IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	**NIMJ BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT**
v.	
Eric S. GILMET Chief Hospital Corpsman (E-7) U.S. Navy, *Appellant.*	Crim. App. Dkt. No. 202200061 USCA Dkt. No. 23-0010/NA

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

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.

This brief addresses only the second half of the granted issue.[1]

[1] NIMJ submitted a Motion for Leave to file on x in which it was requested permission to file a brief on or before 10 March 2023.

Summary of Argument

The granted issue and the parties' briefs necessarily raise the question of apparent unlawful influence's continued vitality as a core doctrine of American military justice. The Court should avoid this issue, if possible, since it is an important and recurring one but may not be dispositive and, perhaps as a result, may not have received the analysis it merits in the briefs. If the Court decides to answer the question, it should hold that the provision limiting relief for Unlawful Influence (UI) to cases in which it "materially prejudices the substantial rights of the accused," Art. 37(c), UCMJ, 10 U.S.C. § 837(c), is satisfied when apparent UI has been found. This is so because apparent UI constitutes structural error, and that is a category in which prejudice is presumed.

Argument

This Court has long held that military law incorporates a prohibition on conduct that "place[s] an intolerable strain upon the public's perception of the military justice system and that [causes] an objective, disinterested observer, fully informed of all the facts and circumstances, [to] . . . harbor a significant doubt about the fairness of

the proceeding." *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020) (cleaned up).

I

THE CASE MAY NOT BE A SUITABLE VEHICLE FOR DECIDING THE CONTINUED VITALITY OF APPARENT UI

Because this case, like many others, involves claims of both actual and apparent UI, it might be resolved without addressing the continued vitality of the apparent UI doctrine. If the Court finds that *actual* UI occurred, then there will be no need for it to assess whether there was *apparent* UI. Moreover, even if apparent UI becomes the only surviving claim (in the event the Court finds, on its de novo review, no actual UI), the Court may nevertheless avoid deciding the larger issue by assuming *arguendo* that the doctrine survives, but that the government had carried its burden. *See, e.g., United States v. Hennis*, 77 M.J. 7, 10 (C.A.A.F. 2017).

Federal courts avoid deciding legal issues when they are not dispositive. *E.g., United States v. Lundy*, 60 M.J. 52, 53-54 n.1 (C.A.A.F. 2004). This restrained approach is especially prudent where, as here, issues of first impression arise that may implicate constitutional

concerns. *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000 (D.C. Cir. 1999).

If the Court can resolve this case without making the underlying issue dispositive, it should do so. This would allow the issue to be addressed in some future case where its resolution is unavoidable and subject to more searching consideration, rather than in the hurried and constrained context of an Art. 62, UCMJ, appeal, in which cases are afforded priority whenever practicable and additional pleadings are barred. *See* C.A.A.F. R. 19(a)(7)(A).

II

AS STRUCTURAL ERROR, APPARENT UI IS PER SE PREJUDICIAL TO SUBSTANTIAL RIGHTS

Should the Court decide to address the underlying issue of apparent UI's continued vitality, NIMJ urges it to hold that apparent UI is a structural defect that is prejudicial per se and hence satisfies Arts. 37 and 59, UCMJ.

Military jurisprudence forbids apparent UI. At times, emphasis has been placed on a feature of this doctrine that distinguishes it from actual UI—that it does not require a showing of prejudice. *United States v.*

Boyce, 76 M.J. 242, 248 (C.A.A.F. 2017). Thus, it is understandable that lower courts have suggested that the 2019 amendments to the UCMJ's provision on unlawful influence eliminated apparent UI by eliminating the one thing that distinguished it from actual UI. *See* Art. 37(c), UCMJ, 10 U.S.C. § 837(c) (UI must "materially prejudic[e] the substantial rights of the accused" for relief); *see United States v. Gattis*, 81 M.J. 748, 754-55 (N-M Ct. Crim. App. 2021).

But a finding of apparent UI *is* a finding of prejudice to substantial rights. The conduct that constitutes the UI violates a right, and the resulting error is structural. *See, e.g., United States v. Becerra*, 939 F.3d 995, 1006 (9th Cir. 2019) ("when an error implicates a structural right, *the error affects substantial rights*, and undermines the fairness of a criminal proceeding as a whole") (cleaned up) (emphasis added). "Structural defects lead to automatic reversals because they are per se prejudicial." *United States v. Vazquez*, 271 F.3d 93, 103 (3d Cir. 2001).

Apparent UI need not be rooted in the Constitution in order to be structural error. "Despite occasionally suggesting in dicta that structural errors must implicate constitutional rights . . . the Supreme Court has clearly held that structural errors need not be of constitutional

dimension." *United States v. Curbelo*, 343 F.3d 273, 280 n.6 (4th Cir. 2003). *See also, e.g., Nguyen v. United States*, 539 U.S. 69, 81 (2003) (violation of a judicial assignment statute); *Green v. United States*, 262 F.3d 715, 718 (8th Cir. 2001) (violation of a court rule).

Whether the right at stake is of constitutional dignity or sub-constitutional, therefore, structural errors involve violations of "basic protection[s] whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (cleaned up). The interests protected by the doctrine reflect "a profound judgment about the way in which law should be enforced and justice administered." *Id.* The fundamental nature of these rights makes it such that any violation's prejudicial effects are "necessarily unquantifiable and indeterminate." *Id.*

What constitutes structural error may well be different (and broader) in the military context than in the civilian administration of justice because the military is a "specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743 (1974), in which, among other things, daily life is pervasively regulated, careers are subject to official management, a social hierarchy is enforced through

criminal sanctions, and obedience to superiors is paramount. *See id*. at 744.[2]

The Supreme Court has identified three rationales a court should consider when determining whether an error is structural: (1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," making it such that "harm is irrelevant to the basis of the underlying right," (2) "if the effects of the error are simply too hard to measure," and (3) "if the error always results in fundamental unfairness." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (noting that "[t]hese categories are not rigid," and that "[i]n a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural").

The right to a trial free of apparent UI falls squarely within the first and second *Weaver* categories. An example the Court cited was the right to conduct one's own defense, which in many cases is exercised to the detriment of the defendant. *Id.* at 1908. It is not the accuracy of the trial that this right protects, but the "fundamental legal principle" of

[2] Neither the briefs filed in this case nor the decisions of the lower courts address this. The Court may wish to direct the parties to do so.

autonomy in choosing how to protect one's "own liberty." *Id.* The doctrine of apparent UI similarly protects "some other interest" to which trial-level "harm is irrelevant. . . ." *Id.* It protects the "public perception" of the military justice system's fairness in the given proceeding.

Concern for the public perception of fairness is fundamental for a separate military justice system as the internal discipline of a standing army is of special concern in a democratic society that cherishes the principle of civilian control. *See United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017). Harm to the accuracy-function of the trial is irrelevant to that interest. For example, UI may be used to rush the trial of a servicemember who is clearly guilty, but the public's perception of the armed forces and their commitment to the rule of law is damaged nevertheless.

The Court need not carve in stone a catalog of what constitutes apparent UI and what does not. Instead, it should continue to develop this important doctrine through the traditional common law process, deciding concrete, often fact-intensive cases--one case at a time.

The Court's review here is do novo, and Chief Gilmet is in a better position than we are to say whether the government carried its burden.

It seems pertinent, however, to recall the Court's long-ago observation that when UI is "directed against defense counsel, it affects adversely an accused's right to effective assistance of counsel." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). The right to an unencumbered relationship with counsel of one's choice is basic to procedural fairness. Defense counsel are not fungible.

Conclusion

The Court should hold that the doctrine of apparent UI, whatever its parameters, survived the 2019 amendment of Art. 37, UCMJ. Alternatively, if the Court determines that appellee carried its apparent UI burden, it should resist any temptation to issue what would be in effect an advisory opinion. Applying the "passive virtues," *see generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961); *see also Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), the Court should await a case in which a ruling on whether apparent UI survives would make a difference in the outcome.

Respectfully submitted,

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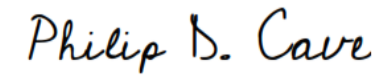
CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: (1) the filing contains 1928 words and complies with the typeface and type style requirements of Rule 37.

CERTIFICATE OF FILING AND SERVICE

I certify that I have, this 8th day of March, 2023, filed and served the foregoing amicus curiae brief by emailing copies thereof to the Clerk of the Court and counsel for both parties and the Army and Air Force Appellate Defense Divisions as amici curiae.



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