JAGC, USN (argued), Major Kerry E. Friedewald, USMC (on brief)

For Appellee: Lieutenant Kristen R. Bradley, USCG (argued),Lieutenant Megan E. Horst, JAGC, USN (on brief)

Before HOLIFIELD, DEERWESTER, and MYERS, Appellate Military Judges

HOLIFIELD, Senior Judge:

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I. BACKGROUND[3]

Appellee was charged at a general court-martial with violation of a lawful order, involuntary manslaughter, obstruction of justice, and negligent homicide, in violation of Articles 92, 119, 131b, and 134, UCMJ,[4] and was arraigned on 24 February 2020.[5] On 9 February 2022, the military judge dismissed all charges with prejudice based on both actual and apparent UCI.

A. Appellee's Counsel and Preparations for Trial

Appellee's lead counsel, Mr. Victor, has represented Appellee as civilian defense counsel [CDC] since January 2019. In March 2020, Appellee requested as his Individual Military Counsel [IMC] Captain [Capt] Tango.[6] This request was approved the following month, accompanied by the excusal of Appellee's detailed defense counsel and the detailing of Capt Romeo as Appellee's new assistant defense counsel [ADC]. Each of the three counsel proceeded to prepare different aspects of Appellee's case, interviewing specific witnesses as appropriate.

After extensive delays due to the impacts of COVID-19, the trial was scheduled to begin in January 2022.

B. Colonel Sierra's Visit and Comments

Col Sierra, as Deputy Director of Community Management and Oversight of the Marine Corps' Judge Advocate Division [JAD], was responsible for managing the assignment process for all Marine judge advocates. While he did not have final say as to what assignments Marine judge advocates would receive, he did supervise preparation of a proposed assignment slate (listing officers matched to specific billets) on which the Staff Judge Advocate to the Commandant of the Marine Corps [SJA to CMC] would make a final recommendation. This recommendation would form the basis for final assignment decisions made by the office of Marine Corps Manpower Management.

***2** Col Sierra was serving in this capacity in November 2021 when he and other members of JAD traveled to Marine bases in North and South Carolina to meet with judge advocates assigned there. On 18 November 2021, Col Sierra met with personnel assigned to Camp Lejeune's Defense Service Office

[DSO]. Numerous defense counsel, including Capt Tango, were in attendance. Notably, Capt Romeo was not.

After introducing himself and explaining his role within JAD, Col Sierra described pending legislative changes that will affect the practice of military justice. Capt Tango, curious about the independence of a new position wherein a senior prosecutor, not a commander, will make referral decisions in certain cases, asked what was being done to minimize any effect of improper influences on those referral decisions. As an example, Capt Tango referenced the current practice of having DSO leadership prepare fitness reports for the defense counsel under their responsibility "so as to protect the defense attorneys from outside influences." [7] Here is where the discussion went off the rails.

Col Sierra stated that defense counsel "may think they are shielded, but they are not protected," calling such protection a "legal fiction." Col Sierra then turned to face Capt Tango and, looking him in the eye, said: "Captain [Tango], I know who you are, and what cases you are on, and you are not protected." He continued, "the FITREP process may shield you, but you are not protected. Our community is small and there are promotion boards and the lawyer on the promotion board will know you," or words to that effect. As examples, he referenced judge advocates who had served for extended periods as defense counsel on high-visibility cases, noting that spending five or six years in a defense billet could negatively affect a judge advocate's chances of promotion.

Capt Tango interpreted Col Sierra's comments as being directed at him and concerning his representation of Appellee. He subsequently became concerned that his role as Appellee's IMC could negatively impact both his promotion prospects and the billets to which he would be assigned. When Capt Tango relayed the encounter to Appellee, the latter began to question his IMC's undivided loyalty to him and his defense.

While Capt Romeo was not at the meeting with Col Sierra, he believed the latter's comments applied equally to him. Like Capt Tango, Capt Romeo became concerned that his zealous representation of Appellee would put his career opportunities at risk. Hearing this, Appellee's doubt as to his IMC's loyalty now extended to his ADC's, as well. [8]

C. Remedial Actions and Motion to Dismiss Charges

Upon learning of Col Sierra's comments, the SJA to the CMC, Major General [MajGen] Bravo, immediately removed Col Sierra from his position at JAD and, on 30 November 2021, ordered an investigation. The investigating officer [IO] concluded that, while Col Sierra's comments to defense counsel were "ill-advised and lacked proper context and background," the matter did not merit further action. [9]

***3** Over the next few weeks, however, Col Sierra put remarkable effort into digging his hole deeper. He provided a statement to the trial counsel in two related courts-martial, claiming he neither knew Capt Tango nor recalled speaking with him. This claim was directly refuted by texts in which Col Sierra, just hours before the 18 November 2021 DSO meeting, discussed Capt Tango with a subordinate at JAD. The discussion concerned Capt Tango's next assignment: he had been selected for a coveted, highly competitive in-house professional military education program. Col Sierra noted in these texts that he thought Capt Tango may ask to remain in his current billet.

Col Sierra also indicated in his statement to trial counsel that, were he called to testify as a witness in any criminal proceeding, he intended to invoke his right to remain silent. He reiterated this intent in a subsequent statement. Accordingly, he never testified under oath regarding his comments.

On 10 December 2021, Appellee's CDC, IMC, and ADC, jointly signed and submitted a motion to dismiss all charges with prejudice based on actual and apparent UCI. [10] Enclosures to the motion included, inter alia, affidavits of Appellee and his two uniformed counsel describing the deteriorated state of their attorney-client relationships.

A week later, MajGen Bravo declared in an affidavit that Col Sierra's statements at the DSO meeting were improper as they do not comport with MajGen Bravo's views or guidance. He indicated that Col Sierra would no longer be involved with the detailing and assignment process. MajGen Bravo went on to praise defense work as vital to success of the military justice system. He further encouraged zealous advocacy and assured counsel that service as a defense counsel will in no way be detrimental to one's career, citing the Marine Corps' need to develop litigation expertise.

Along with MajGen Bravo's affidavit, trial counsel submitted affidavits from various JAD and Military Personnel Law Branch officials detailing the inability of anyone in Col Sierra's role to affect promotion board membership. Trial counsel also provided the official biographies of the past eight

SJAs to the CMC, noting that seven of them had served in defense billets during their careers. [11]

D. Release of Counsel

At an Article 39(a), UCMJ session on 21 December 2022, scheduled to address the UCI motion, the military judge first took up the attorney conflict issue. Through a brief series of leading questions, [12] he asked IMC and ADC if, even knowing MajGen Bravo's remedial actions and statements, each believed there still existed a conflict of interest. Both counsel, having spoken with their respective state licensing authorities and conflict-free supervisory counsel, affirmed that they believed a conflict of interest did exist. When asked if they were seeking to be removed from the case, each answered in the affirmative.

Rather than analyze the issue as a motion for withdrawal for good cause under Rule for Courts-Martial [R.C.M.] 506(c), however, the military judge proceeded to ask Appellee whether he consented to the release of his military counsel. He correctly advised Appellee of R.C.M. 506(c)'s meaning, saying, "your counsel may only be excused with your express permission or by the military judge upon application for withdrawal ... for good cause shown." [13] But, instead of obtaining Appellee's clear, voluntary consent for release of his counsel or finding good cause for their non-consensual release, the military judge did neither.

***4** Appellee described the choice whether to release his counsel as unfair, and how he "didn't do anything wrong to be put in the situation." [14] After a brief recess in which Appellee consulted with conflict-free counsel, he said, "It's a very difficult decision, but I do consent." [15] The military judge excused the IMC and ADC. Appellee then stated that he wished to be represented by his CDC and two new military counsel.

Believing he had settled the conflict of interest matter, the military judge next turned to the UCI motion itself. [16] He first asked CDC whether the release of Appellee's military counsel had mooted the UCI issue. The CDC argued that it did not, as the choice made by his client—a choice created by the Government—was one between two evils. In effect, it was not a voluntary choice.

The military judge agreed with CDC's description of the situation, referring to Appellee's decision as a "Hobson's choice." [17] He then asked whether Appellee's consenting to his counsel's release "created a material prejudice that cannot be cured, or had it mooted the issue? That's how I see it. Very binary. It's either mooted the issue, or it is exhibit A to materially prejudicing the accused." [18]

E. Military Judge's Ruling

In his ruling on the Defense Motion to Dismiss for UCI, the military judge summed up the situation as follows:

> [A] senior judge advocate who occupied a position of authority over the futures of young judge advocates made threatening comments to a young judge advocate about his career while this young judge advocate was assigned as IMC to a HIVIS case, creating an intolerable tension and conflict between an accused and his specifically requested military counsel. [19]

Furthermore,

> Capt Tango was faced with the choice to zealously represent this client and sacrifice the potential for advancement in the USMC or protect his nascent career. This in turn created a difficult choice for [Appellee]; he must either proceed with a conflicted attorney or effectively be deprived of his choice of individually chosen military counsel given the conflict the government created.... This really was not a choice. [20]

Having framed the issue thusly, and having already found that Col Sierra's comments materially prejudiced Appellee's substantial rights, it is not surprising that the military judge

found both actual and apparent UCI and proceeded to grant Appellee's motion to dismiss all charges with prejudice.

Additional facts necessary to resolve the AOEs are addressed below.

II. DISCUSSION

A. Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial," which in this case is Appellee.[21] We review allegations of UCI de novo, accepting a military judge's findings of fact unless clearly erroneous.[22]

B. Unlawful Command Influence

***5** The prohibition against UCI stems from Article 37(a), UCMJ, which provides: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial ... or any member thereof ...."[23] Our superior Court has long held that UCI is the "mortal enemy of military justice."[24]

There are two types of UCI that can arise in the military justice system: actual and apparent.[25] 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.[26] Apparent UCI occurs when, "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[27]

1. Apparent UCI

We address apparent UCI first, as the facts make it more easily dispensed with.

Appellant argues that the 2019 amendment to Article 37, UCMJ, eliminated apparent UCI as a basis for appellate relief. Effective 20 December 2019, the relevant new language in Article 37 states: "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section [i.e., UCI] unless the violation materially prejudices the substantial rights of the accused."[28] We need not address whether the issue before this court involves a "finding or sentence of a court-martial," as we find that, even if apparent UCI is still a viable basis for relief, there was no apparent UCI here.

Whether the Government has created an appearance of UCI is determined objectively.[29] The focus is on "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of [UCI] will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt as to the fairness of the proceeding."[30]

To establish apparent UCI, Appellee bore the initial burden of demonstrating "some evidence" of UCI. Once he had done so, the burden shifted to the government to prove beyond a reasonable doubt that either a) the predicate facts proffered by the accused did not exist, or b) the facts as presented did not constitute unlawful command influence.[31] If the Government was unable to meet either of these tasks, then it was required to prove beyond a reasonable doubt that the UCI "did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer would not harbor a significant doubt about the fairness of the proceeding."[32]

We expect that "an objective, disinterested observer" will likely find Col Sierra's comments to Capt Tango highly disturbing. They were as shocking as they were incorrect. But it is that very demonstrable (and demonstrated) incorrectness that saves these proceedings from the appearance of UCI. The "facts and circumstances" in the present case include the evidence the Government provided to show that Col Sierra's comments were patently untrue, as well as that Capt Tango had been selected for highly valued professional military training. If such an observer is "fully informed" of this evidence, any doubt as to the fairness of the proceeding becomes both unlikely and unreasonable. Thus, we conclude the military judge clearly erred in finding apparent UCI.

2. Actual UCI

***6** The defense has the initial burden of raising the issue of UCI.[33] "The threshold for raising the issue at trial is low, but more than mere allegation or speculation."[34] The evidentiary standard is "some evidence."[35] At trial, "the accused must show facts which, if true, constitute [UCI], and that the alleged [UCI] has a logical connection to the court-

martial, in terms of its potential to cause unfairness in the proceedings."[36] But "prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting [UCI] and the outcome of the court-martial."[37] "For an accused to be entitled to appellate action on his case, the unlawful influence must be the proximate cause of the unfairness of his court-martial."[38]

"Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no UCI or show that the UCI will not affect the proceedings."[39] The burden of disproving the existence of UCI or proving that it will not affect the proceeding does not shift until the defense meets the burden of production. If the defense meets that burden, a presumption of prejudice is created.[40] To overcome this presumption, a reviewing court must be convinced beyond a reasonable doubt that the UCI had no prejudicial effect on the court-martial.[41]

The military judge ruled that Appellee's loss of his IMC and ADC, both of whom had been on the case for over a year, demonstrated that the Government had not disproven any prejudicial effect of the alleged UCI. We disagree.

C. Excusal of Counsel

Appellee's loss of counsel is the central issue to all three of the Government's AOEs. First, by allowing Appellee to release his counsel before addressing the UCI motion, the military judge effectively precluded the Government from ever showing that the alleged UCI would not affect the proceedings. Second, the question of prejudicial effect on the proceedings is a critical factor in deciding whether actual UCI occurred. And, third, the causal connection between Col Sierra's comments and the release of counsel is key to answering whether apparent UCI existed. Thus, we focus our analysis on how and why Appellee's IMC and ADC were excused.

1. Waiver

In this analysis, we decline to apply waiver based on Appellee's consent to his counsel's release. "The Supreme Court has admonished ... that courts should not lightly indulge the waiver of a right so fundamental as the right to counsel."[42] We believe this admonishment particularly apt when UCI is claimed as the cause of counsel's conflict of interest, and that conflict purportedly drives an accused's decision to release counsel. Here, although Appellee affirmatively consented to the release of his counsel, the record fails to establish that he did so voluntarily. Appellee, his CDC, and the military judge describe a "Hobson's choice" whereby Appellee had "no real choice." Given the nature of the right at stake and the conflicts in the military judge's findings of fact regarding consent, we do not consider the issue waived.

2. R.C.M. 506(c) Excusal and Withdrawal

***7** "Whether a conflict of interest exists and what effect any conflict of interest has are questions that involve issues of both fact and law."[43] "In addressing such questions, this Court must accept findings of fact by the military judge unless they are clearly erroneous."[44] We review the military judge's conclusions of law de novo.[45]

At first blush, it appears the military judge resolved IMC's and ADC's requests to be released by relying on "the express consent of the accused" provision of R.C.M. 506(c). His extensive questioning of Appellee supports this. But, in his ruling on the Defense Motion to Dismiss, he referred to "an intolerable tension and conflict between [Appellee] and his specifically requested military counsel."[46] He further stated that, "[Appellee] was not really presented with a choice when his counsel sought to withdraw."[47] Rather than resolve the issue under either of R.C.M. 506(c)'s two alternative bases, he created a novel third: *it was consensual, but not really.* In doing so, the military judge never performed the "good cause" analysis contemplated by R.C.M. 506(c).

From R.C.M. 505(f):

> "*Good cause.* For purposes of this rule, 'good cause' includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge or military magistrate unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include temporary inconveniences which are incident to normal conditions of military life."[48]

While "conflict of interest" is not specifically listed, we consider it an "extraordinary circumstance" contemplated by the Rule. Thus, to determine whether there was good cause to excuse the counsel, we examine whether Appellee's IMC and ADC did, in fact, have a conflict of interest—and whether any such conflict was caused by the alleged UCI.

3. Any conflict of interest was purely subjective

The military judge states that he kept "com[ing] back to the same question: whether or not Col [Sierra's] comments are true or not [sic], how is a young officer like Capt [Tango] in a position to evaluate the truth of Col [Sierra's] statements?" [49] Yet, having repeatedly confronted the question, the military judge failed to recognize the possible answers. Capt Tango and Capt Romeo could have examined the copious, objective evidence provided by trial counsel refuting Col Sierra's comments. The two counsel (who, while significantly junior to Col Sierra, are licensed attorneys and officers of Marines) effectively took the position that: the clear statements of the Marine Corps' top judge advocate (a major general) and experts in the personnel law field; the immediate, permanent removal of Col Sierra from any role effecting promotions or detailing; the fact that seven of the last eight SJAs to the CMC had served as defense counsel at some time in their careers; and that, despite his current role as a defense counsel, Capt Tango had been selected for highly-coveted follow-on orders, were not sufficient to sway their belief in the truth of Col Sierra's comments.

***8** The two attorneys also could have consulted with their leadership. The views of more experienced, senior judge advocates could have alleviated any impact of the two captains' relative inexperience. Both IMC and ADC stated they had spoken with a supervising attorney. (Unfortunately, it appears that the SDC did little but stoke the fires fueling the two defense counsel's belief that their careers were at risk. [50] We ascribe the diminished value of this potential resource not to any Government action, but to the SDC.)

Both counsel told the military judge that they had consulted their respective state licensing authorities. While the military judge assigned great weight to this, the record is bereft of any evidence as to what that consultation involved, either as to how the counsel described the situation or as to the advice received.

From the evidence in the record, we conclude that Capt Tango's and Capt Romeo's conflicts were purely subjective. "A purely subjective conflict is ... an attorney's individual shortcoming, flowing from an incorrect assessment of the situation.... Purely subjective conflicts are, in fact, no more than a polite way of saying personal mistakes." [51] While "a lawyer's mistake about the existence of a conflict could provide good cause if the mistake would adversely affect the attorney's representation," [52] such a "personal mistake" by counsel is not the fault of the Government. And, therefore, it does not merit a remedy at the Government's expense—certainly not the most drastic remedy available.

4. UCI Was Not the Proximate Cause of Counsel Excusal

By handling Appellee's counsel's requests to be excused prior to and independent of the UCI claim, the military judge rendered his ultimate ruling a fait accompli. He accepted Appellee's consent to release his counsel, then, citing Appellee's loss of counsel, [53] concluded that the Government had not proven beyond a reasonable doubt that UCI did not affect the proceedings. By not first critically examining the claimed conflict of interest or purported causal link between Col Sierra's comments and the excusal of counsel, the military judge effectively ceded to Appellee the power to rule on his own motion. *I have released my counsel; the harm has been done. How could the Government possibly prove there would be no effect on the proceedings?*

Later, in his written ruling on the motion to dismiss, the military judge found that "the actions of the Government have materially prejudiced [Appellee's] right to an IMC and his right to detailed counsel." [54] As the evidence (of both the Government's curative actions and the demonstrably false nature of Col Sierra's comments) shows that the loss of counsel was not caused by the alleged UCI, we find this to be clear error. While Col Sierra's clearly improper comments began the chain of events leading to the excusal of Appellee's counsel, they were not its proximate cause. Rather, it was the IMC's and ADC's mistaken belief that they faced a choice between their careers and zealously representing their client.

***9** We are convinced beyond a reasonable doubt that Col Sierra's comments and actions at the 18 November 2021 DSO meeting did not cause counsel to be excused. And we are similarly convinced that his comments will not otherwise affect the proceedings. As the Government has met its burden on this point, the military judge erred in finding actual UCI and imposing a remedy therefor.

III. CONCLUSION

After careful consideration of the record and the briefs and arguments of appellate counsel, we have determined that the military judge abused his discretion in dismissing with prejudice the charges in this case.

Accordingly, the 9 February 2022 ruling of the military judge is **VACATED** and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

Senior Judge HOLIFIELD delivered the opinion of the Court, in which Senior Judge Deerwester and Judge Myers joined.

Footnotes

1 10 U.S.C. § 862(a)(1)(A).

2 All names in this opinion, other than those of Appellee, the judges, and appellate counsel, are pseudonyms.

3 Unless otherwise noted, the background facts are summarized from the military judge's findings of fact. *See* App. Ex. CIX.

4 10 U.S.C. §§ 892, 919, 931b, and 934.

5 Other than noting the serious nature of the charges, that Appellant allegedly committed the offenses while assigned to a Marine unit, and that two Marines are facing courts-martial for related, equally serious offenses, the underlying facts of the charged offenses are not relevant to our present analysis.

6 Capt Tango has since promoted to Major; for clarity's sake, he will be referred to by his previous rank throughout this opinion.

7 App. Ex. LXXXVI at 3.

8 App. Ex. LXXXVI, encl. 12.

9 In his ruling on the motion to dismiss, the military judge noted: "The Court is reluctant to mention the findings and recommendations of the IO, as they are not binding on any of the issues this Court must address and resolve. The Court highlights this investigation to show that (a) it was ordered (b) it was completed (c) to utilize the investigations enclosures for facts that may not have been previously provided by the parties in the UCI litigation and (d) to address the curative efforts by the Government." App. Ex. CIX, at 6, n. 14. We agree with and adopt this limited use of the investigation.

10 App. Ex. LXXXVI.

11 App. Ex. LXXXIII.

12 The entire inquiry regarding both counsel fills less than two transcribed pages. R. at 209-10.

13 R. at 211.

14 R. at 212.

15 R. at 213.

16 Appellee consented to litigating the UCI motion with only his CDC present.

17 R. at 265. “[A]n apparently free choice where there is no real alternative” or “the necessity of accepting one of two or more equally objectionable alternatives.” Merriam-Webster, *Hobson's Choice*, http://www.merriam-webster.com/dictionary/Hobson'schoice (last visited Jul. 28, 2022).

18 R. at 270.

19 App. Ex. CIX at 11 (internal footnote omitted).

20 *Id.* at 14, 17.

21 *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021) (internal citations omitted).

22 *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018).

23 10 U.S.C. § 837.

24 *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

25 *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017).

26 *Id.*

27 *Id.* at 249 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).

28 10 U.S.C. 837(c).

29 *Lewis*, 63 M.J. at 415 (citation omitted).

30 *Id.*

31 *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020) (internal citations omitted).

32 *Id.* (internal quotation and citation omitted).

33 *Barry*, 78 M.J. at 77 (internal citations omitted).

34 *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (internal citations omitted).

35 *United States v. Biagase*, 50 M.J. 143,150 (C.A.A.F. 1999).

36 *Id.*

37 *Id.*

38 *United States v. Reynolds*, 40 M.J. 198, 202 (C.A.A.F. 1994).

39 *Id.* (additional citation omitted).

40 *United States v. Douglas*, 68 MJ 349, 354 (C.A.A.F. 2010) (citing *Biagase*, 50 M.J. at 150).

41 *Id.*

42 *United States v. Cooper*, 78 M.J. 283, 288 (C.A.A.F. 2019) (Sparks, J., dissenting) (quoting *United States v. Catt*, 1 M.J. 41, 47 (C.M.A. 1975) (citing *Glasser v. United States*, 315 U.S. 60 (1942))).

43 *United States v. Watkins*, 80 M.J. 253, 263 (C.A.A.F. 2020) (Maggs, J., dissenting) *(*citing *United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005)).

44 *Id.*

45 *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

46 App. Ex. CIX at 11.

47 *Id.* at 19.

48 Given the similarity in scope—R.C.M. 505 deals with changes to counsel, R.C.M. 506 addresses excusal and withdrawal of counsel—and the shared use of the term "good cause," we find the former Rule's definition useful in interpreting the latter.

49 App. Ex. CIX at 14.

50 See LXXXVI at 69-75 (SDC's affidavit).

51 *Watkins*, 80 M.J. 253, 264 (Maggs, J., dissenting) *(*quoting *Tueros v. Greiner*, 343 F.3d 587, 595 (2d Cir. 2003)).

52 *Watkins*, 80 M.J. 253, 264 (Maggs, J., dissenting).

53 The military judge noted that, in rebuttal of the Government's claim that the alleged UCI will not affect the proceedings, "the Defense, in essence, simply points at its table: Three attorneys once sat, and then there was one." App. Ex. CIX at 15.

54 App. Ex. CIX at 17.

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Special Panel No. 1

UNITED STATES, Appellee v. Eric S. GILMET, Chief Hospital Corpsman (E-7) U.S. Navy Appellant	)	APPELLEE'S MOTION FOR LEAVE TO FILE AND MOTION TO ADMINISTRATIVELY CORRECT OPINION Case No. 202200061 Tried at Marine Corps Base Camp Lejeune, North Carolina, on February 24 and September 4, 2020, January 21, February 10, March 15, September 3, and December 21, 2021, and January 20, 2022, by a general court-martial convened by Commanding General, U.S. Marine Corps Forces, Special Operations Command, Commander H. C. Larsen, JAGC, U.S. Navy, presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.11 of this Court's Rules of Appellate Procedure, the United States respectfully requests leave to file and respectfully requests this Court administratively correct footnote six of its Opinion of August 15, 2022. The footnote incorrectly states Captain Tango has promoted to Major. There is no

evidence in the Record of this promotion, and the United States confirmed Captain Tango did not promote to Major.

Conclusion

The United States respectfully requests the Court grant it leave to file and grant the United States' motion to amend footnote six.

Ebenezer K. Gyasi Digitally signed by Ebenezer K. Gyasi

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Certificate of Filing and Service

I certify this document was emailed to this Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Lieutenant Megan E. HORST, JAGC, U.S. Navy, and Lieutenant Kristen R. BRADLEY, U.S. Coast Guard, on August 15, 2022.

Ebenezer K. Gyasi Digitally signed by Ebenezer K. Gyasi

EBENEZER K. GYASI
Lieutenant, JAGC, U.S. Navy

Appellate Government Counsel

United States v. Suarez

United States Army Court of Criminal Appeals

September 27, 2017, Decided

ARMY MISC[1] 20170366

[1] Corrected.

Reporter
2017 CCA LEXIS 631 *

UNITED STATES, Appellant v. Specialist AVERY J. SUAREZ, United States Army, Appellee

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, Fort Bliss. Michael J. Hargis, Military Judge. Colonel Charles C. Poché, Staff Judge Advocate.

Counsel: For Appellant: Captain Catharine M. Parnell, JA (argued); Lieutenant Colonel Eric K. Stafford, JA; Major Michael E. Korte, JA; Captain Samuel E. Landes, JA; Captain Catharine M. Parnell, JA (on brief); Colonel Tania M. Martin, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Samuel E. Landes, JA (reply brief).

For Appellee: Captain Joshua B. Fix, JA (argued); Lieutenant Colonel Christopher D. Carrier, JA; Major Todd W. Simpson, JA; Captain Joshua B. Fix (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO *ARTICLE 62*, UNIFORM CODE OF MILITARY JUSTICE

WOLFE, Judge:

In this case we consider an appeal by the United States, under *Article 62, Uniform Code of Military Justice*, *10 U.S.C. § 862 (2012 & Supp. IV 2017)* [hereinafter UCMJ]. The government claims that the military judge erred as a matter of law when he suppressed the results of a search of the accused's cell phone. We decline to address the merits of the government's arguments on appeal because we find that the government waived the underlying issues at the trial court. We therefore deny the government's **[*2]** appeal.

BACKGROUND[2]

An internet company provided local police in Richland, Washington, with information indicating that the accused was involved in child pornography offenses. Upon receipt of an affidavit, a military magistrate authorized a search of the accused's phone. The scope or legality of the search authorization is not part of this appeal.

On 28 February 2017, an agent from the Army Criminal Investigative Command (CID) seized the accused's phone from his person pursuant to the authorization. The accused was placed in handcuffs and brought to the CID offices at Fort Bliss and interrogated. The accused was read his rights in accordance with *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, and *Article 31(b)*, UCMJ. While the accused initially waived his rights, he later invoked his right to consult with counsel. The accused was released back to his unit.

There are two versions of events claiming to explain *when* CID asked the accused to provide his passcode to his phone to an investigator. The accused testified that he was asked for his passcode *before* he was advised

[2] We adopt the factual findings of the military judge as they are not clearly erroneous. *See United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011)*.

of his rights under *Article 31(b)*, UCMJ. However, an agent from CID testified that the day after the interview, she sought out the accused to have him sign for personal **[*3]** property that CID was returning to him. During this exchange of personal property she testified that she asked the accused for the passcode to his phone.

The military judge did not find it necessary to determine which version was the more likely. This is because, and critically, neither party asserts that the accused provided his passcode while being questioned after having waived his rights. Either the question was asked pre-warning (claims the accused), or post-invocation of his right to counsel (claims the government).

A search of the accused's phone revealed six images which the government alleges are child pornography. The accused moved to suppress his statement to CID revealing the passcode to his phone and the images that were subsequently discovered. The military judge granted the motion and the government appeals.

LAW AND DISCUSSION

The government makes numerous arguments as to why the military judge erred.

First, the government argues requesting a passcode is similar to requesting consent to search, which the Supreme Court has found is not an interrogation. *Fisher v. United States, 425 U.S. 391, 397, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)*.

Second, the government argues the request for the passcode was not a "communicative act" because *in this case* it did not **[*4]** amount to "an admission to the ownership and control of materials sought by the government." That is, as the phone already had been identified through business records and seized from the accused's person, ownership of the phone was a "foregone conclusion." *See Id. at 411*.

Third, the government argues that assuming the accused was asked to provide his passcode after he had been released from custody, there was no *Edwards* violation because, again, the question was not an interrogation and the accused's answer was not testimonial. *See Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*.

Fourth, the government argues that *Edwards* violations do not require the exclusion of derivative evidence. Here, the government asks us to focus on the constitutional answer to this question and not focus on the exclusionary rule contained in the Military Rules of Evidence.

Fifth, the government initially claimed that the military judge erred because the evidence would have been inevitably discovered. At oral argument the government conceded that this argument was conclusively resolved in the accused's favor by the United States Court of Appeals for the Armed Forces' decision in *United States v. Mitchell, 76 M.J. 413, 2017 CAAF LEXIS 856 (C.A.A.F. 2017)*.

We do not address the merits of the government's arguments. *Mitchell* explicitly did not **[*5]** resolve whether asking for a passcode is testimonial. *Id. at *12* ("We thus do not address whether Appellee's delivery of his passcode was 'testimonial' or 'compelled . . . .'"). We also leave this question unanswered.

It is also unclear, whether *Mitchell* dispatched the foregone conclusion doctrine as a general matter or just based on the facts of that particular case. *See Fisher, 425 U.S. at 411*

(articulating the foregone conclusion doctrine such that the *Fifth Amendment* does not protect an act of production when any potentially testimonial component of the act of production—such as the existence, custody, and authenticity of evidence—is a "foregone conclusion" that "adds little or nothing to the sum total of the Government's information."); *Compare United States v. Apple Mac Pro Computer, 851 F.3d 238, 246-48 (3rd Cir. 2017)* (although dealing with the appeal of a civil contempt order for a suspect's failure to comply with a court order to decrypt devices containing suspected child pornography, the court concluded that even if it could assess the underlying issue of a *Fifth Amendment* privilege in the context of compelled decryption, it would be inapplicable because the magistrate judge issuing the order did not commit a clear or obvious error in applying the foregone conclusion doctrine to the facts of that case as the **[*6]** government had provided evidence to show the files existed on the encrypted portions of the devices and that the suspect could access them), *with In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d 1335, 1337, 1346-49 (11th Cir. 2012)* (determining that the *Fifth Amendment* does apply to compelled decryption and based on the facts before it, the forgone conclusion doctrine did not apply, as the government failed to show that any files existed on the hard drives and could not show with any reasonable particularity that the suspect could access the encrypted portions of the drives).

We do not reach the merits of the government's arguments because the United States waived most of the issues they assert on appeal when they conceded in their initial brief to the military judge that the accused's providing a passcode to a CID agent was testimonial and incriminating. In the brief to the military judge the government stated that "[a] statement is testimonial when its contents are contained in the mind of the accused and are communicated to the Government." The brief then stated "the Government concedes that the Accused's statement [providing the passcode] would be testimonial, incriminating, and compelled."

The government concession in **[*7]** the brief was initially limited to the assumption that CID asked for the accused's passcode before reading him his right's warning. That is, the government's concession assumed that CID asked the accused for his passcode before advising him of his *Article 31(b)*, UCMJ, rights. However, we can distinguish no reason why the statement would be testimonial pre-rights warning and non-testimonial after the accused has invoked his rights. If asking for the passcode is "testimonial" and "incriminating" before a rights warning is given, then it is also testimonial and incriminating after that same suspect has invoked his right to counsel.

However, if there is any doubt about the scope of the government's concession at trial, it was erased by the following exchange between the trial counsel and military judge.

> MJ: So, government, do you concede that asking someone for their passcode to a computer is asking for incriminating evidence or incriminating information that would trigger *5th Amendment* and *Article 31(b)* protections?
> TC: Uhm - - prior to being read one's rights, Your Honor, or in just in general?
>
> MJ: ***No.*** I am asking you, does - - asking someone for the passcode to their iPhone trigger *5th Amendment* protections and **[*8]** *Article 31(b)* protections?
> TC: Yes, Your Honor.

The military judge went on to confirm the

government's concession two more times.[3] The military judge even noted that there was contrary case law that would support an argument that providing a passcode is not testimonial. The government maintained its position.

The government concession at trial included that the passcode was "testimonial" and "incriminating." In conceding the passcode was incriminating, the government necessarily conceded the request for the incriminating response was an interrogation. *See* Military Rule of Evidence [hereinafter Mil. R. Evid.] 305(b)(2) (defining an interrogation as "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."). Thus, we are confused when the government argues to us on appeal that "even if [the accused] was in custody when [CID] asked for his passcode, [the accused] was not entitled to a rights warning because the request for the passcode, which was akin to a request for consent to search, was not 'interrogation.'

The government's argument misunderstands, as we see it, our role on appeal. Our job is not to determine whether the accused **[*9]** providing his passcode is testimonial. Our job is to determine whether the military judge *erred* when he found that providing the passcode was testimonial. In many cases these two questions will be the same.

However, when a party waives or forfeits an issue at trial the two questions diverge. When the government tells the trial judge that the accused's statement is testimonial and incriminating, we will never find that the military judge erred even if—and we do not decide this—in or own view the statements are not testimonial and incriminating.

The efficient appellate review of trial decisions depends on the preservation of issues at trial. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944)*. "Forfeiture is 'not a mere technicality and is essential to the orderly administration of justice.'" *Freytag v. Commissioner, 501 U.S. 868, 895, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)* (Scalia, J. concurring and quoting 9 C. Wright & A. Miller, Federal Practice and Procedure § 2472, p. 455 (1971)). "[A] trial on the merits, whether in a civil or criminal case, is the 'main event,' and not **[*10]** simply a 'tryout on the road' to appellate review." *Id.* (quoting *Wainwright v. Sykes, 433 U.S. 72, 90, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977))*. The waiver doctrine bars consideration of an issue that a party could have raised in an earlier appeal in the case. *See* *Brooks v. United States, 757 F.2d 734, 739 (5th Cir. 1985)*. It "serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and

[3] After the military judge granted the accused's motion to suppress the evidence the government requested reconsideration in light of our sister court's decision in *United States v. Robinson, 76 M.J. 663 (A.F. Ct. Crim. App. 2017)*. The motion stated that "the Government still concedes that stating as [sic] passcode is testimonial, the Government maintains its position that stating a passcode is not incriminating." The government's statement that they "maintain" their position that a passcode is not incriminating is hard to reconcile with their original motion where they stated that "the Government concedes that the Accused's statement would be testimonial, incriminating, and compelled." In any event, the government's position in the motion for reconsideration does not cause us to alter our approach to the case for two reasons: first, the government continued to clearly concede that providing the passcode was testimonial; second, the motion for reconsideration only asked the military judge to reconsider his decision on *5th Amendment* grounds, and not the *Article 31(b)*, UCMJ, grounds that we find to be controlling.

appeals." *Hartman v. Duffey, 88 F.3d 1232, 1236, 319 U.S. App. D.C. 169 (D.C. Cir. 1996)*, *cert. denied*, *520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1048 (1997)*. Regardless, whether waiver or forfeiture is the appropriate principle in a particular case, the preservation of issues is required for orderly appellate review.

The importance of waiver, the issue here, is all the more important as our jurisdiction to hear the government's appeal is provided by *Article 62*, UCMJ. While we have the authority to notice waived and forfeited issues when a case is on direct appeal under *Article 66*, UCMJ, no similar authority exists for interlocutory appeals.

In *United States v. Schelmetty, ARMY 20150488, 2017 CCA LEXIS 445* (Army Ct. Crim. App. 30 June 2017) (mem. op.), the appellant asked us to review the military judge's ruling excluding evidence under Mil. R. Evid. 412. In asking us to find error, appellant asserted for the first time on appeal new legal and factual theories in support of admitting evidence of the victim's sexual behavior. *Id. at *8*. We limited our ruling to determining whether **[*11]** the trial judge had erred based on the arguments made at trial. *Id. at *9*. Thus in *Schelmetty*, we refused to consider an argument on appeal that the victim's other sexual acts should have been admitted under the "consent" exception to Mil. R. Evid. 412 when the defense counsel during the motion's hearing stated that the issue was "not an issue of consent." *Id. at 10-11*.

In other words, in *Schelmetty* we reviewed whether the military judge erred by looking at the facts and legal theories of the case that had been brought to his attention at the time. We did not consider arguments or theories of the evidence that were advanced for the first time on appeal. Applying our methodology in *Schelmetty* to the present case would lead us to accept the government's concessions at trial.

Indeed, we conclude that we *cannot* reject the government's concession in this case, even if we were otherwise inclined. The government argues that we should not accept its concession at trial and that we are not bound by the concession. We disagree. When the government makes a concession to *this* court we may choose to reject the concession. If a party misapplies the law in a brief to this court we are not required to adopt the flawed reasoning. That is **[*12]** what de novo review of an issue of law allows.

However, when the government concedes an issue at trial and the military judge accepts the concession, then the government cannot complain to this court that the military judge erred. We find the cases cited by the government to be unpersuasive. *United States v. Budka, 74 M.J. 220 (C.A.A.F. 2015)* (summ. disp.), is a case where the court of criminal appeals (CCA) rejected a government concession made at the CCA. *United States v. Emmons, 31 M.J. 108, 110 (C.M.A. 1990)*, is a case where the CCA and our superior court rejected the government's concession on appeal. Similarly, *United States v. McNamara, 7 U.S.C.M.A. 575, 578, 23 C.M.R. 39, 42 (1957)*, is a case where the court stated it was not bound by the government's concession on appeal to that appellant's claim of error. *United States v. Hand, 11 M.J. 321 (C.M.A. 1981)*, and *United States v. Patrick, 2 U.S.C.M.A. 189, 7 C.M.R. 65, 67 (C.M.A. 1953)*, are cases where the government's concessions were never accepted. In none of these cases did a party concede an issue at the trial level, have the concession accepted, and then argue to the appellate courts that the concession should be ignored. The closest case cited by the government on point, *zUnited States v.*

Taylor, 47 M.J. 322, 328 (C.A.A.F. 1997), is acknowledged by the government to be a citation to the dissenting opinion.

Our review, here, is to determine whether, under *Article 62(a)(1)(B)*,UCMJ, the military judge erred in his "ruling which exclude[d] evidence that is substantial proof of **[*13]** a fact material in the proceeding." That is, our review is to determine whether the trial judge erred as a matter of law, not to determine how we would decide the same issue in the first instance.

As the accused's counsel on appeal correctly summarized in oral argument, "'[S]hould' is an *Article 66* question, 'can' is an *Article 62* question . . . the problem with trying to overturn the concession here is: the question posed to this court is whether or not the military judge abused his discretion. And, saying that a military judge abused his discretion by accepting the concession of the very party who then claims he abused his discretion in accepting the concession, is—it fails to logically connect."

If asking for the accused's passcode to his phone invited a testimonial and incriminating response, the government was required to obtain a valid waiver of the accused's *Article 31(b)*, UCMJ, rights prior to asking for the passcode. Under Mil. R. Evid. 305(b)(2), action that triggers the requirement for *Article 31*, UCMJ, warnings includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." As either (1) no rights warning was **[*14]** given, or (2) the accused invoked his rights, we find no error when the military judge suppressed both the accused's statement and the derivative evidence from that statement.[4] Military Rule of Evidence 305(a) and (c) provide that statements obtained without a proper rights warning are defined as "involuntary" and are excluded along with any evidence derived from the statement by operation of Mil. R. Evid. 304(a) and (b).

It may be that the government's concession in this case was gratuitous and logically inconsistent with its stated goal of defeating the accused's motion to suppress. This inferred inconsistency is certainly an undercurrent in the government's arguments on appeal. However, except when necessary to address a claim such as ineffective assistance of counsel, we do not think it wise or necessary to try to determine why a party may have done what they did. The concession **[*15]** was made. The government maintained the concession even under repeated questioning by the military judge. As such, the substantive issue of this appeal was waived by the government at trial.

CONCLUSION

Accordingly, the appeal by the United States under *Article 62*, UCMJ, is DENIED.

Senior Judge MULLIGAN and Judge FEBBO concur.

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[4] While the military judge noted the government's waiver and discussed in depth the government's concession during argument, his decision to suppress the evidence may have also reached the merits of the issue. The accused on appeal asks that we apply the Tipsy Coachman doctrine if we arrive at the same result as the military judge, albeit for different reasons. *United States v. Carista, 76 M.J. 511, 515 (Army Ct. Crim. App. 2017)*. We find this argument reasonable.