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*	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW 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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Table of Contents

Table of Cases, Statutes, and Other Authorities

OTHER SOURCES

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.

Introduction

Colonel Christopher Shaw, as a representative of the Staff Judge Advocate to the Commandant of the Marine Corps, spoke to defense counsel at Camp Lejeune—the site of this court-martial. During that meeting, Captain Matthew Thomas, Chief Eric Gilmet's Individual Military Counsel (IMC), asked Colonel Shaw a question about upcoming organizational changes regarding prosecution of courts-martial.

But Colonel Shaw did not directly answer the question. Instead, he told Captain Thomas that defense attorneys "may think they are shielded, but they are not protected." He continued, "You think you are protected but that is a legal fiction." Colonel Shaw then directly squared his body toward Captain Thomas and said, "Captain Thomas, I know who you are and what cases you are on, and you

are not protected." Colonel Shaw warned, "the FITREP process may shield you, but you are not protected."

In case the point had not been sufficiently made, Colonel Shaw discussed the consequences of spending extended periods in defense, highlighting judge advocates who served as defense counsel on high profile courts-martial. He warned that the judge advocate community is small, and the lawyer on a promotion board will know what "you did."

Colonel Shaw's threats are textbook unlawful command influence (UCI). Colonel Shaw threatened Captain Thomas so severely that Chief Gilmet no longer trusted his military counsel to represent him. The Government interfered with, and irreparably damaged, Chief Gilmet's relationship with his military counsel. This violated his constitutional right to established attorney-client relationships.

Now, the burden rests with the Government to prove beyond a reasonable doubt that the UCI no longer tainted Chief Gilmet's court-martial or the public's perception of the military justice system. But as Chief Gilmet's relationship with his military counsel sharply deteriorated, the Government crafted a facade of insufficient curative measures.

Ultimately, if Colonel Shaw had not threatened Captain Thomas while he was IMC on a high-visibility case, there would be no problem. If Colonel Shaw had not blamed defense counsel for misinterpreting his words, there would be no

problem. If the Government had not forced Chief Gilmet to choose between constitutional rights—the right to established attorney-client relationships and the right to conflict-free counsel—there would be no problem. Chief Gilmet did not cause this situation. He was entirely reactionary, making some of the scariest decisions of his life with no good options.

This Court should affirm the military judge's ruling, and find the Government failed to cure the actual and apparent UCI.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction to review this case under Article 62(a)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(A). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

Chief Hospital Corpsman Eric Gilmet was charged with violating a lawful order, involuntary manslaughter, negligent homicide, and obstructing justice in violation of Articles 92, 119, 134, and 131b, UCMJ. The military judge dismissed the charges with prejudice.

The Government appealed. The NMCCA vacated the military judge's ruling and remanded this case for further proceedings on August 15, 2022. On October 14, 2022, the Judge Advocate General of the Navy denied Chief Gilmet's request

to certify this case to this Court. Chief Gilmet timely petitioned this Court for review.

Statement of the Facts

1. Chief Gilmet strategically assembled a defense team to represent him at trial.

Chief Gilmet hired Mr. Colby Vokey as his lead defense counsel in January 2019.[1] In March 2020, he requested Captain Matthew Thomas, United States Marine Corps (USMC), as his IMC.[2] Chief Gilmet selected Captain Thomas based on positive recommendations and because he believed he needed to be represented by an experienced Marine Corps attorney.[3] "Since [his] unit was 2d Marine Raider Battalion," he wanted an IMC who could "understand the culture and customs of the service."[4] His request was approved, and Captain Thomas was detailed to Chief Gilmet's case.[5] Captain J. Keagan Riley, USMC, was later detailed as assistant defense counsel.[6]

2. Colonel Shaw met with junior judge advocates at Camp Lejeune and spoke with them in an official capacity.

On November 18, 2021, Colonel Shaw, USMC, held a two-hour meeting

[1] Appellate Ex. LXXXV at 3.
[2] Appellate Ex. LXXXVI at 49.
[3] Appellate Ex. CVI at 1.
[4] Appellate Ex. CVI at 1.
[5] Appellate Ex. LXXXVI at 55.
[6] R. at 80.

with Camp Lejeune's Defense Service Office (DSO).[7] Eight defense attorneys attended, including Captain Thomas.[8]

Colonel Shaw served as Deputy Director, Community Management and Oversight of Judge Advocate Division (JAD) until November 19, 2021.[9] At JAD, he oversaw the slating and assignment process for all Marine judge advocates.[10] He supervised the preparation of the proposed assignment slate for presentation to the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps (CMC).[11] The SJA to the CMC then forwards the slate to the monitors at Marine Corps Manpower Management, who make the final assignment decisions for judge advocates.[12]

The purpose of Colonel Shaw's visit to Camp Lejeune was to "assist the SJA to CMC with the oversight and supervision of the provision of legal advice and legal services support within in the Marine Corps" and to set conditions for a Legal Support Inspection in 2022.[13]

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[7] Appellate Ex. LXXXVI at 1, 3, 5, 7, 10, 12.
[8] Appellate Ex. LXXXVI at 1, 3, 5, 7, 10, 12.
[9] Appellate Ex. LXXXVIII at 4 (Lore Aff.); Appellate Ex. LXXXVIII at 19 (Bligh Aff.).
[10] Appellate Ex. LXXXVIII at 4 (Lore Aff.).
[11] Appellate Ex. LXXXVIII at 4-5.
[12] Appellate Ex. LXXXVIII at 4-5.
[13] Appellate Ex. CIX at 4.

3. Colonel Shaw threatened Chief Gilmet's IMC in a room full of junior judge advocates.

During the meeting, Colonel Shaw discussed his assignment-related responsibilities at JAD. He also discussed proposed billet changes in the Fiscal Year (FY) 2022 National Defense Authorization Act related to a senior judge advocate serving as the convening authority for serious criminal allegations.[14] While on this topic, Captain Thomas asked Colonel Shaw, "What is being done to protect the attorney in that position from outside influences such as political pressures, media pressure and general societal pressures?"[15] Captain Thomas put his question in context by referencing current protections for DSO attorneys, such as having their fitness reports written by other defense counsel.[16]

Colonel Shaw responded that defense attorneys "may think they are shielded, but they are not protected," and "[y]ou think you are protected but that is a legal fiction."[17] While squaring his body toward Captain Thomas and maintaining eye contact, Colonel Shaw said "Captain Thomas, I know who you are and what cases you are on, and you are not protected."[18] "[T]he FITREP process

[14] Appellate Ex. CIX at 5.
[15] Appellate Ex. CIX at 5.
[16] Appellate Ex. CIX at 5.
[17] Appellate Ex. CIX at 5.
[18] Appellate Ex. CIX at 5.

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."[19]

Colonel Shaw discussed the consequences of spending five or six years in defense, referring to defense counsel who had served for extended periods on high-profile courts-martial in Haditha and Hamdania in Iraq who were not promoted, but who he thought should have been promoted.[20] He once again referenced promotion boards, stating "[t]he lawyer on the promotion board will know what you did."[21] Finally, he mentioned that Congress was not happy with many court-martial results, and resources were going to change to get the "right result."[22]

Colonel Shaw reiterated that defense counsel were "shielded but not protected." He also "took time to reflect on his answers, commenting at one time before answering, 'I want to make sure I'm saying what I am allowed to say.'"[23]

4. Colonel Shaw's threats affected Chief Gilmet's relationship with his military counsel.

Colonel Shaw's "pointed answers" caused Captain Thomas to worry about "his role as a defense counsel for HMC Gilmet."[24] Colonel Shaw "confirmed the

[19] Appellate Ex. CIX at 5.
[20] Appellate Ex. CIX at 5.
[21] Appellate Ex. CIX at 5.
[22] Appellate Ex. CIV at 71 (statement from Major Sorenson for command investigation into Colonel Shaw).
[23] Appellate Ex. CIX at 5.
[24] Appellate Ex. CIX at 6.

belief that some people who served as defense counsel were not promoted who should have been promoted."[25] This created a "significant fear" in Captain Thomas "that his continued representation of HMC Gilmet . . . would be detrimental to his career"[26] and "that the small USMC judge advocate community would remember what he did as a defense counsel and hold it against him."[27] Captain Thomas and Captain Riley consulted their state licensing authorities and supervisory counsel about their representation of Chief Gilmet.[28]

Captain Thomas told Chief Gilmet about the meeting and Colonel Shaw's threats, which the military judge found "created a rift between [Captain Thomas] and his client" and caused Chief Gilmet "to question Capt Thomas' undivided loyalty to him and his defense."[29] Chief Gilmet believed Captain Thomas was no longer "able to provide legal representation without consciously or subconsciously being influenced by Colonel Shaw's comments."[30]

[25] Appellate Ex. CIX at 5.
[26] Appellate Ex. CIX at 6.
[27] Appellate Ex. CIX at 17 n.60.
[28] Appellate Ex. CIX at 7.
[29] Appellate Ex. CIX at 6.
[30] Appellate Ex. LXXXVI at 56.

5. Chief Gilmet filed a Motion to Dismiss for Unlawful Command Influence based on Colonel Shaw's comments.

Chief Gilmet filed a Motion to Dismiss for UCI on December 10, 2021.[31] Chief Gilmet alleged Colonel Shaw's statements constituted actual and apparent UCI and prejudiced his attorney-client relationship with Captain Thomas.[32] The Defense motion provided twelve affidavits, including affidavits from military counsel and Chief Gilmet.[33]

6. In its response, the Government attached a written statement from Colonel Shaw, in which he denied making negative comments about defense counsel and knowing Captain Thomas.

In response to the UCI motion, the Government submitted a statement from Colonel Shaw, denying that he made comments to defense counsel that were "negative or degrading to their practice, their cases, or their career advancements."[34] He wrote, "I do not know Captain Thomas nor do I recall speaking with him. I may, however, have mentioned a case he was working on without knowing he was the DC, but I did not do so to highlight anything negative about either the defense team or the case."[35] Colonel Shaw also wrote he would invoke his Article 31(b) right to remain silent if called to testify.[36]

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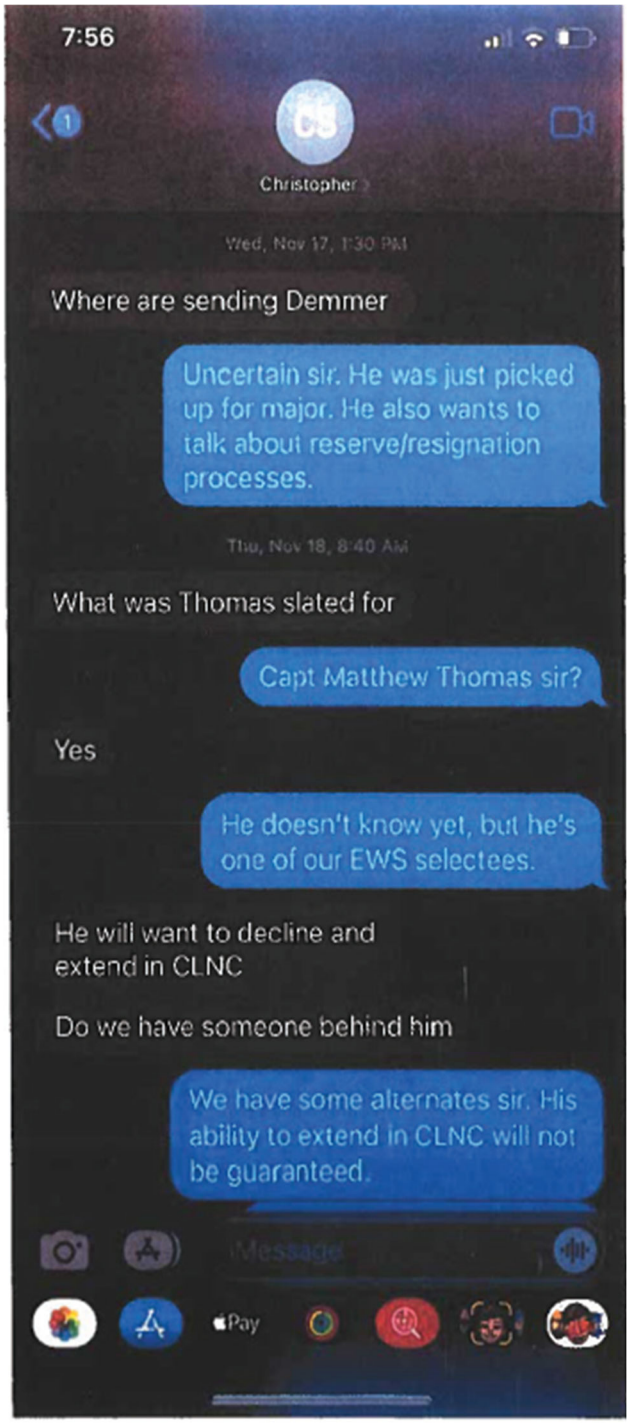
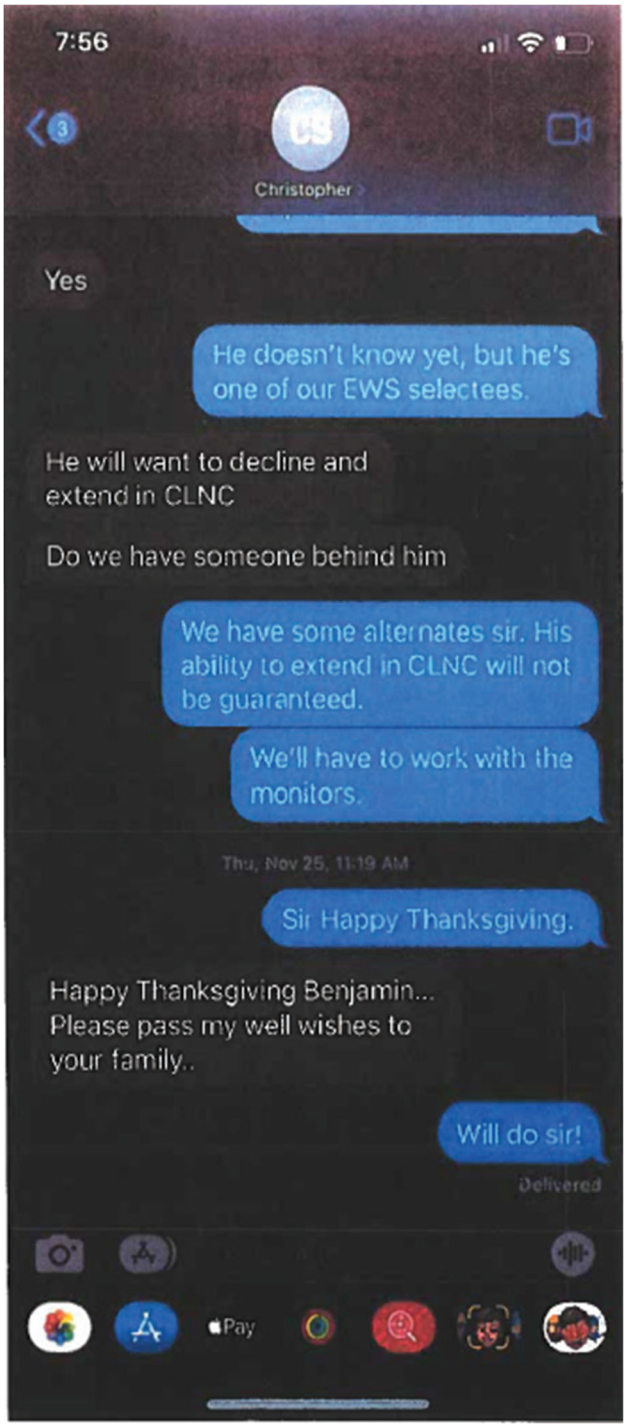
[31] Appellate Ex. LXXXV.
[32] Appellate Ex. LXXXV at 11-15.
[33] Appellate Ex. LXXXVI.
[34] Appellate Ex. LXXXVIII at 1.
[35] Appellate Ex. LXXXVIII at 3.
[36] Appellate Ex. LXXXVIII at 3.

Colonel Shaw's text messages, however, told a different story. Colonel Shaw texted his subordinate about Captain Thomas's next billet, just hours before the DSO meeting.[37]





[37] Appellate Ex. XC at 7-8.

Colonel Shaw later attempted to explain this inconsistency. In his supplemental statement, he wrote, "I still do not recall exactly who [Captain Thomas] is."[38] But he admitted he discussed Captain Thomas's next assignment and reiterated that if called to testify, he would invoke his right to remain silent.[39] The military judge found Colonel Shaw's statements "internally inconsistent, self-serving and directly contradicted by multiple officers."[40]

7. On December 17, 2021, the SJA to the CMC provided an affidavit for the Government to use as evidence in other courts-martial.

The Government enclosed an affidavit from the SJA to the CMC, Major General Bligh, in opposition to Chief Gilmet's UCI motion.[41] The affidavit stated, "Colonel Shaw's alleged comments do not reflect my views or guidance."[42] Major General Bligh emphasized the importance of defense counsel work in the military justice system.[43] Based on the information he had to date, he determined Colonel Shaw would "have no role or authority in the slating and assignment process for Marine judge advocates going forward."[44] However, he would "await completion

[38] Appellate Ex. XC at 9.
[39] Appellate Ex. XC at 9.
[40] Appellate Ex. CIX at 12.
[41] Appellate Ex. LXXXVIII at 19-20.
[42] Appellate Ex. LXXXVIII at 19.
[43] Appellate Ex. LXXXVIII at 19.
[44] Appellate Ex. LXXXVIII at 19-20.

of the investigation to decide whether Colonel Shaw will return to JAD in some capacity."[45]

The Government also provided affidavits from leaders at JAD, denying that zealous representation of defense clients is considered in the detailing process.[46]

8. The parties argued the UCI motion at an Article 39(a) session on December 21, 2021.

The military judge held an Article 39(a) session to address Chief Gilmet's UCI motion. Prior to the 39(a), the military judge emailed the parties to explain he found Chief Gilmet had produced "some evidence" of UCI, which shifted the burden to the Government.[47]

Then, on the record, the military judge supplemented his preliminary findings. He explained Colonel Shaw's statements and actions constituted some evidence of UCI because Colonel Shaw expressed knowledge and understanding of a pending court-martial and gave "a brief regarding the defense counsel role [and] defense counsel promotion opportunities."[48] The military judge found the UCI had a logical connection to the court-martial based on "an erosive effect" on Chief Gilmet's "right to be zealously represented, and the right to be conflict-free" because a "defense attorney should not be shaking in his boots while he's

[45] Appellate Ex. LXXXVIII at 19-20.
[46] Appellate Ex. LXXXVIII at 4-7, 9-10.
[47] Appellate Ex. CII at 1.
[48] R. at 207.

defending . . . his client, wondering whether or not the decisions that attorney makes will affect his career."[49]

9. The military judge inquired into whether Chief Gilmet's counsel had a conflict of interest, and his military counsel asked to withdraw from the case.

After making supplemental findings, and considering the defense counsel's affidavits and professional responsibility concerns, the military judge asked military counsel whether they still believed a conflict of interest existed.[50] Both counsel stated they believed they were conflicted.[51] The military judge then asked whether their beliefs existed regardless of any remedial action by the Marine Corps, whether they had consulted with their state licensing authorities regarding the conflict, whether they discussed the issue with their supervising attorney, and whether they sought to withdraw.[52] Both counsel answered each question in the affirmative. The military judge then asked Chief Gilmet if he consented to his counsels' withdrawal.[53] Chief Gilmet described how he felt he had already lost his defense team because of Colonel Shaw.[54]

[49] R. at 207-08.
[50] R. at 208-09.
[51] R. at 209-10.
[52] R. at 209-10.
[53] R. at 211.
[54] R. at 212.

> I feel like this is just, kind of, an unfair situation for me. You know, I want the Captain Riley and Captain Thomas that I had a month ago, and it's been difficult especially this last couple of months, mentally being - - preparing myself for this trial. And, you know, over these last couple of years, of all of us working together preparing for this [trial] . . . it was nice having that team."[55]

The military judge recessed to give Chief Gilmet time to discuss the issue with conflict-free counsel.[56] After the recess, the military judge again asked Chief Gilmet if he consented to the excusal of military counsel. Chief Gilmet replied, "[i]t's a very difficult decision, sir, but I do consent."[57] The military judge asked, "[d]o you understand, Chief Gilmet, that you could have waived that conflict of interest and still had Captain Thomas and Captain Riley on your defense team?"[58] He replied, "Yes, sir. I understand."[59] The military judge excused Captain Thomas and Captain Riley.[60]

10. <u>The Government provided the results of a command investigation conducted by a sitting NMCCA judge with its supplemental motion.</u>

The parties argued the merits of the UCI motion during the remainder of the 39(a), and the military judge asked the parties to submit additional briefing on the

[55] R. at 211-12.
[56] R. at 212.
[57] R. at 213.
[58] R. at 213.
[59] R. at 213.
[60] R. at 213.

UCI issue.[61] In support of its supplemental briefing, the Government provided the results of the command investigation conducted by Colonel Houtz—a sitting NMCCA judge.[62] An anonymous complaint filed with the Inspector General (IG) of the Marine Corps triggered the investigation.[63] Colonel Houtz did not substantiate any allegations against Colonel Shaw and concluded his comments "were unprofessional but do not reflect critical or sustained flaws in Col Shaw's abilities as a Marine Officer or Judge Advocate."[64]

11. The military judge dismissed the charges with prejudice.

The military judge issued his written ruling, dismissing all charges and specifications with prejudice.[65] He found Colonel Shaw's comments constituted actual and apparent UCI.[66] He explained Colonel Shaw's comments, coupled with his position and authority, created "an intolerable tension and conflict" between Chief Gilmet and Captain Thomas.[67] The military judge found Captain Thomas had a significant fear that the small Marine judge advocate community would remember what he did as defense counsel and hold it against him.[68] He concluded

[61] R. at 216-83.
[62] Appellate Ex. CIV at 3.
[63] Appellate Ex. CIV at 16-26.
[64] Appellate Ex. CIV at 14.
[65] Appellate Ex. CIX.
[66] Appellate Ex. CIX at 11.
[67] Appellate Ex. CIX at 11.
[68] Appellate Ex. CIX at 11, 17 n.60.

the Government failed to prove beyond a reasonable doubt the UCI would not affect the proceedings because its corrective actions did not assuage the concerns of Chief Gilmet and his military counsel.[69] He concluded the Government's actions materially prejudiced Chief Gilmet's rights to IMC and detailed counsel, and his right to established attorney-client relationships.[70] Finally, after discussing the Government's proposed remedies, he concluded that dismissal with prejudice was the only appropriate remedy.[71]

12. The Government appealed and the NMCCA vacated the military judge's ruling.

The Government appealed the military judge's ruling and the NMCCA vacated it.[72] Contrary to both parties' positions, the NMCCA found Chief Gilmet's consent to the release of counsel under Rule for Courts-Martial (R.C.M.) 506(c) was involuntary. It also found there was no "good cause" to excuse counsel because their subjective beliefs about Colonel Shaw's comments amounted to a "personal mistake."[73] The NMCCA found Colonel Shaw's "comments and actions

[69] Appellate Ex. CIX at 15-16.
[70] Appellate Ex. CIX at 17-20.
[71] Appellate Ex. CIX at 20-22.
[72] *United States v. Gilmet*, No. 202200061, 2022 CCA LEXIS 478 at *16-21 (N-M. Ct. Crim. App. Aug. 15, 2022).
[73] *Id.* at *17-20.

at the 18 November 2021 DSO meeting did not cause counsel to be excused" and "will not otherwise affect the proceedings."[74]

Reasons to Grant Review

This Court should grant review because the NMCCA (1) applied the wrong legal test for prejudice, (2) applied the incorrect standards of review for Article 62 appeals, (3) departed from R.C.M. 801(a)(3) by mandating the order in which motions must be addressed, and (4) exceeded the scope of review allowed by Article 62.

1. The NMCCA applied the wrong legal test when assessing prejudice.

In its opinion, the NMCCA applied the prejudice test from *United States v. Reynolds*, requiring that "the unlawful command influence be the proximate cause of the unfairness in his court-martial."[75] This Court announced in *United States v. Biagase* that the *Reynolds* test does "not apply to the responsibility of the military judge during assessment of motions at trial, where any impact of unlawful command influence is a matter of potential rather than actual effect."[76] Because this case arises under Article 62, it was error for the NMCCA to apply a standard

[74] *Id.* at *21-22.
[75] 40 M.J. 198, 202 (C.A.A.F. 1994); *Gilmet*, 2022 CCA LEXIS 478, at *14.
[76] 50 M.J. 143, 150 (C.A.A.F. 1999).

the trial judge was not bound to apply. Thus, this Court should grant review because the NMCCA's decision conflicts with *Biagase*.[77]

2. The NMCCA applied incorrect standards of review.

This Court should grant review because the NMCCA failed to apply the correct standards of review for Article 62 appeals, departing from *United States v. Becker*.[78] First, the NMCCA failed to give the military judge's findings of fact the deference the clearly erroneous standard requires, and instead engaged in factfinding—something it had no authority to do.[79] For example, the NMCCA characterized military counsel's fears regarding continued representation of Chief Gilmet as "personal mistake[s]" rather than deferring to the military judge's findings that these were "valid concerns."[80] Additionally, the NMCCA found Colonel Shaw's comments "were patently untrue."[81] The military judge did not find this, and the record does not support it. Further, the NMCCA found as fact that Captain Thomas was selected for "highly-coveted follow-on orders"—and

[77] *See* C.A.A.F. Rule 21(b)(5)(B).
[78] *See* C.A.A.F. Rule 21(b)(5)(B), (F).
[79] *See* Art. 62(b), UCMJ; *United States v. Becker*, 81 M.J. 483, 490 (C.A.A.F. 2021); *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).
[80] *Compare Gilmet*, 2022 CCA LEXIS 478, at *20 *with* Appellate Ex. CIX at 16; *see also Becker*, 81 M.J. at 490 ("On an Article 62, UCMJ, appeal, the lower court is not authorized to make factual determinations to support a simple difference of opinion between it and the military judge.").
[81] *Gilmet*, 2022 CCA LEXIS 478, at *14.

relied heavily on this fact in its analysis—but the military judge neither found this as a fact nor mentioned it in his ruling.[82]

Second, the NMCCA failed to view the evidence in the light most favorable to the party prevailing at trial.[83] For instance, the NMCCA viewed the senior defense counsel's affidavit as "stok[ing] the fire[]" of the UCI, rather than addressing Captain Thomas's valid concerns.[84] The NMCCA also characterized Captain Thomas as "interpret[ing Colonel Shaw's] comments as being directed at him and concerning his representation of [Chief Gilmet]." However, the military judge found Colonel Shaw's "statements were *tied directly* to Capt Thomas's role as defense counsel and his then-current status as IMC to HMC Gilmet."[85]

3. The NMCCA departed from R.C.M. 801(a)(3) by mandating that military judges resolve UCI motions before addressing motions to withdraw.

The NMCCA held that the military judge was required to resolve the UCI motion before resolving counsel's motion to withdraw because the judge's treatment of these issues "effectively precluded the Government from ever showing the alleged UCI would not affect the proceedings."[86] But R.C.M. 801(a)(3) grants military judges the authority to "exercise reasonable control over

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[82] *Gilmet*, 2022 CCA LEXIS 478, at *19.
[83] *See Becker*, 81 M.J. at 536-37 (citing *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)).
[84] *Gilmet*, 2022 CCA LEXIS 478, at *19 (citing Appellate Ex. LXXXVI at 69-75).
[85] Appellate Ex. CIX at 14 (emphasis added).
[86] *Gilmet*, 2022 CCA LEXIS 478, at *15.

the proceedings." As the Discussion to the Rule notes, this authority includes control over "when, and *in what order*, motions will be litigated."[87]

Here, the military judge's approach was driven by the fact that he already had affidavits from Chief Gilmet and his military counsel stating Chief Gilmet "no longer believe[s] Captain Thomas is able to provide legal representation without consciously or subconsciously being influenced by Colonel Shaw's comments and the possible impact that his continued representation would have on his career progression."[88] R.C.M. 901(d)(4) and its Discussion require the military judge to inquire into potential conflicts of interest and advise the accused of his right to counsel. Knowing all of this, the military judge attempted to avoid creating errors, such as violating the accused's right to counsel of choice or Judge Advocate General Instruction 5803.1E, Rule 1.7(a)(2), which prohibits representation during a conflict of interest. The military judge resolved the counsel issue first—a prudent decision given the evidence presented to him in the UCI filings—by applying R.C.M. 506(c), which allows for excusal of counsel "with the express consent of the accused."

Military judges must be able to take such an approach, especially where, as here, the evidence of the interference with, and break down of, the attorney-client

[87] R.C.M. 801(a)(3) Discussion (emphasis added).
[88] Appellate Ex. LXXXVI at 56.

relationship stared the military judge in the face. This Court should grant review to correct the NMCCA's departure from the usual course of judicial proceedings under R.C.M. 801(a)(3).[89]

4. The NMCCA exceeded the scope of its powers under Article 62.

This case was appealed under Article 62(a)(1)(A), UCMJ, which limits the Government's appeal to "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." The only ruling in this case that terminated the proceedings was the ruling on the UCI motion. While the NMCCA needed to review the facts relevant to the R.C.M. 506(c) issue to resolve the UCI motion, it had no jurisdiction to review or vacate the military judge's ruling on that issue, nor did it have the authority to conduct its own "good cause" analysis.

Even if this Court finds the NMCCA had jurisdiction to address the R.C.M. 506(c) issue, the court still applied the wrong legal standard—conducting a *de novo* review,[90] rather than reviewing the military judge's resolution for an abuse of discretion, as is required.[91]

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[89] *See* C.A.A.F. Rule 21(b)(5)(C), (F).
[90] *Gilmet*, 2022 CCA LEXIS 478, at *17.
[91] *United States v. Watkins*, 80 M.J. 253, 262 (C.A.A.F. 2020) (Maggs, J., dissenting); *United States v. Rhoades*, 65 M.J. 393, 397 (C.A.A.F. 2008).

And within the NMCCA's erroneous *de novo* review, the NMCCA also improperly imported a voluntariness standard into its analysis of whether Chief Gilmet consented to release of his counsel under R.C.M. 506(c). The NMCCA found that the Rule requires not just consent, as the plain language states, but *voluntary* consent and apparently some inquiry into the reasons the accused would like to release his counsel.[92] The NMCCA had no authority to modify the straightforward plain language of R.C.M. 506(c). This Court should grant review to correct the NMCCA's contravention of this Court's precedent and improper extension of Article 62 jurisdiction.[93]

Argument

The Government failed to prove beyond a reasonable doubt that Colonel Shaw's unlawful command influence (1) would not prejudice further proceedings and (2) has not placed an intolerable strain on the public's perception of the military justice system.

Standard of Review

This Court reviews claims of unlawful command influence *de novo*, accepting the military judge's findings of fact unless they are unsupported by the record or clearly erroneous.[94] When such issues arise in an appeal under Article 62,

[92] *Gilmet*, 2022 CCA LEXIS 478, at *16-17.
[93] *See* C.A.A.F. Rule 21(b)(5)(B), (F).
[94] *United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021) (citations omitted); *Becker*, 81 M.J. at 490.

UCMJ, this Court must "review[] the evidence in the light most favorable to the prevailing party at trial."[95] This Court reviews matters of statutory interpretation *de novo*.[96]

Analysis

1. The Government failed to prove beyond a reasonable doubt that Colonel Shaw's UCI would not taint further proceedings.

In order to raise a claim of UCI at trial, the defense must show "some evidence" of unlawful command influence.[97] Once the defense shows "some evidence," the burden shifts to the government. The government can respond in three ways. First, by disproving the underlying facts related to the claim.[98] Second, by demonstrating that the facts do not actually constitute UCI.[99] Third, if the Government cannot disprove the UCI, it can prove beyond a reasonable doubt that the proceedings were "untainted" by the UCI.[100]

Both at trial and on appeal below, the Government conceded that Colonel Shaw's threats to Captain Thomas constitute UCI.[101] Therefore, the question before this Court is whether the Government has proven beyond a reasonable doubt that

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[95] *Becker*, 81 M.J. at 488 (citing *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)).
[96] *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014).
[97] *Biagase*, 50 M.J. at 150.
[98] *Id.*
[99] *Id.*
[100] *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006).
[101] R. at 228-29; Gov. NMCCA Brief at 40 n.3.

the UCI will not affect the proceedings.[102]

A. The Government, through Colonel Shaw's threats, interfered with Chief Gilmet's relationship with his military counsel.

Colonel Shaw's threats irreparably interfered with the relationship between Chief Gilmet and his military counsel. Captain Thomas and Captain Riley were so shaken by Colonel Shaw's threats that "their representation of [him] changed" and they informed Chief Gilmet they "did not believe they could ethically continue to represent [him]."[103]

After carefully reviewing the evidence, and questioning the military counsel and Chief Gilmet on the record, the military judge adopted their perceptions about Colonel Shaw's threats in his findings of fact.[104] The military judge found their beliefs genuine, and the record supports this finding.[105]

The Sixth Amendment provides a right to counsel, which "may not be lightly interfered with."[106] "Once entered into, the relationship between the accused and his appointed military counsel may not be severed or materially altered" by the

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[102] *See Biagase*, 50 M.J. at 151 (C.A.A.F. 1999).
[103] Appellate Ex. CVI at 2.
[104] Appellate Ex. CIX at 6.
[105] R. at 208. This Court has repeatedly said a military judge's evaluation of the demeanor of those appearing before him is critical when handling sensitive issues related to UCI. *See Gore*, 60 M.J. at 187; *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002).
[106] *United States v. Baca*, 27 M.J. 110, 119 (C.M.A. 1988).

government.[107] An accused "is absolutely entitled to retain an established relationship with counsel in the absence of demonstrated good cause."[108] "[T]he government's frustration of the continuance of a proper attorney-client relationship . . . constitutes a denial of due process" afforded by Congress under the UCMJ.[109]

Here, the Government violated Chief Gilmet's Sixth Amendment right to counsel and military-due-process right to continue his attorney-client relationships with Captains Thomas and Riley. Colonel Shaw's comments intimidated the military counsel so strongly that they felt they could no longer zealously represent Chief Gilmet. Likewise, Colonel Shaw's threats rattled Chief Gilmet to the point he no longer trusted his military counsel to zealously represent him. This bullying by a judge advocate is textbook UCI.[110] Here, government interference materially altered those relationships so severely that Chief Gilmet felt he had "no real choice" but to release his counsel, who were "no longer able to provide [him] with legal representation without looking over their shoulder."[111] Government misconduct degraded their relationship to the point the Government needed to take

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[107] *United States v. Murray*, 42 C.M.R. 253, 254 (C.M.A. 1970) (citing *United States v. Tellier*, 32 C.M.R. 323 (C.M.A. 1962)).
[108] *Baca*, 27 M.J. at 119.
[109] *United States v. Eason*, 45 C.M.R. 109, 112 (C.M.A. 1972).
[110] *See generally United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013); *Lewis*, 63 M.J. at 405.
[111] Appellate Ex. CIX at 8.

swift and equally strong actions to repair that damage. The Government, however, failed to deliver.

i. The Government did not prove Colonel Shaw's comments were false. Regardless, Captain Thomas and Captain Riley interpreted those comments reasonably.

The Government never attempted to prove Colonel Shaw's threats were false. Colonel Shaw did not say he would personally ensure service as defense counsel for Chief Gilmet would negatively impact Captain Thomas's career. Instead, his threats were much more ominous. He stated, "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," and "*the lawyer on the promotion board* will know what you did."[112] Captain Thomas and seven other judge advocates heard Colonel Shaw's threats about "the lawyer on the promotion board" and reasonably interpreted their meaning.[113]

When considering those threats, (along with Colonel Shaw's reference to defense counsel on the Haditha and Hamdania cases who were not, but should have been promoted) they understood him to mean senior Marine judge advocates took action in the past to ensure defense counsel on high-profile cases were not promoted and would do so in the future.[114] Simply put, they understood Colonel

[112] Appellate Ex. CIX at 5 (emphasis added).
[113] Appellate Ex. CIX at 5; Appellate Ex. LXXXVI at 1-13.
[114] Appellate Ex. CIX at 5-6.

Shaw to be saying, it has happened before and it will happen again. The military judge found the military counsels' concerns "valid" and noted that Colonel Shaw's threats, made "under a color of authority," could reasonably have created fears in the minds of young judge advocates.[115]

But the Government never addressed Colonel Shaw's veiled threats. Colonel Shaw's removal from his position at JAD could not cure this problem because it only prevented *him* from influencing the future assignments of defense counsel.

In *United States v. Gore*, this Court held that UCI is not cured where threats panic court-martial participants so deeply that the threats ultimately chill their participation in the trial.[116] While *Gore* dealt with chilled participation by a defense witness, this case poses an even greater problem since Colonel Shaw's threats chilled military defense counsel's participation in the remainder of Chief Gilmet's court-martial, causing them to ask to withdraw from the case. This chilling effect tainted Chief Gilmet's proceedings as his defense team crumbled.

The Government's failure to prove Colonel Shaw's threats were false is apparent based on evidence in the record related to the "Forkin Paper."[117] The

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[115] *See* Appellate Ex. CIX at 13 n.49, 16; *see also United States v. Thomas*, 22 M.J. 388, 392 (C.M.A. 1986) (holding that fears flowing from a misinterpretation of a General's comments caused UCI).
[116] *Gore*, 60 M.J. at 188.
[117] *See* Appellate Ex. LXXXVI at 72-74 (First SDC Aff.); Appellate Ex. CIV at 23, 25 (attachment to original IG complaint); Appellate Ex. CVI at 14-16 (Second SDC Aff.).

"Forkin Paper" corroborates Colonel Shaw's threats. It is a briefing page given to members on an O-6 promotion board around 2017, and contains handwritten notes stating "look out for multiple tours on defense," "look for 8006 billets," and "Forkin."[118] It was disseminated at a Professional Military Education event by a Marine Colonel who sat on the board.[119] Lieutenant Colonel Keith Forkin is a judge advocate who was passed over for O-6 in FY2017 to FY2019.[120] The Government never rebutted the meaning of the "Forkin Paper" and it was never mentioned in the command investigation, despite its inclusion as an enclosure. If the Government wanted to repair the damage done by Colonel Shaw's comments, it was imperative to address the tangible evidence of how those threats reflect reality.

ii. Major General Bligh's affidavit was too little, too late.

Major General Bligh's affidavit was produced for the purpose of litigation, in order to solve the Government's litigation problem—not to solve the Government's underlying UCI problem. It was provided nearly one month after Colonel Shaw's threats, and the military judge found at that point "the damage had already been done."[121]

[118] Appellate Ex. CIV at 25.
[119] Appellate Ex. LXXXVI at 72.
[120] Appellate Ex. CIV at 25.
[121] Appellate Ex. CIX at 15.

When a senior leader makes a public statement amounting to UCI, the taint from that statement can be cured with a "clear and effective retraction." [122] For example, in *United States v. Rivers*, the convening authority accidentally issued a memorandum to his subordinates stating, "[t]here is no place in our Army for illegal drugs or those who use them."[123] After learning of the mistake, the convening authority deleted the unlawful comments in a corrected memorandum and published an additional memorandum explaining that he "inaccurately presented [his] view toward drug offenders" and his original message "should not be read to express a command philosophy on drug offenders."[124] This Court found the convening authority's retraction effective enough to dissipate the taint of the UCI because it clarified that the convening authority did not believe drug offenders must always be discharged and explained the original message was accidental.

Here, Major General Bligh's affidavit did not effectively retract Colonel Shaw's message. His affidavit states "Colonel Shaw's alleged comments do not reflect my views or guidance."[125] He never said Colonel Shaw's comments were wrong nor addressed the discussion of defense counsel who had already suffered the consequences of serving on high-profile cases.[126] He never acknowledged the

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[122] *United States v. Rivers*, 49 M.J. 434, 440-41 (C.A.A.F. 1998).
[123] *Id.* at 438.
[124] *Id.* at 440.
[125] Appellate Ex. LXXXVIII at 19.
[126] Appellate Ex. LXXXVIII at 19-20.

substance of Colonel Shaw's threats, stating only that Colonel Shaw

> may have made comments contrary to the slating and assignments philosophy and processes at Judge Advocate Division (JAD). Specifically, it has come to my attention that he allegedly made comments to the effect that service as a defense counsel in the Marine Corps is detrimental to career progression and billet opportunities.[127]

His affidavit misses the point. The thrust of Colonel Shaw's threats were about "the lawyer on the promotion board," yet Major General Bligh's affidavit focused on the assignment process. Major General Bligh generally stated that "service as defense counsel . . . will in no way be detrimental to an individual's career"[128] without addressing the specific examples where it seemingly had been fatal to the careers of defense counsel who Colonel Shaw called "good attorneys."[129]

Major General Bligh—intentionally or not—was unprepared to address Colonel Shaw's specific threats because his knowledge of the situation was "about an 'inch deep.'"[130] He was not aware Colonel Shaw said anything other than "it was not good to be a defense counsel."[131] Since that is all Major General Bligh knew, his affidavit could not fully address, let alone cure, the UCI.

Major General Bligh's affidavit was also insufficient because it was

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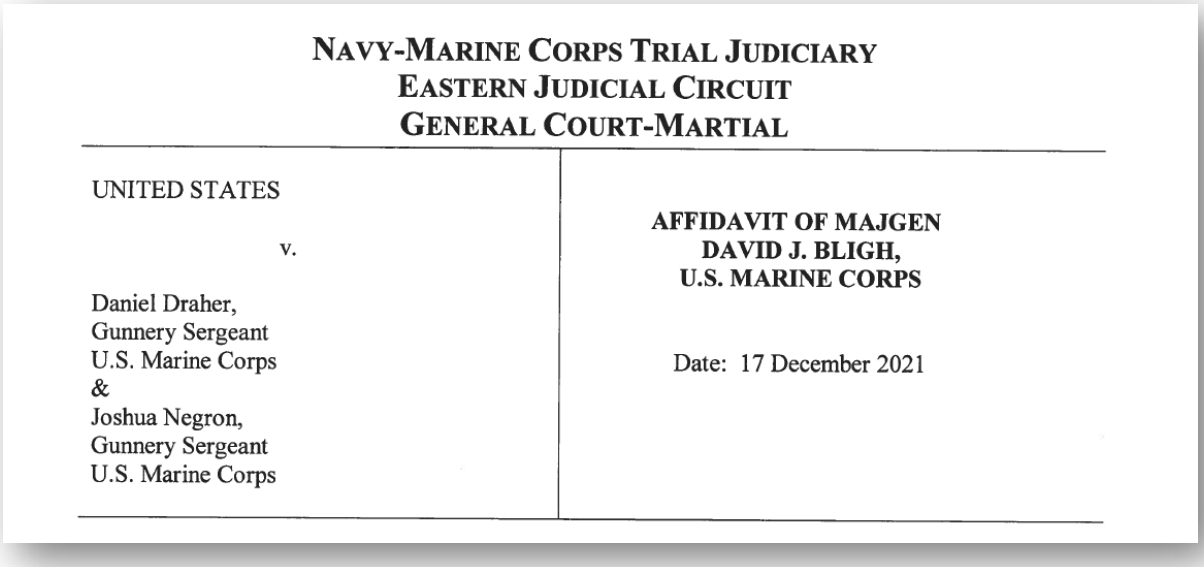
[127] Appellate Ex. LXXXVIII at 19.
[128] Appellate Ex. LXXXIII at 19.
[129] Appellate Ex. LXXXVI at 4.
[130] Appellate Ex. LXXXVI at 66.
[131] Appellate Ex. LXXXVI at 65.

provided to a limited audience. In *Rivers*, the convening authority ordered that the retraction memorandum be sent to every commander, who had to acknowledge receipt and return the old memorandum containing the unlawful language.[132] In contrast, Major General Bligh did not send his affidavit to even a portion of the judge advocate community, nor to Chief Gilmet's counsel. It was provided for use as government evidence in companion cases.



NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. Daniel Draher, Gunnery Sergeant U.S. Marine Corps & Joshua Negron, Gunnery Sergeant U.S. Marine Corps	**AFFIDAVIT OF MAJGEN DAVID J. BLIGH, U.S. MARINE CORPS** Date: 17 December 2021

Worse, it did not address Chief Gilmet or his counsel, despite Captain Thomas being the primary target of Colonel Shaw's threats.

Essentially, the affidavit said "I'm not sure what Colonel Shaw said, but whatever it was, I didn't tell him to say it, it's not how I feel, and that's not how our process works." It was not enough to say this is not how the process works

[132] *Rivers*, 49 M.J. at 434.

without trying to determine whether what Colonel Shaw threatened is actually happening under the guise of the current process. As such, Major General Bligh's affidavit failed to cure the harm.

iii. The affidavits from Marine Corps personnel law experts are irrelevant to the UCI here.

The Government tried to cure Colonel Shaw's threats about the promotion prospects for defense counsel by providing affidavits about the judge advocate assignment process and who controls promotion board membership.[133] However, as discussed above, Colonel Shaw did not suggest someone would negatively influence defense counsel assignments. And he did not claim to control who sits on promotion boards. Therefore, the affidavit stating that JAD has no ability to influence who will be tasked with "promotion selection board duties or any ability to influence a judge advocate who may be assigned to a board" is also irrelevant.[134] These affidavits illustrate that, instead of targeting the actual substance of the UCI in Chief Gilmet's court-martial, the Government tried to downplay it by providing affidavits about how the system *should* work.

[133] Appellate Ex. LXXXVIII at 4-7, 9-10.
[133] Appellate Ex. LXXXVIII at 9.

B. None of the Government's actions cured the taint on Chief Gilmet's court-martial after the Government violated his right to counsel of choice.

Colonel Shaw's threats so deeply eroded the relationship between Chief Gilmet and his military counsel that the taint from the UCI remained even after he released his counsel. The Government's interference with his attorney-client relationship with Captain Thomas also violated Chief Gilmet's right to counsel of choice.

The Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[135] "Despite adequate representation by counsel, if it is not the accused's counsel of choice and if he is erroneously prevented from being represented by the lawyer he wants, then the right has been violated."[136] The military right to counsel of choice is broader than in the civilian context. Under Article 38(b)(4), UCMJ, the accused has a right to retain IMC as associate counsel *even if* the accused is also represented by civilian counsel of choice under Article 38(b)(2), UCMJ. An accused's choice of IMC is also part of his "right to conduct his own defense" and he "must be allowed to make his own choices about the way to protect his own liberty."[137]

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[135] *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006).
[136] *Watkins*, 80 M.J. at 258 (citing *Gonzalez-Lopez*, 548 U.S. at 148).
[137] *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

In *United States v. Hutchins*, this Court held prejudice to the accused depends on which party initiated the action leading to the severance of an attorney-client relationship.[138] Where the prosecution or the command initiates the action leading to the severance, the accused's Sixth Amendment right to counsel may be violated.[139]

Here, the Government violated not only Chief Gilmet's broader Sixth Amendment right to counsel, but also his narrower right to counsel of choice. The military judge found that Chief Gilmet "would *never* have sought, or consented to, the release of his two military counsel but for Col Shaw's comments and the effect they had on Capt Thomas."[140] Ultimately, because of Colonel Shaw's threats, Chief Gilmet lost both his military counsel—"two thirds of his trial defense team"—only "a few weeks before his trial was set to begin."[141]

The military judge concluded the prejudice was made worse by the fact that Captain Thomas "represent[ed] Chief Gilmet for almost two years" and Captain Riley "represent[ed] HMC Gilmet for about one year."[142] The loss of these two counsel greatly prejudiced Chief Gilmet because "each counsel was responsible for

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[138] 69 M.J. 282, 292 (C.A.A.F. 2011).
[139] *Hutchins*, 69 M.J. at 292.
[140] Appellate Ex. CIX at 20 (emphasis in original).
[141] Appellate Ex. CIX at 19.
[142] Appellate Ex. CIX at 19.

different parts of the trial"[143] "or specific witnesses," and "Captain Thomas and Captain Riley had spent time interviewing witnesses who had not spoken with civilian counsel."[144]

"Defense counsel are not fungible items."[145] The knowledge Captains Thomas and Riley gained over such a lengthy relationship is difficult, if not impossible to replace. Chief Gilmet strategically selected Captain Thomas as his IMC because he believed he needed to be represented by an experienced Marine defense counsel.[146] The Government's actions made it impossible for Chief Gilmet to use this trial strategy since Colonel Shaw's comments intimidated nearly all Marine defense counsel.[147] The military judge found the Government initiated the chain of events that led to the severance of Chief Gilmet's relationship with his military counsel.[148] As such, the Government did not cure this prejudice.

[143] Appellate Ex. CIX at 19.
[144] Appellate Ex. CIX at 3.
[145] *Baca*, 27 M.J. at 119.
[146] Appellate Ex. CVI at 1.
[147] Appellate Ex. LXXXVI at 71.
[148] Appellate Ex. CIX at 17.

2. The Government failed to prove beyond a reasonable doubt that Colonel Shaw's comments did not place an intolerable strain on the public's perception of the military justice system.

This Court should find both that apparent UCI still exists and the Government failed to cure the apparent UCI here. The recent amendments to Article 37, UCMJ, did not change the doctrine of apparent UCI at the trial level.

A. The doctrine of apparent UCI was not superseded by the amendments made to Article 37 in the NDAA 2020.

When questions of statutory construction arise, courts apply the traditional canons of statutory construction.[149] "Unless ambiguous, the plain language of a statute will control."[150] Courts look to legislative history "[o]nly when the statute remains unclear."[151]

i. The plain language of the amendment shows it is operative only during appellate review.

Through the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Congress added a new provision to Article 37: "No *finding or sentence* of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the

[149] *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).
[150] *Id.*
[151] *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (internal quotations and citations omitted).

accused."[152] The meaning of this amendment is plain, and does not affect the doctrine of apparent UCI at trial.

By limiting its application to a "*finding or sentence* of a court-martial," the text shows Congress was concerned with the application of UCI *after* a verdict is rendered. As such, this statute's plain language only precludes *appellate relief* if there is no material prejudice to the accused, consistent with Article 59, UCMJ.

ii. The purpose and legislative history of Article 37 illustrate it is operative only during appellate review.

Assuming this Court finds Article 37's text ambiguous, the legislative history surrounding this amendment is informative and supports an interpretation that Article 37(c) only applies during appellate review. The amendment followed this Court's decisions in *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018), and *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017), where this Court set aside the convictions in two high-profile sexual assault cases due to UCI. The NDAA 2020 amendments to Article 37(c) have been described as codifying then-Judge Ryan's dissent in *Boyce*[153] where this Court reversed the appellant's findings and sentence without finding the UCI prejudiced Boyce.

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[152] Art. 37(c), UCMJ, 10 U.S.C. § 837(c) (2019) (emphasis added); National Defense Authorization Act 2020, Pub. L. No. 116-92, § 532(c), 133 Stat. 1361 (2019).

[153] *See* Rachel E. VanLandingham, *Ordering Injustice: Congress, Command Corruption of Courts-Martial, and the Constitution*, 49 HOF. L.R. 211, 233 (2020);

In her dissent, Judge Ryan criticized the majority for defying "the restriction that Article 59(a), UCMJ, places *on this Court*."[154] Her criticism was not that apparent UCI cannot exist, but that relief is not warranted *on appeal* without a showing of prejudice to the appellant. Although Article 59(a) has always required prejudice, courts—including this Court—had not required such a showing in apparent UCI cases.[155]

The NDAA 2020 amendments appear to put the *Boyce* dissenting opinion into action. Congresswoman Jackie Speier sponsored the Article 37(c) provision in the NDAA 2020. She touted it as a "provision that would redefine unlawful command influence *to prevent appeals courts* from needlessly overturning sexual assault convictions."[156] This says nothing about nullifying the doctrine of apparent UCI at the trial level. Rather, it shows the amendment targeted only appellate review, preventing "needlessly" overturned cases after the courts-martial were complete where no prejudice to the accused flowed from the apparent UCI.

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see also United States v. Horne, 82 M.J. 283, 290 (C.A.A.F. 2022) (Ryan, S. J. concurring in judgment).

[154] *Boyce*, 76 M.J. at 254 (Ryan, J., dissenting) (emphasis added).

[155] *See, e.g.*, *Proctor*, 81 M.J. at 255; *Boyce*, 76 M.J. at 248.

[156] *See Military Sexual Violence*, CONGRESSWOMAN JACKIE SPEIER, https://speier.house.gov/military-sexual-violence (last visited Nov. 2, 2022).

The amendment originated in the House of Representatives in H.R. 2500, and was agreed to in Conference Committee.[157] The Conference Committee Report explicitly states the amendment "would *clarify* that no findings [or] a sentence of a court-martial may be held incorrect on the grounds of a violation of this provision unless the violation materially prejudices the substantial rights of the accused."[158] If Congress intended to completely eliminate the doctrine of apparent UCI, this amendment would have been a substantial change—not a simple clarification.

This statutory change must logically be interpreted to clarify that prejudice under Article 59(a) is only required when taking action on a finding or sentence during appellate review. This is not a new requirement—it represents a course correction *for appellate courts* that have gone astray and granted relief without finding specific prejudice to the accused.

This Court should find the doctrine of apparent UCI exists at the trial level, and the military judge here did not err by finding apparent UCI in Chief Gilmet's court-martial.

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[157] H.R. Rep. No. 116-333, at 1,257 (2019) (Conf. Rep.).
[158] *Id*.

B. The Government's attempted curative measures were insufficient to convince a member of the public that Chief Gilmet would get a fair trial.

The Government's actions in this case put a greater strain on the public's perception of the military justice system, rather than cure the problem.[159] The Government must prove beyond a reasonable doubt that the UCI did not place an "intolerable strain on the public's perception of the military justice system."[160] The Government's attempted curative measures here failed because they did not target the substance of Colonel Shaw's comments.

The IG-directed command investigation did more harm than good. As the military judge found, it "did little to weed out the harm caused by Colonel Shaw's comments" and barely admonished Colonel Shaw for his inexcusable actions.[161] The investigation was "basically just counsel to Colonel Shaw to be a better public speaker"[162] and did not recommend he suffer any adverse consequences.[163]

This Court noted in *United States v. Lewis* that the appearance of unfairness persists where the government actor causing the UCI does not appear to have suffered any ethical or disciplinary sanctions.[164] That is exactly the case here. No

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[159] *See supra* pp. 23-34 (explaining why the Government's attempted curative measures failed to show the UCI would not taint further proceedings).
[160] *Proctor*, 81 M.J. at 255.
[161] Appellate Ex. CIX at 16.
[162] R. at 320.
[163] Appellate Ex. CIV at 10-14 (finding none of the allegations substantiated or amounted to misconduct).
[164] 63 M.J. 405, 416 n.4 (C.A.A.F. 2006).

member of the Marine Corps has reprimanded Colonel Shaw for his actions or stated that what he did was unlawful. The Investigating Officer (IO) seemed to brush Colonel Shaw's actions aside, allowing his "inconsistent statements [to] go unmentioned," and concluded no further action was needed.[165]

From the public's perspective, the Government's handling of the UCI in this case looks like a whitewash. The military judge found the command investigation was problematic because it failed to address the substance of Colonel Shaw's comments and dismissed the defense counsels' "valid concerns."[166] He found the investigation essentially said to take the defense counsels' legitimate concerns "with a grain of salt, because, well, they're defense counsel who will do anything to benefit their client."[167] This dismissive approach does not cultivate confidence that the Government took Colonel Shaw's objectively threatening statements seriously.

The military judge also found the investigation failed to cure the problem because it did not mention Colonel Shaw's three unsworn statements, each ending with an invocation of his right to remain silent. Colonel Shaw's inconsistent statements took the same dismissive approach to the defense counsels' valid

[165] Appellate Ex. CIX at 16.
[166] Appellate Ex. CIX at 16.
[167] Appellate Ex. CIX at 16.

concerns and would cause a member of the public to question both his integrity and the integrity of the investigation.

This investigation made it look like the institution was trying to protect its own, rather than safeguard the right of the accused to a fair trial. A sitting judge on the NMCCA was appointed as the IO and he found all allegations unsubstantiated.[168] The investigation was given only to trial counsel, who held onto it for eight days before turning it over to defense counsel one day before the final 39(a) session.[169] Nothing about the Government's handling of this matter has been transparent. The secrecy that has riddled the Government's curative measures would cause the public to seriously doubt whether the Government actually wanted to fix the UCI infecting Chief Gilmet's court-martial or do just enough to sweep it under the rug.

In *Lewis* and *United States v. Salyer*, the Government tainted the courts-martial by bullying the military judges. In both cases, the trial counsel conducted *voir dire* of the military judge by asking highly personal questions, suggesting the military judge would secretly rule in the accused's favor on substantive issues due to personal relationships.[170] These inappropriate *voir dire* tactics—not bias based

[168] Appellate Ex. CIV at 2; Appellate Ex. CVIII at 1.
[169] Appellate Ex. CVII at 4.
[170] *Salyer*, 72 M.J. at 419-22 (asking questions about whether the military judge married his wife when she was seventeen); *Lewis*, 63 M.J. at 408-11 (asking

on the underlying personal questions—caused the military judges in both cases to recuse themselves.[171] Accordingly, this Court held government actors used their official positions to unduly influence the deliberative processes of actors in pending courts-martial and "the appearance and impression that the Government obtained advantage from its actions" could not stand.[172]

Here, similar to *Lewis* and *Salyer*, a government actor used his official position to unduly influence the deliberative processes of both Chief Gilmet and his military counsel. Just like trial counsel have no authority to unseat military judges through personal attacks, senior Marine judge advocates have no authority to threaten and manipulate who represents the accused in high-visibility courts-martial. Such actions "strike at the heart of what it means to have . . . a credible military justice system."[173] The military justice community and the public are watching this case.[174] The perception left by the Government's actions and the NMCCA's opinion harms the military justice system. This Court should act to

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questions related to an allegedly inappropriate personal relationship with civilian defense counsel).

[171] *Salyer*, 72 M.J. at 425-26 (accessing the judge's personnel file without permission and ex parte conversations with the judge's supervisor); *Lewis*, 63 M.J. at 411 (engaging in "slanderous conduct" during *voir dire* that caused the judge to have an "emotional reaction").

[172] *See Salyer*, 72 M.J. at 428.

[173] *See id.*

[174] Appellate Ex. CIX at 11 n.47; Appellate Ex. LXXXVI at 30-46; Appellate Ex. CVIII at 9-22.

safeguard the integrity of established attorney-client relationships and Chief Gilmet's court-martial.

Conclusion

Because of the lingering UCI that taints Chief Gilmet's court-martial and the NMCCA's erroneous approach to the issues involved, this Court should grant review, reverse the NMCCA's decision, and reinstate the military judge's ruling.

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APPENDIX

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

CERTIFICATE OF FILING AND SERVICE

I certify that on November 3, 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 8,965 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.

APPENDIX