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	)))))))))	APPELLEE'S ANSWER TO APPELLANT'S SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim.App. Dkt. No. 202200061 USCA Dkt. No. 23-0010/NA

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Index of Brief

Table of Authorities

Page

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

UNITED STATES CIRCUIT COURTS OF APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946 (2019)

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.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 62(a)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(A) (2016), because the United States timely appealed the Military Judge's Ruling dismissing the Charges and Specifications. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

The Convening Authority referred four Charges against Appellant to a general court-martial, alleging involuntary manslaughter, negligent homicide, obstructing justice, and violating a lawful order, in violation of Articles 119, 134, 131b, and 92, UCMJ, 10 U.S.C. §§ 919, 934, 931b, and 892 (2016).

Before trial, the Military Judge issued a Ruling dismissing the Charges and Specifications with prejudice. The United States filed a timely Notice of Appeal. The lower court found error, vacated the Ruling, and remanded the case.

Appellant petitioned this Court for review and filed a Supplement to his Petition.

Statement of Facts

A. The United States charged Appellant with multiple offenses.

The United States charged Appellant with involuntary manslaughter, negligent homicide, obstructing justice, and violating a lawful general order. (Charge Sheet, Dec. 5, 2019; Add'l Charge Sheet, Dec. 5, 2019.)

B. Appellant moved to dismiss the Charges and Specifications, alleging unlawful command influence from a senior officer's comments toward Appellant's Counsel. The Parties presented evidence.

Appellant moved to dismiss the Charges and Specifications due to unlawful command influence and provided affidavits as evidence. (Appellate Exs. LXXXV–LXXXVI.) The United States responded and provided affidavits and evidence to rebut Appellant's claims. (Appellate Exs. LXXXVII–LXXXVIII.)

1. During a meeting attended by one of Appellant's Counsel, Colonel Shaw said defense attorneys are "shielded but not protected" by the Marine Corps fitness reporting process.

Appellant and the United States provided affidavits describing how Colonel Shaw, then the Marine Corps Judge Advocate Division Deputy Director for Oversight and Development, held a meeting with the Defense Services Organization Camp Lejeune Branch, including Appellant's Individual Military Counsel, Captain Thomas. (Appellate Ex. LXXXVIII at 1, 4; Appellate Ex.

LXXXVI at 1, 3, 5, 7, 10, 12.) Colonel Shaw discussed proposed changes in the National Defense Authorization Act giving referral authority over certain cases to judge advocates. (Appellate Ex. LXXXVI at 1, 3, 5, 7, 10, 12.)

Captain Thomas asked Colonel Shaw how trial counsel would be protected from improper influence, citing defense counsel's separate chain of command as an existing protective measure for fitness reports. (Appellate Ex. LXXXVI at 1, 3, 5, 7, 10, 12.) Colonel Shaw's response described the protection provided by their separate chain of command as a "legal fiction." (Appellate Ex. LXXXVI at 1, 3, 5, 7, 10.) He said that although the chain of command shields defense counsel from adverse fitness reports, the Marine judge advocate community is small, so the lawyer on a promotion board will know the judge advocates. (Appellate Ex. LXXXVI at 1–2.) He used the phrase, "shielded but not protected," more than once. (Appellate Ex. LXXXVI at 3.)

Colonel Shaw told Captain Thomas "I know who you are and what cases you are on, and you are not protected," but he did not mention Appellant. (Appellate Ex. LXXXVI at 1, 3, 5.)

When asked about billet assignments, Colonel Shaw said there are secondary effects for judge advocates who spend too much time in defense, citing the failure of otherwise good attorneys to promote after spending five or six years as defense counsel on war crimes cases. (Appellate Ex. LXXXVI at 1–2, 4, 5.)

2. Major General Bligh removed Colonel Shaw from his position the day after the comments.

The United States presented an Affidavit explaining that the next day Major General David Bligh, the Staff Judge Advocate to the Commandant of the Marine Corps, learned that Colonel Shaw may have "made comments contrary to the slating and assignments philosophy and processes" and he removed Colonel Shaw from his duties at the Division. (Appellate Ex. LXXXVIII at 19.)

3. Appellant argued Colonel Shaw's comments affected his Counsel and moved for dismissal for unlawful command influence.

Appellant filed a Motion to Dismiss for unlawful command influence, claiming Colonel Shaw's comments created a conflict of interest because "governmental action" made Appellant question "his faith in Captain Thomas [and] denied [Appellant] the right to have Captain Thomas continue to represent him conflict free." (Appellate Ex. LXXXV at 16.) The Motion did not reference Detailed Defense Counsel, Captain Riley. (Appellate Ex. LXXXV.)

4. Appellant presented evidence of the effect of Colonel Shaw's comments and his Counsel's concerns about being defense counsel in the Marine Corps.

Affidavits from four junior officers who attended the meeting expressed concerns that representing higher profile clients would "carry negative connotation[s]," and have a negative professional impact. (Appellate Ex. LXXXVI at 5–6, 8, 10–11.) In his Affidavits, the Senior Defense Counsel described the

impact of the comments and his own fears about being a zealous defense attorney. (Appellate Ex. LXXXVI at 1–2, 69–75.) He said Colonel Shaw's comments threatened his counsel and "injected doubt as to whether any Marine Corps Defense counsel can fulfill their creed to selflessly defend our clients without fear of reprisal." (Appellate Ex. LXXXVI at 71.)

a. Captain Riley was not present but felt Colonel Shaw's comments "appl[ied] to [him] with equal force."

Captain Riley was not present at the meeting, but his Affidavit stated that Colonel Shaw's comments "seem to apply to me with equal force." (Appellate Ex. LXXXVI at 58.) He said: "I fear that zealous advocacy of my clients, but most specifically [Appellant], will put my standing and opportunities in the Judge Advocate Community at risk." (Appellate Ex. LXXXVI at 59.) "[T]he implications of Col Shaw's message appear to have created questions in the mind of [Appellant]," who now questions the loyalty of his counsel. (Appellate Ex. LXXXVI at 59.)

b. Captain Thomas said he believed the comments affected his representation of Appellant.

Captain Thomas wrote in his Affidavit that Colonel Shaw's comments "made [him] concerned that [his] continued representation of [Appellant] and zealous advocacy of clients accused of sexual assaults may be detrimental to [his] career." (Appellate Ex. LXXXVI at 4.) He cited Judge Advocate Division's

ability to negatively affect his career and family's well-being through billet assignments. (Appellate Ex. LXXXVI at 4.)

Finally, he said: "Colonel Shaw's comments, and my concerns identified above, have created a rift between [Appellant] and myself. His comments have made [Appellant] question my undevoted loyalty to him and to his defense because they have created at least the appearance that I may have a personal interest in not defending him to the best of my ability." (Appellate Ex. LXXXVI at 4.)

c. Appellant believed Captain Thomas's representation may be "consciously or subconsciously" influenced by Colonel Shaw's comments.

Appellant provided an Affidavit, stating after he learned about the meeting, he believed Captain Thomas had a personal interest inconsistent with his zealous representation. (Appellate Ex. LXXXVI at 56.) Appellant now believed Captain Thomas would be unable 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." (Appellate Ex. LXXXVI at 56.)

C. The United States opposed the Motion and provided evidence that Colonel Shaw was removed and his statements were untrue.

The United States opposed Appellant's Motion to Dismiss, arguing: (1) Appellant failed to meet his burden to show some evidence of unlawful command influence; and (2) evidence supported that, beyond a reasonable doubt,

the proceedings would not be influenced because Colonel Shaw was removed from his position at Judge Advocate Division and from the judge advocate detailing and slating process. (Appellate Ex. LXXXVII at 4, 6–7.)

The United States presented evidence Major General Bligh removed Colonel Shaw from his position at Judge Advocate Division pending an investigation, and permanently removed him from the slating and assignment process. (Appellate Ex. LXXXVIII at 19–20.)

1. The United States submitted Affidavits from all the Marine judge advocates with authority over the detailing process. Each rejected Colonel Shaw's claims.

The Manpower Management Division Officer Assignments—not Judge Advocate Division—controls assignments of all judge advocates. (Appellate Ex. LXXXVIII at 4.) Judge Advocate Division receives a list of scheduled "movers" and begins to develop a proposed slate. (Appellate Ex. LXXXVIII at 6.) The determinations are made based on the needs of the Marine Corps and the desire of the officers—including professional backgrounds, family situations, and the officer's career progression. (Appellate Ex. LXXXVIII at 6–7.) Never during the Branch Head's time had detailing decisions involved punishment or retribution for the actions or performance of a defense attorney, and "such considerations have no place in the slating calculous [sic]." (Appellate Ex. LXXXVIII at 6–7.)

Major General Bligh then reviews the proposed slate and forwards his recommendations to Manpower Management Division Officer Assignments. (Appellate Ex. LXXXVIII at 4–5.) "At no point would a defense counsel's zealous representation of a client be held against that attorney in determining future assignments of duty stations." (Appellate Ex. LXXXVIII at 4–5.)

Once Manpower makes a detailing decision, the local officer in charge determines what job each inbound counsel will perform based on section needs and the individual officer's experience. (Appellate Ex. LXXXVIII at 8.)

2. The United States presented evidence that Judge Advocate Division cannot affect promotions, and that Captain Thomas was selected for a prestigious higher education opportunity while serving as a defense counsel.

The United States presented evidence describing the selection process for those who sit on promotion boards. (Appellate Ex. LXXXVIII at 9.) Judge Advocate Division does not determine which officers are tasked with promotion board duties and has no input on which judge advocate is assigned to the promotion board. (Appellate Ex. LXXXVIII at 9.)

The Commandant's Education Board "competitively select[s] officers to participate in educational opportunities such as resident school or fellowships," which is "considered a mark of distinction within the Marine Corps and the judge advocate community." (Appellate Ex. LXXXVIII at 11.) Captain Thomas was selected to attend resident professional military education—Expeditionary Warfare

School—by the Commandant's Education Board. (Appellate Ex. LXXXVIII at 13–18.)

D. Captain Thomas and Captain Riley requested to withdraw as counsel. Appellant consented to their release.

Making his Ruling on the Record in a 39(a) session, the Military Judge found Appellant presented some evidence that, if true, was unlawful command influence. (R. 207–08.) He found Colonel Shaw, while holding a position of authority over Marines, discussed the defense counsel role commented on being shielded but not protected, and addressed Captain Thomas directly effectively saying: "I know who you are. I know who you represent." (R. 207.) He found this was some evidence of unlawful command influence, "during a court-martial of which Colonel Shaw expressed a knowledge and understanding." (R. 207.) He found the unlawful influence had a logical connection to the court-martial as it had "an erosive effect on . . . the right to be zealously represented and the right to be conflict-free." (R. 207–208.)

The Military Judge then inquired whether Captain Thomas and Captain Riley still believed a conflict of interest existed, whether they spoke to their supervisory attorney, whether they spoke to their state licensing authority, and whether they sought to withdraw from the case. (R. 209–10.)

Both responded in the affirmative to all questions. (R. 209–10.)

Neither counsel explained what they believed the conflict was or why it still existed in light of the United States' remedial actions. (R. 209–10.) They did not explain what they discussed with their state licensing authority. (R. 209–10.) The Military Judge did not ask, and neither Counsel offered, whether they could continue to zealously represent Appellant. (R. 209–10.)

The Military Judge then confirmed Appellant had the opportunity to consult with "conflict-free" counsel, and asked Appellant if he agreed to excuse Captains Thomas and Riley from representing him. (R. 211.)

Appellant consented to their excusal, and the Military Judge excused them. (R. 213–15.)

The Military Judge made no finding of good cause under R.C.M. 506(c). (R. 209–15.)

E. At the Military Judge's request, the Parties submitted additional briefing on whether Appellant's release of counsel and Colonel Shaw's removal from Judge Advocate Division affected the unlawful command influence analysis.

1. The United States argued it proved beyond a reasonable doubt that unlawful command influence would not affect the proceedings.

The United States argued that, to the extent Colonel Shaw's comments affected Counsel, Colonel Shaw's removal and the evidence the United States presented about the slating process removed the taint of those comments. (Appellate Ex. CIII at 4.) It argued there was no irreconcilable conflict of interest,

so the severance of the attorney-client relationship was not inevitable. (Appellate Ex. CIII at 8–12.) The United States offered an investigation into Colonel Shaw, including his comments to defense counsel. (Appellate Ex. CIV at 3–132.)

2. Appellant argued his Counsel's removal prejudiced him.

Appellant argued Colonel Shaw's misconduct caused the loss of Counsel, resulting in an "unwaiverable [sic] conflict." (Appellate Ex. CV at 8.) He argued Colonel Shaw's influence remained, as "the threatening comments . . . were not that *he* was going to affect their promotions directly," but, "there are a number of senior judge advocates in the Marine Corps who do not look favorably upon those who serve as defense counsel." (Appellate Ex. CV at 11–12.)

Appellant felt he had no choice but to release his Counsel, and "based on the evidence of this UCI, [he] [did] not believe that any Marine defense counsel can represent [him] in this trial without the possibility of feeling that career pressure." (Appellate Ex. CVI at 1–3.) Appellant declined the detailing of any Marine counsel "because of the actual or apparent conflict." (Appellate Ex. CVI at 4.)

Regional Defense Counsel stated Colonel Shaw's comments caused a decline in morale of defense counsel across the region who are distracted and worried about their careers. (Appellate Ex. CVI at 18.)

F. The Military Judge found Colonel Shaw's comments were unlawful command influence, and that Appellant was prejudiced when he released counsel as a result of those comments. He dismissed the Charges and Specifications with prejudice.

The Military Judge dismissed the Charges and Specifications with prejudice in a written Ruling. (Appellate Ex. CIX at 1–2.)

The Ruling only addressed "the specific actions of a specific senior officer regarding a specific junior officer." (Appellate Ex. CIX at 11.)

The Military Judge found Colonel Shaw's statements "left them with the distinct impression that their service as defense counsel was harmful to their career progression." (Appellate Ex. CIX at 12.) He found Appellant showed some evidence of how Colonel Shaw's comments directly affected Counsel's ability to represent Appellant, and that the United States neither disproved the predicate facts nor prove that the facts do not constitute unlawful command influence. (Appellate Ex. CIX at 12.)

The Military Judge found the United States' curative actions—removing Colonel Shaw and explaining that his comments are not an accurate reflection of how Marine promotions and assignments work—did not meet its burden to show the proceedings would not be affected. (Appellate Ex. CIX at 15.)

The Military Judge found Colonel Shaw's comments materially prejudiced Appellant's substantial right to counsel. (Appellate Ex. CIX at 20.)

G. On appeal, the lower court vacated the Ruling, holding the Military Judge erred finding unlawful influence.

The lower court vacated the Ruling because "the military judge clearly erred in finding apparent UCI," and the military judge committed "clear error" when he found the loss of Appellant's Counsel was caused by actual unlawful influence and imposed the remedy of dismissal with prejudice. *United States v. Gilmet*, No. 202200061, 2022 CCA LEXIS 478, at *14, *21–22 (N-M. Ct. Crim. App. Aug. 15, 2022).

Argument

I.

APPELLANT FAILS TO ESTABLISH GOOD CAUSE FOR THIS COURT TO GRANT REVIEW: THE LOWER COURT (1) APPLIED THE CORRECT LEGAL STANDARDS AND (2) DID NOT ENGAGE IN ADDITIONAL FACTFINDING.

A. To warrant review, an appellant must show good cause and state with particularity the prejudicial errors.

"Review on petition for grant of review requires a showing of good cause." C.A.A.F. R. 21(a); *see also* Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

The Appellant must provide "direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to [his] substantial rights." C.A.A.F. R. 21(b)(5).

Examples of good cause include when the lower court: (1) addressed unsettled law; (2) ruled in conflict with precedent; (3) adopted a law materially differently than civilian courts; (4) addressed a military custom, regulation, or statute; (5) ruled en banc or non-unanimously; (6) deviated from the accepted course of judicial proceedings; or (7) inadequately addressed an issue on remand. *See* C.A.A.F. R. 21(b)(5)(A)–(G).

Here, each of Appellant's four reasons for this Court to grant review fail to establish good cause. This Court should deny review.

B. The lower court correctly applied the *Reynolds* test for prejudice because the alleged harm already occurred: his Counsel became conflicted, and Appellant released them.

In *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994), the Court explained that when unlawful influence is raised, "prejudice is not presumed," and "the unlawful influence must be the proximate cause of the unfairness of [the] court-martial." *Id.* at 202.

In *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999), the Court clarified that the *Reynolds* test applies when the alleged prejudice has already occurred, such as on appeal, because "prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial." *Id*. at 150. When the influence has only the potential to effect proceedings, an accused must show only the

"alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* at 150.

Here, although the issue arose pretrial, the lower court correctly applied the *Reynolds* test because the alleged prejudice had already occurred: Counsel had become conflicted, and Appellant had released them. There was no need to apply *Biagase*'s "potential to cause unfairness" test when the alleged harm had already happened.

Thus, the lower court applied the correct legal standard, and this Court need not grant review.

C. The lower court applied the correct standard of review when it found the Military Judge erred because his Ruling was based on clearly erroneous facts. The lower court did not engage in factfinding.

1. A finding of fact is clearly erroneous when there is no evidence to support it or the reviewing court "is left with the definite and firm conviction that a mistake has been committed."

Appellate courts "assess[] findings of fact that inform [a UCI ruling] under a clearly erroneous standard." *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018). "A finding of fact is clearly erroneous when there is no evidence to support the finding or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harrington*, 81 M.J. 184, 185 (C.A.A.F. 2021).

During an Article 62 appeal, "the lower court may act only with respect to matters of law." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). Thus, "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'" *United States v. Baker*, 70 M.J. 283, 287–88 (C.A.A.F. 2011).

The court "reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017).

2. The lower court properly assessed whether the Military Judge's factual findings were clearly erroneous. Appellant's allegations of additional factfinding fail.

In *Baker*, the lower court appeared to adopt the "factual findings set forth by the military judge," but it then proceeded to find an additional fact that the military judge had not found. 70 M.J. at 289. This Court found the finding was "clearly distinct from, and indeed contrary to, the finding of the military judge. There [was] no evidence in the record" to support the lower court's finding. *Id.* at 290.

Here, the lower court properly tested the Military Judge's findings of fact under the clearly erroneous standard. *See Gilmet*, 2022 CCA LEXIS 478, at *11, *17. Unlike in *Baker*, the lower court's conclusions were based on the facts in the Record, not additional factfinding. Appellant's four allegations of unlawful factfinding fail. (Suppl. Pet. at 18–19, Nov. 3. 2022.)

First, the lower court found the Military Judge's characterization of Counsel's subjective conflicts as "valid concerns" unsupported by the Record because they were rebutted by the evidence presented by the United States and amounted to what courts have characterized as "personal mistakes." *Gilmet*, 2022 CCA LEXIS 478, at *20 (quoting *Tueros v. Greiner*, 343 F.3d 587, 595 (2d Cir. 2003)).

Second, the lower court found the Military Judge failed to consider important facts presented through the United States' evidence showing "Colonel Shaw's comments were patently untrue," and showing Captain Thomas's selection for career level school established "highly-coveted follow-on orders." *Id.* at *14. The lower court reasoned the Military Judge's failure to consider these important facts made his legal conclusions about unlawful influence unreasonable. *Id.*

Third, the lower court correctly noted the Military Judge's failed to consider the Senior Defense Counsel's Affidavit, which led to Counsel erroneously believing they were conflicted. *Id.* at *19. Referring to the Affidavit already in the Record was not additional factfinding.

Fourth, the lower court held the Record did not support the Military Judge's finding that Colonel Shaw's "statements were *tied directly* to Capt Thomas's role as defense counsel and his then-current status as IMC to [Appellant]" merely that

Captain Thomas perceived them that way. (Suppl. Pet. 18–19); *Gilmet*, 2022 CCA LEXIS 478, at *5.

Finally, Appellant's incorrectly claims the lower court failed to review the Ruling in the light most favorable to the prevailing party. (Suppl. Pet. 19–20.) The lower court cited the correct legal standard, based its holdings on the Record, and provided detailed analysis. *See Gilmet*, 2022 CCA LEXIS 478, at *11. Nothing in the Opinion shows the lower court misapplied the standard.

The lower court applied correct standards and correctly found the Military Judge made clearly erroneous findings of fact and erred in his conclusions of law. This case does not warrant review.

D. The lower court correctly held the Military Judge erred releasing Counsel before giving the United States an opportunity to rebut, making the unlawful influence ruling an improper *fait accompli*.

"Subject to the UCMJ and this Manual [a military judge shall] exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual." R.C.M. 801(a)(3). A military judge "may determine: when, and in what order, motions will be litigated." R.C.M. 801(a)(3), Discussion.

The Discussion sections to the Rules for Courts-Martial are nonbinding. *United States v. Chandler*, 80 M.J. 425, 429 n.2 (C.A.A.F. 2021); *see also* Manual for Courts-Martial, United States (MCM) pt. I, para. 4, Discussion (2019 ed.).

As discussed below, the Military Judge erred when he released Appellant's Counsel before giving the United States an opportunity to respond. *See infra* Section II.B. This Court's unlawful influence framework requires giving the United States an opportunity to cure the influence after the burden shifts. *See Biagase*, 50 M.J. at 150–51. The Military Judge circumvented this framework by releasing Counsel first, which made the issue a foregone conclusion.

Appellant's claim that R.C.M. 801(a)(3) and the Discussion authorize the Military Judge to sidestep the requirements of the unlawful influence framework to maintain "reasonable control over the proceedings" is unsupported by the plain language of the Rule or precedent. (Suppl. Pet. at 19–21.)

Nothing in the Rule or nonbinding Discussion authorizes military judges to manipulate the outcome by resolving motions in a particular order. Rather, the reasonable control granted to military judges "promote[s] the purposes of these rules and this Manual." R.C.M. 801(a)(3). Appellant cites no case law supporting his reading of R.C.M. 801(a)(3), and the United States is unaware of any.

The lower court did not err, and this Court should not grant review.

E. The lower did not exceed the scope of Article 62: the unlawful influence Ruling was inextricably tied to the R.C.M. 506(c) issue. To hold otherwise would allow military judges to insulate themselves from Article 62 review.

"[T]he United States may appeal . . . [a]n order or ruling of the military judge which terminates the proceedings with regard to a charge or specification." Art. 62, UCMJ (2016).

Here, as discussed below, the Military Judge's release of Counsel under R.C.M. 506(c)—before considering whether the United States met its unlawful command influence burden—was inextricably intertwined with the unlawful influence Ruling. *See infra* Section II.B. The alleged conflict and later release of Counsel were the basis for the Military Judge's Ruling.

If the lower court was unable to consider the R.C.M. 506(c) issue, then there would be nothing meaningful to review: after the release of counsel, the unlawful influence Ruling was a foregone conclusion. Such an approach would insulate the Military Judge's dismissal from Article 62 review.

Likewise, the lower court properly reviewed the Judge's legal conclusions regarding R.C.M. 506 "de novo" and found he erred. *See* (Suppl. Pet. at 21); *Gilmet*, 2022 CCA LEXIS 478 at *17. The lower court's mention of "voluntary release of counsel" is synonymous with R.C.M. 506(c)'s requirement that the accused "consent" to counsel's release. *See* (Suppl. Pet. at 22); *Gilmet*, 2022 CCA LEXIS 478, at *9. Appellant's arguments for review fail.

II.

THE MILITARY JUDGE ERRED BY CONSIDERING THE CLAIMED CONFLICTS OF INTEREST BEFORE ALLOWING THE UNITED STATES TO DISPROVE THE UNLAWFUL INFLUENCE. APPELLEE VOLUNTARILY RELEASED COUNSEL BASED ON PURELY SUBJECTIVE CONFLICTS, AND THE MILITARY JUDGE NEVER MADE A FINDING OF GOOD CAUSE AS REQUIRED BY R.C.M. 506(C). APPELLEE'S RELEASE OF COUNSEL WAS A PERSONAL CHOICE, NOT PREJUDICE THE UNITED STATES HAD TO DISPROVE.

A. The standard of review is de novo.

Appellate courts review claims of unlawful command influence de novo, accepting findings of fact unless clearly erroneous. *Barry*, 78 M.J. at 77.

B. When the Military Judge addressed the conflict issue before allowing the United States to rebut, he violated this Court's established unlawful influence framework.

1. If an accused presents "some evidence," the burden shifts to the United States to disprove the claim beyond a reasonable doubt.

"No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial . . . ." Art. 37(a)(3), UCMJ, 10 U.S.C. § 837(a)(3) (2019); *see also* R.C.M. 104(a)(2).

Actual unlawful command influence occurs "when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017) (citation omitted). When prejudice is alleged to have already

occurred, an appellant must show "some evidence," that is, "facts which, if true, constitute unlawful command influence," and that the alleged unlawful influence is the "proximate [cause]" of prejudice to Appellant at the court-martial. *See Biagase*, 50 M.J. at 150; *Reynolds*, 40 M.J. at 202.

If the military judge finds the accused showed "some evidence," the burden shifts to the United States to rebut the allegation beyond a reasonable doubt. *Biagase*, 50 M.J. at 151. The United States can rebut the allegation by (1) disproving the predicate facts of the allegation, (2) persuading the judge or appellate court that the facts do not constitute unlawful influence, or (3) producing evidence proving the unlawful influence will not affect the proceedings. *Id.*

2. The Military Judge erred when he circumvented the unlawful influence framework by first excusing Counsel then finding incurable unlawful influence.

Here, contravening the *Biagase* standard, the Military Judge denied the United States the opportunity to address and cure the alleged unlawful influence. By prematurely releasing Counsel, the Military Judge froze Appellant's alleged unlawful influence at the low standard of some evidence without resolving a case-dispositive matter with meaningful litigation. *See United States v. Moultak*, 21 M.J. 822 (N.M.C.M.R. 1985) (finding trial court correctly evaluated whether unlawful influence impeded representation before moving to excusal issue); *United States v. Pack*, 9 M.J. 752 (N.M.C.M.R. 1980) (holding judge correctly denied

unlawful influence and recusal motions when defense counsel's concern over poor fitness report amounted to subjective conflict and not unlawful influence).

The United States' curative measures were aimed at proving that Colonel Shaw's comments would have no effect on Captain Thomas's and Captain Riley's ability to zealously represent Appellant. *See infra* Section II.D. But the Military Judge never let the United States satisfy its burden under *Biagase's* third prong, as he improperly allowed Counsel's subjective beliefs—that their representation was tainted—to preclude curative measures. (*See* Appellate Ex. CIX at 15 (citing absence of military counsel as proof United States failed to carry its burden)); *see also Greiner*, 343 F.3d at 597 ("A purely subjective conflict is . . . an attorney's individual shortcoming, flowing from an incorrect assessment of the situation and void of any actual obligation.").

Such an approach, which wholly negates the United States' ability to rebut the claim, as set forth in *Biagase*, is error. *See* 50 M.J. at 151.

C. The Military Judge erred finding that Colonel Shaw's comments were the proximate cause of Appellant's release of military counsel.

1. To establish prejudice from counsel excusal, the unlawful influence must be the proximate cause of the excusal.

When unlawful influence is alleged to have already affected the proceeding, it must be the proximate cause of the unfairness. *See Biagase*, 50 M.J. at 150; *Reynolds*, 40 M.J. at 202.

2. R.C.M. 506(c) establishes the framework for an accused to consent to the severance of an established attorney-client relationship during trial.

"[D]efense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown." R.C.M. 506(c); *United States v. Hutchins*, 69 M.J. 282, 289 (C.A.A.F 2011).

Defense counsel may be excused over an accused's objection when there is good cause shown. *United States v. Baca*, 27 M.J. 110, 118–19 (C.M.A. 1988). However, counsel need not show good cause to withdraw in cases where the detailed military defense counsel seeks to withdraw with the express consent of the accused. *See Hutchins*, 69 M.J. at 289; *United States v. Acton*, 38 M.J. 330, 337 (C.A.A.F. 1993). An accused's acquiescence to the requested withdrawal amounts to consent. *Acton*, 38 M.J. at 336–37.

3. Appellant released his Counsel under the "express consent" provision of R.C.M. 506(c). Good cause was neither required nor established. The Military Judge erred finding prejudice from this voluntary release of counsel.

a. The Military Judge never found good cause for excusal of Counsel. They were released with express consent of Appellant.

In *United States v. Nicholson*, 15 M.J. 436 (C.M.A. 1983), the assistant trial counsel served as the appellant's military defense counsel's reporting senior. *Id.* at 436–37. The appellant moved to disqualify assistant trial counsel. *Id.* at 437.

Identifying a possible conflict of interest, the military judge asked military defense counsel if they felt inhibited by his representation of the appellant given the reporting senior's participation. *Id*. The individual military counsel replied that he did not, and the detailed military counsel replied that despite his enthusiasm and obligation to defend the appellant, "[s]ubconsciously, I don't know." *Id*. He continued, saying that he had not felt intimidated and would do what he considered best for his client. *Id*. 30

The military judge then ensured the appellant had discussed the possible conflict with his counsel and asked the appellant if he still wanted to be represented by his detailed military counsel—and he did. *Id.* at 437–38. The military judge then denied the appellant's motion to disqualify assistant trial counsel. *Id*. at 438.

The *Nicholson* Court determined the appellant had established clearly on the record he understood the nature of his military counsel's relationship with the assistant trial counsel and chose not to excuse him. *Id*. While the court noted that the United States' practice of assigning counsel in this case gave rise to a situation "wholly inimical to the appearance of integrity in the military justice system," the appellant was not prejudiced. *Id*. at 436.

Like in this case, the trial court in *Nicholson* never affirmatively found that the appellant's military counsel labored under a conflict of interest prior to ruling

on excusal. *Id*. at 436–39. However, in that case, the Court determined that even if a conflict *did* exist due to the United States' practices, there was no prejudice when the appellant made an informed choice to retain his counsel. *Id*. at 439.

The Military Judge here determined Appellant's choice whether to "keep the counsel he wanted, but who had a conflict of interest, or release the counsel who he had specifically chosen . . . really was not a choice." (Appellate Ex. CIX at 17.) However, if Appellant's military defense counsel had moved for excusal for good cause, the Military Judge could have released them without Appellant's consent. *See Baca*, 27 M.J. at 118–19. Appellant's military counsel made no such motion, and the Military Judge made no finding that there was good cause.

Unlike *Nicholson*, the Military Judge here never engaged in a thorough colloquy with defense counsel to determine if a conflict of interest objectively existed that would result in actual prejudice to Appellant. (R. 209–10); *cf. Nicholson*, 15 M.J. at 437.

Instead, he relied on the subjective belief of counsel that a conflict of interest existed. (R. 209–10.) The Military Judge made no finding a conflict of interest existed or good cause existed to excuse counsel before asking Appellant if he consented to the withdrawal. (R. 210–213.)

By consenting after consulting with counsel, Appellant prompted the Military Judge to avoid entering a finding of good cause. *See Hutchins*, 69 M.J. at 289; *Acton*, 38 M.J. at 337.

The Military Judge failed to examine if good cause supported Appellant's release of military counsel and whether counsel could continue to zealously represent Appellant. The Military Judge failed the requirement to "investigate and make a final determination" on whether a conflict existed. *United States v. Watkins*, 80 M.J. 253, 264 (C.A.A.F. 2020) (Maggs, J. dissenting) (citing *United States v. Holloway*, 435 U.S. 475, 485–87 (1978) (stating trial judge has ability to explore adequacy of defense counsel's representations)).

Appellant properly released his Counsel with no showing of good cause, and the Record does not conclusively show there was a conflict of interest requiring counsel to be excused.

b. <u>The Military Judge erred when he found Appellant would not have consented to release Counsel absent Colonel Shaw's comments and their effect on Captain Thomas</u>.

In *Baca*, the military judge erroneously severed the appellant's attorney-client relationship with his detailed counsel without good cause. 27 M.J. at 115–19. In *United States v. Eason*, 21 C.M.A. 335 (C.M.A. 1972), the court found mere non-availability was insufficient grounds for the United States' denial of the

appellant's request for counsel with whom he had an established attorney-client relationship. *Id.* at 338.

Unlike in *Baca* and *Eason*, where action by the United States or the military judge unequivocally caused the severance of counsel, the Record here does not establish that Colonel Shaw's comments caused the severance of Appellant's attorney-client relationships with his military counsel. Because the Military Judge never tested the asserted conflict for good cause and failed to meaningfully evaluate whether the United States had carried its burden under *Biagase*, his conclusion that Colonel Shaw's comments amounted to direct government severance of the attorney-client relationship was unfounded.

The Military Judge cabined his finding of unlawful influence to "the actions of a specific senior officer regarding a specific junior officer" and failed to consider the important facts presented by the United States. (Appellate Ex. CIX at 11.) He did not find that any practices in the Marine Corps, its view of defense counsel, or its promotion practices constituted "some evidence" of unlawful influence. (Appellate Ex. CIX at 11.) Therefore, under the Military Judge's framing of the issue, for the asserted unlawful influence to have prejudiced Appellant, Appellant's excusal of his Counsel must have been caused only by Colonel Shaw's actions toward Captain Thomas.

But the Military Judge failed to consider the additional evidence presented about the Marine Corps treatment of defense counsel and its promotion practices. Instead, he held Appellant would have chosen to excuse his Military Counsel, regardless of whether the United States had carried its burden to rebut the effects of Colonel Shaw's actions on the proceedings.

Despite the United States' curative actions, Appellant still chose to excuse his Military Counsel. Citing an actual or apparent conflict, he then declined to have any Marine defense counsel detailed to his case. (Appellate Ex. CVI at 5.)

Appellant's actions—from excusing his Counsel after the United States had removed Colonel Shaw from a position of influence to refusing the services of any Marine defense counsel—highlight why the Military Judge erred finding Colonel Shaw's comments amounted to United States action severing the relationship akin to *Eason*. (Appellate Ex. CIX 19–20.) The Military Judge cannot determine prejudice based solely upon an election Appellant made, for which he was neither required nor expected to show good cause.

c. <u>The Military Judge failed to acknowledge that neither Captain Thomas nor Captain Riley labored under a prejudicial conflict of interest in the litigation of the Motion</u>.

In *Baca*, the Court analyzed the evidence underpinning the military judge's erroneous ruling to excuse the appellant's counsel for good cause. 27 M.J. at 115. Despite the counsel's affidavit referencing his "general 'burn-out,'" the Court did

not find the counsel's "burn-out" had caused or would cause counsel to inadequately represent the appellant. *Id*. Moreover, the Court found that the record of trial, up until the point of disqualification, "portrays counsel as dedicated, thorough, aggressive, and fully competent." *Id*.

Here, as in *Baca*, Captain Thomas provided an Affidavit that pointed to apprehensions about what his zealous representation could portend for his career, but never claimed that would affect his representation or claim he could not adequately and zealously represent Appellant. (Appellate Ex. LXXXVI at 4.) Instead, Captain Thomas mentioned that Appellant questioned his loyalty after Colonel Shaw's comments because of "the appearance that I may have a personal interest in not defending him to the best of my ability." (Appellate Ex. LXXXVI at 4.) Nor did Captain Riley assert he would be unable to adequately and zealously represent Appellant. (Appellate Ex. LXXXVI at 59.)

While the Military Judge found Captain Thomas was conflicted due to "a significant fear that the small USMC judge advocate community would remember what he did as a defense counsel and hold it against him," Captain Thomas's behavior indicated otherwise. (Appellate Ex. CIX at 17 n.60.) Captains Thomas and Riley filed a Motion to Dismiss, which accused Colonel Shaw—"a senior judge advocate who occupied a position of authority over [their] futures"—of unlawful influence. (Appellate Ex. LXXXV at 17; Appellate Ex. CIX at 11.)

They gathered affidavits from seven attorneys to describe Colonel Shaw's conduct. (Appellate Ex. LXXXVI at 1–2, 6–13, 62–63, 69–75.)

Considering Captains Thomas's and Riley's zealous advocacy even after Colonel Shaw's comments and the fact that they never cited an inability to continue zealously representing Appellant, there is no basis to conclude that either Counsel labored under a prejudicial conflict of interest. *See Pack*, 9 M.J. at 755–56 (noting "basic duty" of lawyers "to serve . . . with courage [and] devotion" and that subjective conflicts over career advancement do not warrant relief).

d. *Watkins*'s harmless error analysis is inapposite to the statutory rights to counsel at issue here. The Military Judge erred finding a de facto structural error.

In *Watkins*, the civilian defense counsel moved for removal based on good cause, and the appellant requested to excuse and replace his civilian defense counsel. *Watkins*, 80 M.J. at 259; *see also* R.C.M. 506(c). The military judge in *Watkins* erred by denying the appellant's implicit request for a continuance to retain new civilian counsel. *Watkins*, 80 M.J. at 259. The Court held this was structural error because it violated the appellant's right to counsel of choice under the Sixth Amendment, which is applicable to an accused's right to civilian counsel of choice. *Id.* at 258; *see also United States v. Gonzales-Lopez*, 548 U.S. 140, 151 (2006) ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.").

Unlike in *Waikins*, Appellant's Sixth Amendment right to civilian counsel of choice is not at issue, but rather, his statutory rights to individual military counsel and detailed military counsel. *See* Articles 27, 38(b)(3)(B), UCMJ, 10 U.S.C. §§ 827, 838(b)(3)(B) (2016); *see also United States v. Spriggs*, 52 M.J. 235, 237 (C.A.A.F. 2007) (right to individual military counsel is statutory right to select military counsel in limited circumstances).

The Military Judge's citation to the structural error in *Watkins* is inapplicable to the statutory rights to counsel here. (Appellate Ex. CIX at 18.) Moreover, the Military Judge's prejudice analysis erroneously applies *Watkins*'s harmless error analysis to Appellant's statutory rights. *Compare Watkins*, 80 M.J. at 258, *with* (Appellate Ex. CIX at 18, 20).

The Military Judge elevates the statutory rights to individual military counsel and detailed counsel to the status of "the complete deprivation of counsel"—an error that affects the framework and reliability of the adversarial process. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 656, 662 (1984); *Gideon v. Wainwright*, 372 U.S. 445 (1963).

This was error.

e. Appellant erroneously argues his "military-due-process right to continue his attorney-client relationships" was violated. This Court explicitly rejected the idea of "military due process" in *Vasquez*.

"[M]ilitary due process," is an "amorphous concept . . . that appears to suggest that servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the [Manual for Courts-Martial]. They do not." *United States v. Vasquez*, 72 M.J. 13, 19 (C.A.A.F. 2013).

Here, Appellant erroneously relies on the "military-due-process" concept this Court has explicitly rejected when he alleges the United States violated his "military-due-process right to continue his attorney-client relationships with Captains Thomas and Riley." (Suppl. Pet. at 25.) As this Court held in *Vasquez*, no special rights of military members exist beyond "the plain text of the Constitution, the UCMJ, and the [Manual for Courts-Martial]." 72 M.J. at 19.

Appellant's argument fails.

D. Appellant's claim of actual unlawful commend influence fails. The United States proved beyond a reasonable doubt that the unlawful influence would not affect the proceedings.

1. The United States proved beyond a reasonable doubt the unlawful influence would not affect the proceedings.

a. A command's corrective actions can remove the taint of unlawful influence.

In *United States v. Horne*, 82 M.J. 283 (C.A.A.F. 2022), the government's actions cured, in part, any possible prejudice from unlawful influence. *Id.* at 289–90. There, trial counsel and victim's counsel "discourage[d] law enforcement agents from interviewing [the victim's husband]-an outcry witness." *Id.* at 288. "[T]he United States['s] immediate steps to reduce prejudice" by removing both trial counsel and victim counsel, the lone actors in the unlawful influence, "ameliorate[d] the situation." *Id.* at 289–90; *see also United States v. Gattis*, 81 M.J. 748 (N-M. Ct. Crim. App. 2021) (unlawful influence cured by swift repudiation of statement discouraging cooperation with defense counsel).

b. *Lewis* and *Salyer* held unlawful influence was not cured when the unlawful actors remained in their positions and able to effect the trial.

In *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), a trial counsel and senior judge advocate conspired to intimidate a military judge to recuse. *Id.* at 416. This Court held the United States failed to take adequate curative steps to remove the taint of the unlawful influence because the "trial counsel remained an active

member of the prosecution despite participating fully in the unlawful command influence." *Id.* at 413.

In *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013), trial counsel and judge advocate leadership committed conspired to disqualify a military judge after an adverse ruling. *Id.* at 426–27. After finding an appearance of unlawful influence, the Court found that although the new judge left all "defense friendly" rulings intact and the conspiring leader removed from the courtroom, the United States had failed to meet its burden because the trial counsel, who was directly involved in the unlawful influence and supervised by the removed leader, remained on the case. *Id.* at 427–28.

c. Like *Horne*, and unlike *Lewis* and *Salyer*, the United States cured any unlawful influence by (1) removing Colonel Shaw and (2) showing his statements were false.

Unlike *Lewis* and *Salyer*, where the unlawful actors remained in place, Major General Bligh removed Colonel Shaw from his position in Judge Advocate Division pending an investigation, and permanently removed any authority he had in the slating and assignment process. (Appellate Ex. LXXXVIII at 19.)

Like the commands in *Horne* and *Gattis*, the United States also produced evidence that Colonel Shaw's comments were false. Major General Bligh affirmed that "service as a defense counsel is vital to overall mission success, and will in no way be detrimental to an individual's career." (Appellate Ex. LXXXVIII at 19.)

Moreover, the "substantially high percentages of O-5's and O-6's" who have held defense billets supports that defense experience does not hinder a judge advocate's chances for promotion and that defense experience is valued in the community. (R. 222; Appellate Ex. LXXXVIII at 21.) The Affidavits from Major General Bligh, Judge Advocate Division, and Manpower Division demonstrated the billet assignment and promotion process does not hold defense billets against officers, showing Colonel Shaw's statements false. (Appellate Ex. LXXXVIII at 4–7.)

Yet the Military Judge discounted this evidence, focusing instead only on "the effect Colonel Shaw's comment has had on this case." (R. 223; *see also* Appellate Ex. CIX at 11 ("Court is not here to litigate . . . the career viability of being a defense counsel in the USMC.").) In doing so, the Military Judge failed to recognize the remedial effects of this evidence.

By making this information known to Captain Thomas, the United States corrected any misinformation he received from Colonel Shaw's comments. Captain Thomas's career belies that his "assign[ment] as IMC to a [high visibility] case" is harmful to career progression: Captain Thomas was selected, in an "exceptionally competitive process," for resident professional military education—during his representation of Appellant and after time spent as a defense counsel. (Appellate Ex. CIX at 11; Appellate Ex. LXXXVIII at 18.)

Even if Colonel Shaw were a lone bad actor biased against defense counsel, his removal from a position of influence fully alleviated any taint from his comments to Appellant's proceedings. *Cf. United States v. Villareal*, 51 M.J. 27, 30 (C.A.A.F. 1999) (finding transfer of case to new convening authority cured any appearance of unlawful influence from telephone call between convening authority and his superior).

Appellant's arguments against the United States' curative measures fail. (Suppl. Pet. 28–35.) Major General Bligh's message, as a flag officer overseeing the whole judge advocate community, affirmed defense counsel work as vital to the Marine Corps and that defense counsel would not be discriminated against for their work. That coupled with the Colonel Shaw's removal and clarity as to the neutral manning process demonstrated Colonel Shaw's statements false and Appellant's counsel's fears were unfounded. The United States' remedial actions removed any taint from Colonel Shaw's comments.

The United States produced evidence that proved beyond a reasonable doubt that any actual unlawful influence will not affect the proceedings.

E. Congress, by amending Article 37, overturned the judicially created doctrine of apparent unlawful command influence. That doctrine had permitted relief without proof of specific prejudice. Regardless, an objective, disinterested observer, fully informed of the facts would not harbor a significant doubt to the proceedings.[1]

1. The 2019 amendment to Article 37 overturned the judicially created doctrine of apparent unlawful influence.

Congress amended Article 37 in 2019 to require a showing of "material prejudice[] [to] the substantial rights of the accused" before a finding or sentence can be held incorrect. Art. 37(c), 10 U.S.C. § 837(c) (2019).

Thus, by amending Article 37 to require a demonstration of material prejudice to the accused, Congress eliminated consideration of whether "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249.

This judicially created standard was never rooted in the text of Article 37 but instead on "the spirit of the Code." *Id.* at 247–248 (quoting *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002)). By amending Article 37, Congress clarified that the Court had misinterpreted its legislative intent. It reaffirmed that courts must find material prejudice to the substantial rights of an accused before

[1] Like the lower court, this Court need not determine whether apparent unlawful influence continues to exist at trial under the new Article 37 because even assuming it does, Appellant failed to prove apparent unlawful influence. *Gilmet*, 2022 CCA LEXIS 478, at *12.

dismissing a case—not the damage to "the military justice system" based on hypothetical outside observers. *See id.*

The amendment now directly "tethers relief to Article 59(a)'s requirement of [specific] prejudice to the accused," and statutorily overturns the judicially created apparent unlawful influence doctrine. *Id.* at 256 (Ryan, J., dissenting) (reviewing prior Article 37 and arguing that relief for any unlawful influence should require showing of material prejudice to accused); *see also id*. at 254–55 (Stucky, J., dissenting).

Appellant's interpretation of the new Article 37 ignores the atextual nature of apparent unlawful influence. (Suppl. Pet. at 36–39.) Rather than speculating about congressional intent based on legislative history, this Court should instead look to the text of the statute, which makes no mention of testing whether a third-party observer would "harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249. Instead, the statute speaks of concrete effects, such as "censur[ing]," "reprimand[ing]," "admonishing," "attempt[ing] to coerce" and "attempting to influence." Art. 37(a)(1)–(2), UCMJ, 10 U.S.C. § 837(a)(1)–(2) (2019).

Moreover, Appellant's interpretation of the new Article 37 would yield absurd results by insulating military judges from regular appellate review of their decisions on apparent unlawful influence and requiring parties to resort to

extraordinary writs to correct any errors. The Court should reject such a nonsensical interpretation and instead respect Congress's desire to jettison the apparent unlawful influence framework—both at trial and on appeal.

2. Regardless, the United States proved beyond a reasonable doubt that an objective, disinterested observer would not harbor significant doubts about the fairness of Appellant's case.

If the United States does not meet its burden of rebutting the initial allegation of unlawful influence, it may "seek to prove beyond a reasonable doubt that the unlawful command influence did not place 'an intolerable strain' upon the public's perception of the military justice system and that 'an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" *Boyce*, 76 M.J. at 249–50 (citing *Salyer*, 72 M.J. at 423). Where the government meets this evidentiary burden, the appellant merits no relief. *Id.* at 250.

A determination "that the prejudice caused by the unlawful command influence was later cured, is a significant factor . . . when deciding whether the unlawful command influence placed an 'intolerable strain' on the public's perception of the military justice system." *Id.* at 256.

Here, like the curative measures in *Horne* and *Gattis*, the swift and definitive response from Judge Advocate Division cured any unlawful influence from Colonel Shaw's comments beyond a reasonable doubt. *See supra* Section

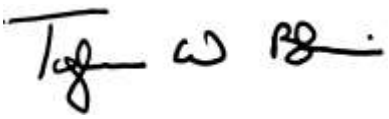
II.D. Thus, like in *Horne* and *Gattis*, the totality of the circumstances do not place an intolerable strain the public's perception of the military justice system.

Rather, "an objective, disinterested observer" who is "fully informed" would understand the reality of the situation: a single judge advocate made an incorrect statement, which was swiftly and conclusively rebutted by Marine Corps leadership. Such an observer would not "harbor a significant doubt about the fairness of the proceeding" based on the repudiated comments of a lone judge advocate. *See Horne*, 82 M.J. at 289–90; *Gattis*, 81 M.J. at 757–58.

Thus, the Military Judge erred by finding apparent unlawful influence.

Conclusion

The United States respectfully requests this Court affirm the lower court's decision.



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1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 8905 words.

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Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on November 14, 2022.

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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.

Subsequent History: Petition for review filed by *United States v. Gilmet, 2022 CAAF LEXIS 729 (C.A.A.F., Oct. 13, 2022)*

Motion granted by *United States v. Gilmet, 2022 CAAF LEXIS 736 (C.A.A.F., Oct. 14, 2022)*

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

[1] *10 U.S.C. § 862(a)(1)(A)*.

[2] All names in this opinion, other than those of Appellee, the judges,

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-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

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and appellate counsel, are pseudonyms.

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

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

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

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 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

[6] App. Ex. LXXXVI at 3.

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

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 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

[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.

[9] App. Ex. LXXXVI.

[10] App. Ex. LXXXIII.

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 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

[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.

[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.

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 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

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[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)*.

[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)*.

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 circumstances" in the present case include the evidence the

[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).

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

[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.*

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.

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

[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.

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 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

[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.

[48] App. Ex. CIX at 14.

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

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, 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

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[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).

[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.

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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